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**DEPARTMENT OF
WATER RESOURCES**

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

A&B IRRIGATION DISTRICT,

Petitioner,

vs.

DAVID R. TUTHILL, JR., in his official
capacity as director of the Idaho Department
of Water Resources, and **THE IDAHO
DEPARTMENT OF WATER
RESOURCES**

Respondents.

)
) Case No. CV-07-655
)
)

) **RESPONDENTS' BRIEF IN**
) **SUPPORT OF MOTION TO DISMISS**
) **PETITIONER'S ALTERNATIVE WRIT**
) **OF MANDATE AND THE VERIFIED**
) **PETITION FOR PEREMPTORY**
) **WRIT OF MANDATE**
)
)
)

COME NOW, State Respondents, David R. Tuthill, Jr., Director of the Idaho Department of Water Resources ("Director") and the Idaho Department of Water Resources, an executive agency of the state of Idaho ("Department"), by and through the undersigned deputy attorney general, and respectfully submit this Brief in Support of its Motion to Dismiss Petitioner's

Alternative Writ of Mandate and Verified Petition for Peremptory Writ of Mandate.

Respondents request that this Court deny Petitioner's requested relief and, in accordance with Idaho Rule of Civil Procedure 12(b)(6), dismiss Petitioner's cause of action.

I.

INTRODUCTION

On August 23, 2007, Petitioner A&B Irrigation District ("A&B") filed a *Petition for Peremptory Writ of Mandate* ("Petition") and *Application for Alternative Writ of Mandate* ("Application") with the Court. The Department accepted service of the Petition on September 5, 2007. The Petition seeks to compel the Director to administer junior priority ground water rights in accordance with its *Petition for Delivery Call* ("Delivery Call") that was filed on July 27, 1994, but stayed by stipulation of the parties and order of the Director on May 1, 1995 ("May 1995 Order"). In accordance with the terms of the May 1995 Order, A&B moved to lift the stay when it filed its *Motion to Proceed* on March 16, 2007 ("Motion to Proceed"). Additionally, the Petition seeks the award of costs and attorneys' fees. On August 28, 2007, the Court granted A&B's Application and ordered the Director to respond to the Delivery Call and distribute water to A&B. The Director and Department were ordered to appear before the Court on September 25, 2007 to show cause why they have not complied with A&B's Petition and Application.

As shown by the Affidavit of David R. Tuthill, Jr., Director, Idaho Department of Water Resources ("Tuthill Affidavit") and the argument herein, A&B's request for a writ of mandate is without merit because the Director and Department have and continue to take all actions required by the May 1995 Order and the Motion to Proceed. Moreover, A&B is not entitled to the relief requested because it has failed to comply with its legal duty to provide notice to parties to the pending administrative proceeding. Therefore, the Director and the Department respectfully

request that this court deny A&B's requested relief, deny A&B's request for costs and attorneys' fees, and dismiss this cause of action. Furthermore, the Director and Department request their own costs and attorneys' fees, as A&B as pursued this matter without basis in law or fact.

II.

ANALYSIS

A. Procedural History

In 1994, A&B sought administration of junior priority ground water rights based on its assertion that its members were suffering material injury as a result of declining ground water levels. *A&B Attachment B* at 2. Notice of the Delivery Call was served on approximately 7,200 junior priority ground water right holders who divert water from the Eastern Snake Plain Aquifer ("ESPA") with priorities later in time than September 16, 1948. *A&B Attachment C* at 1. In accordance with Idaho Code § 42-233b, A&B also moved for the designation of the ESPA as a Ground Water Management Area ("GWMA"). *A&B Attachment B* at 3.

On November 16, 1994, a pre-hearing conference was held at the Minidoka County High School at which "the attorney for A&B presented the outline of a proposed stipulation by the parties which would allow the matter of the contested case to be held in abeyance for a time." *A&B Attachment C* at 2. The proposed stipulation was reduced to writing, filed with the Department, and approved by order of then-Director R. Keith Higginson on May 1, 1995: "[T]he proposed Stipulation is adopted in part as the pre-hearing conference order of the IDWR . . . and actions called for in the Stipulation will be accomplished in so far as possible using available department resources . . ." ¹ *Id.* at 8. The May 1995 Order further stated that "IDWR retains jurisdiction of the petition for the purpose of continued review of information concerning water

¹ The "actions" to be undertaken by the Department in the 1995 Order will be discussed below.

supply,” and that “action on the Petition is hereby stayed until further *notice to the parties*. Any party may file a Motion to Proceed at any time to request the stay be lifted.” *Id.* (emphasis added).

On March 16, 2007, nearly twelve years after entry of the May 1995 Order, A&B filed its Motion to Proceed with the Department.² According to its Motion to Proceed, A&B requested that “the Director . . . lift the stay agreed to by the parties in regard to the petition of A&B . . . for the delivery of ground water and the creation of a ground water management area, and that said Director proceed, without delay, in the administration of the Eastern Snake Plain Aquifer . . . in such a manner as to provide ground water to A&B under its ground water rights that are being materially interfered with and materially injured by junior ground water appropriators” *A&B Attachment E* at 1. A&B’s Motion to Proceed was not served on other parties, *Tuthill Affidavit* at 4, as required by the May 1995 Order, *May 1995 Order* at 8.

On May 7, 2007, the Director held an informal status conference, which was not recorded, on A&B’s *Motion to Proceed* and Delivery Call. *Tuthill Affidavit* at 3. Among others present at the status conference, either in person or by telephone, were A&B’s attorney, Roger Ling, and A&B’s manager, Dan Temple. *Id.*

On June 15, 2007, Mr. Ling sent a letter (“June 2007 Letter”) to the Director expressing concern that the Director had not taken action on A&B’s Motion to Proceed. *A&B Attachment F*. According to the June 2007 Letter, “Unless immediate action is taken to meet the obligations of I.C. § 42-233b [creation of a GWMA], we will have no alternative but to seek an order from a court . . . to order that you carry out these duties.” *Id.* at 3.

² As will be discussed more fully below, prior to A&B filing its Motion to Proceed, multiple calls for delivery of senior surface water rights were filed with the Department, most notably by Blue Lakes Trout Farm, Inc., Clear Springs Foods, Inc., and the Surface Water Coalition in 2005.

On July 26, 2007, the Director met with the A&B Board of Directors and Manager, Dan Temple, in Rupert, Idaho. *Tuthill Affidavit* at 3. A&B's attorneys were not present at the meeting. *Id.* As stated in Dan Temple's affidavit, the Director informed the attendees that the Department did not anticipate curtailing junior priority ground water rights in response to the Delivery Call in 2007. *Id.* The Director did state, however, that the Department intended to respond to the Delivery Call by scheduling a hearing in early 2008, after the scheduled hearings in delivery calls filed by Blue Lakes Trout Farm, Inc. ("Blue Lakes"), Clear Springs Foods, Inc. ("Clear Springs"),³ and the Surface Water Coalition⁴ were completed. *Id.* at 3-4. The Director left the meeting with the understanding that the attendees were satisfied with the proposed schedule for responding to the Delivery Call. *Id.* at 4.

On August 23, 2007, A&B filed its Petition, Application, and Affidavit of Dan Temple with the Court. The Petition sought to compel the Director to respond to the Delivery Call and administer junior priority ground water rights within "Water Districts 100, 110, 120, 130, and 140 to supply A&B's prior right." *Petition* at 14. On August 28, 2007, the Court granted A&B's Application and ordered the Director to respond to the Delivery Call and distribute water to A&B. Additionally, the Director and Department were ordered to appear before the Court to

1) respond to A&B's water delivery call (as requested in its original petition filed July 27, 1994, its *Motion to Proceed* filed March 16, 2007, and its June 15, 2007 letter to Respondent Tuthill) and distribute water in the Eastern Snake Plain Aquifer to the wells of A&B Irrigation District . . . ; 2) That Respondents are further Ordered to appear before this Court . . . to show cause, if any they have, why they have not complied with the alternative writ of mandate and why the

³ A joint hearing in the delivery calls filed by Blue Lakes and Clear Springs is scheduled for November 28 through December 18, 2007. *Attachment A to Tuthill Affidavit.*

⁴ The Surface Water Coalition is composed of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company. The hearing is scheduled for January 16 through February 6, 2008. *Attachment A to Tuthill Affidavit.*

alternative writ of mandate should not continue in force and effect until this matter is tried by the Court on the merits.

Alternative Writ of Mandate at 2.

On September 13, 2007, a *Notice of Status Conference* (“Notice”) was sent to attorneys for A&B and other parties involved in the pending delivery call matters involving Blue Lakes, Clear Springs, and the Surface Water Coalition. *Attachment B to Tuthill Affidavit*. The Notice stated that a formal status conference would occur on September 20, 2007. Despite A&B’s failure to provide “notice to the parties” of its Motion to Proceed, *May 1995 Order* at 8, the Notice stated that those who appeared at the status conference would discuss A&B’s Motion to Proceed, the creation of an updated service list, and proper service of the Motion to Proceed. The Notice set a March 18, 2008 hearing date for the Delivery Call.

At the September 20, 2007 status conference, attorneys for A&B, as well as those that the Department served with the Notice appeared. *Tuthill Affidavit* at 4. A&B’s attorneys stated at the hearing that the Motion to Proceed was only served on the Department and that it was the Department’s obligation to serve notice of the Motion to Proceed on junior priority water right holders. *Id.* The participants to the status conference were instructed to provide the Director with pre-hearing schedules within two weeks that were consistent with the setting of a March 18, 2008 hearing. *Id.* at 5.

B. Standard of Review

1. Writ of Mandate

The writ of mandate is an extraordinary remedy requiring extraordinary circumstances. *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 43, 794 P.2d 632, 632 (1990). The writ will not issue when an adequate remedy at law or equity exists. *Edwards v. Industrial Comm’n*, 130 Idaho 457, 459-60, 943 P.2d 47, 49-50 (1997). Only if the act sought to be

compelled of the public officer is ministerial, and the party seeking the writ has a clear legal right to have the act performed, and the officer has a clear duty to perform the act, will mandamus lie. *Rogers v. Gooding Joint Public School District No. 231*, 135 Idaho 480, 483, 20 P.3d 16, 19 (2001); *Kolp v. Board of Tr. of Butte County Joint Sch. Dist. No. 111*, 102 Idaho 320, 323, 629 P.2d 1153, 1156 (1981).

C. Delivery Call and May 1995 Order

A&B alleges in its Petition that it is entitled to administration of junior ground water rights because the Director and Department have failed to comply with the May 1995 Order. *Petition* at 6. The May 1995 Order provided that the Director and Department would do the following:

1. [D]evelop a plan for management of the ESPA which will provide for active enforcement of diversion and use of water pursuant to established water rights. Such plan will be adopted and implemented under the Administrative Procedure Act.
2. No[t] [issue] drought-related emergency permits to divert ground water from the ESPA for limited seasons or periods of time . . . except as provided in section 42-202A, Idaho Code.
3. [P]ropose rules for supplemental water rights under the Administrative Procedure Act defining the term “supplemental water right,” and governing the use and transfer of such rights and the relationship of use of water under such rights to the primary rights which they are supplement.
4. [S]eek to fully implement the provisions of section 42-701, Idaho Code, regarding the measurement and reporting of diversions of water statewide and particularly from the ESPA. This effort will expand as funding and staffing are made available. It will include the organization of water measurement districts as provided in title 42, chapter 7, Idaho Code, as amended by Chapter 291, 1995 Session Laws.
5. [Continue] [t]he amended moratorium order on appropriations of surface and ground water from the Eastern Snake River Plain Area entered by the Director on April 30, 1993 and subsequently approved and confirmed by the Legislature in Chapter 449, 1994 Session Laws . . . through December 31, 1997 as provided by law.

6. [R]etain[] jurisdiction of the petition for the purpose of continued review of information concerning water supply, the impact of use of ground water on other uses of the resource and the determination and designation of the ESPA as a ground water management area.

May 1995 Order at 8.

A&B asserts in its Petition that “the Department has failed to adopt and implement a management plan to regulate and monitor the ground water resources within the ESPA. In addition . . . the Department has failed to formally identify which actions it has taken to comply with the 1995 *Pre-Hearing Order*.” *Petition* at 6. As demonstrated herein, the Director and Department have complied with the May 1995 Order.

1. The Director and Department have Developed and Implemented a Plan for Administration of the ESPA.

The Director and Department have developed and implemented a plan for administration of the ESPA by completing hydrologic studies of the ESPA, adopting the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”), creating water measurement districts, creating ground water management areas, filing Director’s Reports in the Snake River Basin Adjudication (“SRBA”) in basins that overlay the ESPA, and creating water districts. Long-term planning for the ESPA is currently underway through actions taken by the Idaho Water Resource Board (“Board”). Therefore, despite A&B assertion to the contrary, *Petition* at 6, the Director and Department have developed and implemented a plan for water rights diverting from the ESPA. With the possible exception of the initial gathering of information, and as demonstrated by the record herein, A&B was fully aware of the actions undertaken by the Director and Department in developing its plan for administration of the ESPA. Thus, this Court should deny A&B’s requested relief, *Edwards*, 130 Idaho 457, 943 P.2d 47; *Idaho Falls*, 118 Idaho 43, 794 P.2d 632, and dismiss its cause of action.

a. **Gathering of Information**

One of the first steps taken to manage the ESPA during the general time period of the Delivery Call and May 1995 Order was begun by the Board. In 1993, the Board began a study to inventory water resources in the Upper Snake Basin. *Tuthill Affidavit* at 5. The project, which was published in December 1998 and entitled *Upper Snake River Basin Resource Inventory* (“Inventory Study”), was a “compilation of the data and information that was collected as part of the . . . Board’s . . . comprehensive basin planning study of the Eastern Snake Plain Aquifer and tributary basins conducted from 1993 to 1996.” *Inventory Study* at 1. “This document is being presented by the board as an up-to-date, comprehensive inventory of the water resources in the Upper Snake River Basin.” *Id.*

A second study, which was begun by the Department in 1993, was the *Upper Snake River Basin Study* (“Upper Snake Study”). *Tuthill Affidavit* at 5; *see Upper Snake Study* at 80. The Upper Snake Study took four years to complete and cost \$287,000. *Upper Snake Study* at 80. The Upper Snake Study examined “the effects of ground water withdrawals,” a “method of accounting for the effect of ground water withdrawals . . . in the allocation of natural flow and use of stored water,” “the effects of reduced diversions by surface water irrigators . . . on ground water discharges . . . and show corresponding water table elevation changes throughout the aquifer,” and “the effects of further reductions in surface diversions on ground water discharges to surface sources.” *Upper Snake Study* at 4. The Upper Snake Study also prepared “study plans including time and cost estimates for evaluating the hydrologic effects of ground water withdrawals,” “hydrologic evaluations of potential managed ground water recharge programs . . . as possible mitigation,” and “possible plans for mitigation of depletion of natural flow supplies in Water District 1 resulting from ground water pumping on the ESPA.” *Id.*

b. Adoption of the CM Rules

A next step taken by the Department to manage the ESPA and conjunctively administer water rights was the adoption of the CM Rules on October 7, 1995. IDAPA 37.03.11; *Tuthill Affidavit* at 5. As evidenced by the delivery calls filed by Blue Lakes, Clear Springs, and the Surface Water Coalition, among others, the orders issued by the Director in those cases, *Tuthill Affidavit* at 2, and the Idaho Supreme Court's recent decision in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007), the Director has been actively using the CM Rules to administer junior priority ground water rights that are hydraulically connected to the ESPA.

A&B participated in the development of the CM Rules by submitting comments to then-Director R. Keith Higginson. *Attachment L to Tuthill Affidavit*. Moreover, as demonstrated by *American Falls*, A&B cannot credibly assert that it was without knowledge of these actions.

c. Creation of Water Measurement Districts

On October 24, 1996, a *Final Order Creating Water Measurement Districts and Notice of Annual Meeting* was issued by then-Director Karl J. Dreher. *Attachment C to Tuthill Affidavit*. The districts were created "to insure that water users are diverting water within the limits of their water rights" and to "facilitate the measurement of water diverted from the ESPA and reports of the diversions." *Id.* at 4-5. The order created the North, East, and West water measurement districts, which overlay virtually all of the ESPA. Water measurement districts were created by the Director in accordance with authority contained in chapter 7, title 42 of the Idaho Code.

A&B had full knowledge of the creation of water measurement districts as evidenced by its October 2, 1996 *Petition for Exclusion from Water Measurement District*, which was granted by the Director on December 30, 1996. *Attachment D to Tuthill Affidavit*.

d. Creation of Ground Water Districts

While not an action undertaken by the Department, Ground Water Districts have been created in counties that overlay the ESPA. The creation of Ground Water Districts in accordance with Idaho Code §§ 42-5201-5276, allows for additional protection of the ESPA, as the boards of directors for those districts have the authority “To monitor, measure, study, and implement programs in the interests of the district’s members regarding the protection of ground water diversions, depth of water in wells, aquifer water levels and characteristics.” Idaho Code § 42-5225(17). The Magic Valley Ground Water District (“MVGWD”) was approved by residents of Minidoka County and created by order of the Minidoka County Commissioners on February 12, 1996. *Attachment E to Tuthill Affidavit*. The North Snake Ground Water District (“NSGWD”) was approved by residents of Gooding County and created by order of the Gooding County Commissioners on January 4, 1996. *Id.*

A&B is located in both the MVGWD and NSGWD and its shareholders irrigate land with surface and ground water rights in Gooding and Minidoka counties. Therefore, A&B cannot credibly claim that it was without knowledge of the creation of the ground water districts.

e. Creation of GWMA

A next step in the development of the plan for managing the ESPA was the creation of GWMA. On August 3, 2001, pursuant to Idaho Code § 42-233b, then-Director Karl J. Dreher exercised his discretion in entering orders designating the American Falls GWMA and the Thousand Springs GWMA. *Attachment F to Tuthill Affidavit*. “The Director initiates this matter in response to his recognition that he has a responsibility . . . to exercise his statutory authorities to administer rights to the use of ground water in a manner that recognizes and protects senior priority surface water rights in accordance with the directives of Idaho law.” *Id.* The American

Falls and Thousand Springs GWMA's overlay much of the ESPA and allowed for administration of water rights in those areas.

A&B participated in the proceedings creating the GWMA's. *Attachment L to Tuthill Affidavit*. Therefore, A&B cannot credibly claim that it was without knowledge of these actions.

f. Filing of Director's Reports in the SRBA in Areas that Overlay the ESPA and the Creation of Water Districts

With the filing of Director's Reports for basins overlying the ESPA in the Snake River Basin Adjudication ("SRBA"), and the subsequent issuance of partial decrees by the SRBA District Court, the Director was authorized to create water districts. Idaho Code § 42-604 ("The director . . . shall divide the state into water districts . . . provided that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated . . ."); Idaho Code § 42-607 ("It shall be the duty of said watermaster to distribute the waters . . . comprising a water district . . ."); *see generally A&B Attachment D*.

A&B was and remains a claimant in the SRBA and had knowledge of the state of Idaho's Motion for Interim Administration in the Eastern Snake Plain Aquifer, as it was served upon A&B. *Attachment G to Tuthill Affidavit*. Included in support of the Motion for Interim Administration was the affidavit of Timothy J. Luke, Section Manager for the Water Distribution Section for the Department ("Luke Affidavit"). *Id.* According to page 3 of the Luke Affidavit,

The specific reasons for creation or enlargement of water districts in Basins 35, 36, 41, and 43 are:

- Existing water districts in these basins are limited to surface water sources and do not include ground water sources. . . .
- All of the water rights claimed in Basins 35, 36, 41, and 43 have been reported or partially decreed in the SRBA
- IDWR has already created Water Measurement Districts in these areas, but the Measurement Districts' authority is limited to measurement and reporting of water use and does not include authority to regulate water rights, including enforcement of water right conditions.

- The establishment of water districts will provide the watermasters with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law.
- The available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights.

The state of Idaho's Motion for Interim Administration was granted by the SRBA District Court on January 8, 2002. *Order Granting State of Idaho's Motion for Order for Interim Administration. Attachment G to Tuthill Affidavit.* "Interim administration in those portions of Administrative Basis 35, 36, 41, and 43 . . . is reasonably necessary to protect senior water rights in accordance with the prior appropriation doctrine as established by Idaho law." *Id.* at 2.

Shortly after the SRBA District Court granted the state of Idaho's Motion for Interim Administration, the Director began taking the necessary steps to create water districts. The creation of Water District Nos. 100, 110, 120, 130, and 140, has allowed the Director to administer water rights that are hydraulically connected to the ESPA. *A&B Attachment D.* Furthermore, the creation of water districts overlying the ESPA allowed the Director to rescind his orders that created the American Falls and Thousand Springs GWMA's in favor of administering water through water districts: "Thus, the need for the GWMA no longer exists in those portions of the GWMA overlain by Water District[s] . . . , and its continued existence within the Water District boundaries may cause confusion in the administration of water rights."⁵ *Attachment F to Tuthill Affidavit* at 1. A GWMA is not necessary in an area that has an organized water district. *Tuthill Affidavit* at 7. A&B is located wholly within Water District No. 130. *Id.* at 8.

The creation of Water District No. 130 began when the Director "mailed notice . . . of the proposed action . . . to each water user in the proposed district" *A&B Attachment D, Final*

Order Creating Water District No. 130 at 3 (“Final Order”). A hearing on the proposal occurred at the Jerome High School Auditorium on February 4, 2002, which provided persons attending to make comments. The Final Order states that “Mr. Roger Ling, attorney for the A&B Irrigation District, stated that the questions he had were addressed by the Director during the presentation and discussion that occurred prior to going on the record.” *Id.* The Final Order was issued on February 19, 2002. The watermaster for Water District No. 130’s duties to administer water rights were defined by the Director as follows:

- a. Curtail illegal diversions (i.e., any diversion without a water right on in excess of the elements or conditions of a water right);
- b. Measure and report the diversions under water rights;
- c. Enforce the provisions of stipulated agreements approved by the Director, and
- d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director.

Id. at 5.

Dan Temple, for A&B, has participated in Water District No. 130 as a member of the advisory committee, as indicated in Water District 130’s 2006 annual minutes. *Attachment L to Tuthill Affidavit.* Therefore, A&B cannot credibly claim that it was without knowledge of these actions.

g. Long-Term ESPA Planning and Management

Recently, the Legislature authorized the Board to undertake a Comprehensive Aquifer Management Plan (“CAMP”) for the ESPA. *Attachment H to Tuthill Affidavit* (House Bill 320, 2007 Idaho Sess. Laws 850, and Senate Concurrent Resolution No. 136, 2006 Idaho Sess. Laws 1392). The CAMP will aid not only in administration and enforcement of water rights, but also in long-term planning and management of the ESPA.

⁵ The Director’s orders dissolving the GWMA’s have been challenged, but a hearing date has not been set.

Representatives of Water District No. 130 are Advisory Committee members of the CAMP. *Attachment I to Tuthill Affidavit*. A&B is located within Water District No. 130, and at least as recently as the 2006 annual meeting, Dan Temple was a member of the Water District No. 130 advisory committee. *Attachment L to Tuthill Affidavit*. Therefore, A&B cannot credibly claim that it is without knowledge of this action.

2. The Director and Department have not Issued New Drought-Related Permits Except in Conformance with Idaho Law

In 1992, the Department issued thirty drought-related permits to divert ground water from the ESPA. *Tuthill Affidavit* at 8. The Department renewed one of the thirty permits, 47-8296, in 1993, for a diversion rate of 4.00 cfs. *Id.* Since the May 1995 Order, the Department has renewed three of the original thirty drought-related permits to divert ground water from the ESPA. *Id.* The Department renewed 21-7510 in 2001 and 2002 for a diversion rate of 7.00 cfs; 22-7734 was renewed in 2001-2003 for a diversion rate of 3.20 cfs; and 22-7737 was renewed in 2001-2004 for a diversion rate of 5.60 cfs. *Id.* at 8-9 Since the May 1995 Order, the Department has not issued new drought-related permits.

The Department's actions are matters of public record; therefore, A&B had a duty to investigate this provision of the May 1995 Order before filing its action with the Court. Thus, A&B cannot credibly claim that it was without knowledge of this action.

3. The Director and Department have Proposed Rules for Supplemental Water Rights

Beginning in 1995 and again in 1997, the Department, through the Idaho Administrative Procedure Act, initiated rulemakings defining the term "supplemental water right." *Attachment K to Tuthill Affidavit*. Notice of proposed rulemaking was published in 1998, and notice of

continuation of negotiated rulemaking in 2000. Due to opposition to the proposals, the attempts have never resulted in the adoption of rules. *Tuthill Affidavit* at 9.

The 1997 Notice of Negotiated Rule Making states that “rule making is responsive to an agreement which arose from efforts initiated by the A&B Irrigation District seeking conjunctive management of surface and ground water supplies used in the Eastern Snake Plain Aquifer area.” *Attachment K to Tuthill Affidavit*. On October 30, 2001, Roger D. Ling submitted written comments to Norman C. Young regarding Draft Statewide Water Management Rules of July 10, 2001. *Id.* Therefore, A&B cannot credibly claim that it was without knowledge of these actions.

4. The Director and Department have Created Water Measurement Districts

As stated above, the Director, in exercising his discretion, created the North, East, and West water measurement districts, which overlay virtually all of the ESPA. A&B was included in the West water measurement district until its petition for exclusion from the measurement district was granted by the Director. Therefore, again, A&B cannot credibly claim that it was without knowledge of this action.

5. The Director and Department have not Rescinded the Amended Moratorium Order

The commitment to keep “the amended moratorium order on appropriations of surface and ground water from the Eastern Snake River Plain Area . . . at least through December 31, 1997” has been fulfilled, as the amended moratorium order covering the ESPA has not been rescinded, *Tuthill Affidavit* at 8; see also *Attachment J to Tuthill Affidavit*, and the Department has not processed permits for consumptive uses, absent approved mitigation, *Tuthill Affidavit* at 8.

The amended moratorium order is a matter of public record; therefore, A&B had a duty to investigate this requirement of the May 1995 Order before filing its action with the Court. Thus, A&B cannot credibly claim that it was without knowledge of this action.

6. The Director and Department have Retained Jurisdiction of the Delivery Call

As required by the May 1995 Order, the Director and Department have retained jurisdiction of the Delivery Call and, in accordance with the provision in the May 1995 Order that allowed any party to file a “Motion to Proceed,” a hearing will commence on the Delivery Call on March 18, 2008. *Tuthill Affidavit* at 4; *Attachment B to Tuthill Affidavit*. A&B’s own actions in filing the Motion to Proceed demonstrate its knowledge of the Department’s retained jurisdiction.

In summary, and as the record demonstrates, A&B was fully knowledgeable that the Director and Department were in compliance with the May 1995 Order. A&B’s real dispute is not about the Director or Department’s taking action under the May 1995 Order, but the choice of actions pursued by the Director and Department to develop the plan for management of the ESPA. The purpose of a writ of mandate is to force action of a governmental entity, *Idaho Falls*, 118 Idaho at 45, 794 P.2d at 634, not to argue over the entity’s choice of action. Because A&B knew that the Director and Department acted by establishing a plan for management of the ESPA, A&B’s Petition should be dismissed by this Court.

D. Response to A&B’s Motion to Proceed

1. A&B Failed to Serve Junior Priority Ground Water Users with its Motion to Proceed Thereby Failing to Comply with the Terms of the May 1995 Order

The May 1995 Order staying A&B’s Delivery Call stated that the “action on the Petition is hereby stayed until further *notice to the parties*. Any party may file a Motion to Proceed at

any time to request the stay be lifted.” *Id.* (emphasis added). A&B’s 1994 Delivery Call was therefore stayed until a party to the proceeding filed a Motion to Proceed and served that motion on the parties to the proceeding. A&B complied with the first requirement of the May 1995 Order when it filed its Motion to Proceed with the Department; however, A&B failed to satisfy the second requirement by not providing notice to the other parties to the contested case. A&B admitted in the September 20, 2007 status conference that it only served its Motion to Proceed on the Department. *Tuthill Affidavit* at 4. Despite A&B’s failure to properly serve, the Director has sought to avoid undue delay by conducting a status and scheduling conference to set the Delivery Call for hearing as expeditiously as possible.

A&B’s argument that the Department is required to serve its Motion to Proceed is inconsistent with the May 1995 Order and IDAPA 37.01.01.302. The May 1995 Order does not place the duty on the Department to serve the Motion to Proceed on affected junior priority ground water users. Indeed, if the May 1995 Order were read as advocated by A&B, it would be inconsistent with the Department’s Rules of Procedure and the Idaho Rules of Civil Procedure which require the party initiating the proceeding to serve notice. IDAPA 37.01.01.302 (“All documents intended to be part of the agency record for decision must be served upon the representatives of each party of record concurrently with filing the original with the officer designated by the agency to receive filings in the case.”); *see also* I.R.C.P. 5(a). A&B is the petitioning party and therefore required to provide service of its Motion to Proceed upon junior priority ground water users that may be impacted by its Delivery Call. By failing to serve those water users, A&B has not complied with the terms of the May 1995 Order and has thereby delayed lifting the stay. Nevertheless, the Director has met with A&B in a status and scheduling conference to expedite the resolution of the Delivery Call while A&B complies with its duty to

serve its Motion to Proceed on affected junior priority ground water users. Once notice has been served on the respondent junior priority ground water users that may be affected by the Delivery Call, the Department will lift the stay and a hearing may commence.

2. A Timely Hearing has been Set given the Complexity of the A&B Delivery Call

As stated in the September 13, 2007 Notice, and again at the September 20, 2007 status conference, a hearing on the Delivery Call will begin on March 18, 2008. Given the complexity of the Delivery Call, the date chosen is timely:

Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water. While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

American Falls, 143 Idaho at 875, 154 P.3d at 446.

The timing of the A&B hearing is appropriate given its complexity. The A&B Delivery Call will be the first time the Department has been presented with a delivery call between ground water users and will likely rely heavily on use of the ground water model and presentation of expert opinions. In order to provide both senior and junior water right holders with due process and a full and fair opportunity to be heard, a time period of six months to allow for discovery and the development of a record is reasonable. Additionally, many of the parties to A&B's Delivery Call are involved in the delivery call proceedings in Blue Lakes, Clear Springs, and the Surface Water Coalition, making it unrealistic to have simultaneous proceedings.

Moreover, the delivery calls in Blue Lakes, Clear Springs, and the Surface Water Coalition are set for hearing in late 2007 and early 2008. *Tuthill Affidavit* at 3-4. The information that will be garnered from the orders entered by the hearing officer in those proceedings will be instructive in the A&B Delivery Call. Common issues such as use of the ground water model, application of the CM Rules, determination of futile call, and the means by which junior priority ground water users may provide mitigation to senior users will all likely be reviewed by the hearing officer in those delivery calls and his findings and conclusions will aid in the A&B proceeding.

E. A&B's Request for Costs and Attorneys' Fees Should be Denied Because the Director and Department have Acted with a Reasonable Basis in Law and Fact

A&B requests an award of costs and attorneys' fees in accordance, but not limited to, Idaho Code § 12-117 and § 12-121. Initially, it should be noted that an award of costs and attorneys fees under Idaho Code § 12-121 is inappropriate because the cause of action filed by A&B is against a "state agency." Idaho Code § 12-117; *see Idaho Watersheds Project, Inc. v. State Bd. of Land Com'rs*, 128 Idaho 761, 767, 918 P.2d 1206, 1212 (1996). Therefore, A&B is only entitled to costs and attorneys' fees in accordance with Idaho Code § 12-117.

In order for costs and attorneys' fees to be awarded under Idaho Code § 12-117, the Court must find that the Director and Department acted "without a reasonable basis in law or fact." Idaho Code § 12-117(2). As demonstrated above, the Department and Director have complied with the terms in the Director's May 1995 Order, and the Department and Director are proceeding with A&B's Delivery Call as expeditiously as possible.

III.

RESPONDENTS' REQUEST FOR COSTS AND ATTORNEYS' FEES

As a direct and proximate result of Plaintiff's actions in filing this matter, the Director and the Department have been required to expend legal resources and have also incurred various costs. Therefore, Respondents request costs and attorneys' fees pursuant to Idaho Code § 12-117. A&B alleges that it was without knowledge of the actions taken by the Director and Department to administer water rights. As amply demonstrated by the record, A&B had knowledge and participated in many of the actions undertaken by the Director and Department. Therefore, A&B acted without any reasonable basis in law or fact when it filed its action with the Court. Furthermore, A&B did not provide "notice to the parties" of its Motion to Proceed, thereby failing in its duty under the May 1995 Order to inform parties to the action of its decision to renew its Delivery Call. Despite A&B's failure, the Director and Department have moved as expeditiously as possible to schedule the matter for hearing.

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IV.

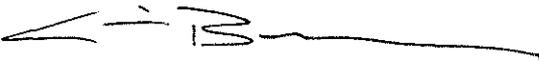
CONCLUSION

For the reasons stated herein, and in accordance with Idaho Rule of Civil Procedure 12(b)(6), the Court should dismiss Petitioner's Alternative Writ of Mandate and the Verified Petition for Peremptory Writ of Mandate, and should deny Petitioner's request for costs and attorneys' fees. Because the Petitioner has pursued this matter without any reasonable basis in law or fact, the Court should award reasonable costs and attorneys' fees to Respondents.

RESPECTFULLY SUBMITTED this 21st day of September, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served one (1) true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 21st day of September 2007.

Document(s) served: Respondents Brief in Support of Motion to Dismiss Petitioner’s Alternative Writ of Mandate and the Verified Petition for Peremptory Writ of Mandate

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