

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION FOR)	
DELIVERY CALL OF A&B IRRIGATION)	FINAL ORDER REGARDING
DISTRICT FOR THE DELIVERY OF GROUND)	THE A&B IRRIGATION
WATER AND FOR THE CREATION OF A)	DISTRICT DELIVERY CALL
GROUND WATER MANAGEMENT AREA)	
_____)	

FINDINGS OF FACT

I. Procedural Background

1. This matter originally came before the Director of the Department of Water Resources (“Director” or “Department”) on July 26, 1994 when the A&B Irrigation District (“A&B”) filed a petition for delivery call, which sought administration of junior priority ground water rights diverting from the Eastern Snake Plain Aquifer (“ESPA”), as well as the designation of the ESPA as a ground water management area. On May 1, 1995, A&B, the Department, and other participants entered into an agreement that stayed the petition for delivery call until such time as a motion to proceed (“Motion to Proceed”) was filed with the Director. On March 16, 2007, A&B filed a Motion to Proceed seeking the administration of junior priority ground water rights, as well as the designation of the ESPA as a ground water management area.

2. On August 23, 2007, A&B filed a *Petition for Peremptory Writ of Mandate and Application for Alternative Writ of Mandate* (collectively referred to herein as “Writ”) in the Fifth Judicial District, in and for the County of Minidoka. The Writ sought that the Director respond to A&B’s delivery call by distributing water to its senior ground water right, 36-2080 (September 9, 1948) for 1,100 cfs. On August 28, 2007, the Honorable John K. Butler granted the Writ and ordered the Director to appear before the court to show cause why he had not responded to A&B’s delivery call.

3. Following a September 20, 2007 status conference on A&B’s Motion, the Director issued an order stating that “The delivery call shall proceed under IDWR’s Rules for Conjunctive Management of Surface and Ground Water Resources.” *Notice of Motion to Proceed Filed by A&B Irrigation District; and Order Lifting Stay, Setting Hearing Schedule, and Appointing Independent Hearing Officer* at 1. Gerald F. Schroeder was “appointed to serve as hearing officer [“Hearing Officer”]. . . to conduct a hearing and issue a recommended order pursuant to IDAPA Rule 37.01.01.410 and -413 and the provisions of chapter 52, title 67, Idaho Code.” *Id.* at 2.

4. On September 21, 2007, the Department responded to A&B's Writ. Following an October 29, 2007 hearing, Judge Butler ordered the Director "to make a determination of material injury, if any, in accordance with Rule 42 of the Conjunctive Management Rules on or before January 15, 2008." *Memorandum Decision Re: Respondent's Motion to Dismiss* at 15 (Case No. CV-2007-665, Minidoka County, October 29, 2007). The deadline for the Director to issue his order was later extended by order of the court to January 29, 2008.

5. On January 29, 2008, the Director issued his Order on A&B's delivery call, finding that A&B was not materially injured ("January 2008 Order").

6. On December 3, 2008, a hearing on A&B's delivery call was commenced before the Hearing Officer. Over the course of approximately eleven days, evidence and testimony was presented to the Hearing Officer by the Department and participating parties: A&B, the Idaho Ground Water Appropriators, Inc. ("IGWA"), and the City of Pocatello ("Pocatello"). The Committee of Nine participated at the hearing.

7. On March 27, 2009, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("Recommended Order"). In his Recommended Order, the Hearing Officer agreed with the Director's determination that A&B had not suffered material injury to its senior ground water right. As stated by the Hearing Officer in his Recommended Order, "The Director's findings are accepted as part of this recommendation unless the recommendation explicitly finds differently or the Director's findings are inconsistent with the findings in this recommendation." *Recommended Order* at 8, ¶ 3.

8. Petitions for reconsideration were filed by A&B and considered by the Hearing Officer. On May 29, 2009, the Hearing Officer issued his *Order Granting in Part and Denying in Part A&B's Petition for Reconsideration* ("Response Order"). In the Response Order, the Hearing Officer corrected two procedural errors: that A&B's Motion was filed in 2007, not 2008; and that the Committee of Nine was not a party to the case. The Hearing Officer made one editorial change to remove the term "catastrophic loss" from paragraph 5, page 26 of his Recommended Order.

II. A&B's Petition for Clarification Filed with the Hearing Officer

9. On June 12, 2009, fourteen days after the Hearing Officer issued his Response Order, A&B filed a *Petition for Clarification of the Hearing Officer's May 29, 2009 Order* ("Petition for Clarification"). The Petition for Clarification asked the Hearing Officer to clarify the term "total project failure" and whether A&B has been required to exceed reasonable pumping levels.

10. On June 15, 2009, IGWA, Pocatello, and Freemont-Madison Irrigation District filed a joint *Response to Petition for Clarification and Request for Director's Order that Deadline to File Exceptions has Expired* ("Joint Response"). The Joint Response requested that the Petition for Clarification be denied and that the Director deem the matter fully before him

because A&B failed to file exceptions to the Recommended Order within fourteen days of the Response Order. IDAPA 37.01.01.720.

11. On June 19, 2009, the Hearing Officer issued his *Response to A&B's Petition for Clarification*. The Hearing Officer further clarified the term "total project failure" and took no further action.

III. Exceptions Filed with the Director

12. On June 19, 2009, the Director issued his *Order Shortening Time to File Exceptions*. As discussed and explained in that order, the Director found it necessary to shorten the time to file exceptions from fourteen days to seven days. In order for an exception to be considered timely, it must have been received by June 26, 2009.

13. On June 26, 2009, the Director received A&B's *Exceptions Brief*.

14. On June 29, 2009, the Director received a *Response to Petitioner's Exceptions Brief and Request for Final Order*, filed jointly by IGWA, Pocatello, and Freemont-Madison Irrigation District.

15. The Exceptions Brief has been reviewed and considered by the Director. The record developed at the hearing has been reviewed by the Director.

16. Two procedural issues, which the Director will address here, were raised in the Exceptions Brief. First, A&B argues that the Director has no authority to shorten time to file exceptions and that his decision will prejudice A&B. The Director's authority to shorten time is discussed in the *Order Shortening Time to File Exceptions* and will not be reiterated. As found in the Exceptions Brief, A&B continues to reargue the same points it made at hearing and in its Petition for Reconsideration and Petition for Clarification. The Director finds that there has been no prejudice to A&B as a result of shortening time to file exceptions.

17. The second procedural issue raised by A&B is that the Director's decision to shorten time will deprive opposing parties of the opportunity to respond to its Exceptions Brief. The only active participants in this proceeding have been A&B, IGWA, Pocatello, the Committee of Nine, and Freemont-Madison Irrigation District. On page two of the *Response to Petitioner's Exceptions Brief and Request for Final Order*, attorneys for IGWA, Pocatello, and Freemont-Madison Irrigation District state: "The Respondents ask that the Director deny the relief requested by A&B and issue a final order affirming the Director's *January 29, 200[8] Order* and the *March 27, 2009 Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* both issued in this matter."¹ Therefore, the only active parties opposing A&B's Motion to Proceed have responded to A&B's Exceptions Brief.

¹ The Committee of Nine was a non-party participant at the hearing and was represented by Jerry R. Rigby. Mr. Rigby is also counsel for Freemont-Madison Irrigation District.

18. Unless discussed herein, the recommendations of the Hearing Officer are accepted. If an exception is not discussed herein, the Findings of Fact entered previously by the Director and recommendations of the Hearing Officer govern.

IV. The Hearing Officer's Recommended Order

19. The Hearing Officer previously served as hearing officer in the delivery call proceedings initiated by Blue Lakes Trout Farm, Inc. ("Blue Lakes"), Clear Springs Foods, Inc. ("Clear Springs"), and the Surface Water Coalition ("SWC"). In the Recommended Order, the Hearing Officer stated that his "interpretations of the State Constitution, Idaho statutes and the Conjunctive Management Rules . . . in the prior [contested cases] are incorporated in this recommendation to the extent they are relevant." *Recommended Order* at 8-9, ¶ 1.

20. As noted by the Hearing Officer, "those interpretations will be the subject of judicial review and may be modified or found to be in error." *Id.* The Blue Lakes, Clear Springs, and SWC delivery calls are currently on judicial review before the Honorable John M. Melanson of the Fifth Judicial District. On June 19, 2009, Judge Melanson issued a decision in the Blue Lakes and Clear Springs matters.

21. The records developed in the contested cases initiated by Blue Lakes, Clear Springs, and SWC are distinct from the record developed in this delivery call hearing. Any interpretation not included by the Hearing Officer in his Recommended Order should not be considered by the Director in this contested proceeding and should not be made part of the record. Therefore, the Director does not accept the recommendation of the Hearing Officer on this point.

22. As argued at the hearing, as well as in its Petition for Reconsideration, Petition for Clarification, and now its Exceptions Brief, A&B asserts that reasonable pumping levels have been exceeded. *Exceptions Brief* at 20; *Petition for Reconsideration* at 24; *Petition for Clarification* at 4. A&B argues that the Director and Hearing Officer's determinations that reasonable pumping levels have not been exceeded should be overturned, in part, because a particular Department employee could not be attributed to drafting the following sentence in Finding of Fact 18 from the January 2008 Order: "There is no indication that ground water levels in the ESPA exceed reasonable pumping levels required to be protected under the provisions of Idaho Code s 42-226." *See Exceptions Brief* at 20-21; *Petition for Reconsideration* at 24-25; *Petition for Clarification* at 5-6.

23. The Director signed the January 2008 Order and is responsible for all findings of fact and conclusions of law made therein. The Director determined, based on the information presented to him before issuance of the January 2008 Order, that reasonable pumping levels in the ESPA have not been exceeded. *January 2008 Order* at 5, ¶ 18. The issue of whether reasonable pumping levels have or have not been exceeded was thoroughly reviewed during the hearing. The Hearing Officer found that there was no evidence to support A&B's position that reasonable pumping levels had been exceeded. *Recommended Order* at 36, ¶¶ 5-8. The Director agrees with the Hearing Officer that A&B's water right is subject to Idaho Code § 42-226; that A&B's poorest performing wells cannot *per se* be the measure of whether reasonable pumping

levels have been exceeded; that the ESPA is not being mined; and that A&B has not been required to exceed reasonable pumping levels. *Id.*

CONCLUSIONS OF LAW

1. Conclusions of Law set forth in the Director's orders in the above-captioned matter, unless expressly discussed and modified herein, are incorporated into this order by reference. Unless discussed, the recommendations of the Hearing Officer are accepted. If an exception is not discussed herein, the Conclusions of Law entered previously by the Director and recommendations of the Hearing Officer govern.

2. The independent Hearing Officer in this matter was appointed by the Director pursuant to IDAPA 37.01.01.410, -413, and the provisions of chapter 52, title 67, Idaho Code. According to IDAPA 37.01.01.720, "Recommended Orders," "Recommended orders are orders issued by a person other than the agency head that will become a final order of the agency only after review of the agency head (or the agency head's designee) pursuant to Section 67-5244, Idaho Code."

3. Idaho Code § 67-5244(3), "Review of recommended orders," states that "The agency head on review of the recommended decision shall exercise all the decision-making power that he would have had if the agency head had presided over the hearing."

4. "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Idaho Code § 67-5251; IDAPA 37.01.01.600.

5. The record does not support the relief requested by A&B in its Exceptions Brief. The relief requested therein by A&B is denied.

6. The records developed in the contested cases initiated by Blue Lakes, Clear Springs, and SWC are distinct from the record developed in this delivery call hearing. Any interpretation not included by the Hearing Officer in his Recommended Order will not be considered by the Director in this contested proceeding and will not be made part of the record. Idaho Code §§ 67-5240, -5249.

7. There is no indication that ground water levels in the ESPA exceed reasonable pumping levels required to be protected under the provisions of Idaho Code § 42-226.

ORDER

Based upon and consistent with the foregoing, the Director hereby orders as follows:

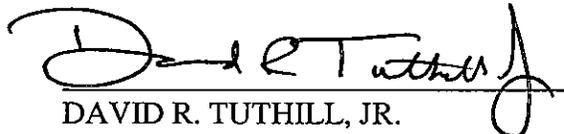
That the findings of fact and conclusions of law entered herein, and the findings of facts and conclusions of law entered by the Hearing Officer in this matter, unless discussed and

modified in this FINAL ORDER, are hereby accepted. All other requests for relief, unless specifically discussed herein are hereby denied.

That this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued by the Director in this matter may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the issuance of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 30th day of June 2009.

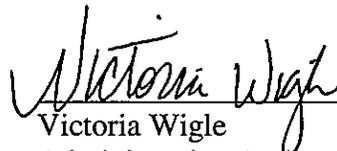

DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class with the correct postage affixed thereto, as well as by e-mail to those persons listed with e-mail addresses, on this 30th day of June 2009.

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