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ATTORNEYS FOR THE IDAHO GROUND WATER APPROPRIATORS

BEFORE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

IN THE MATTER OF THE PETITION
FOR DELIVERY CALL OF A&B
IRRIGATION DISTRICT FOR THE
DELIVERY OF GROUND WATER AND
FOR THE CREATION OF A GROUND
WATER MANAGEMENT AREA

Docket No.: 37-03-11-1

IGWA'S POST-HEARING BRIEF

COME NOW the Idaho Ground Water Appropriators, Inc., and its Ground Water District members, for and on behalf of their respective members (collectively the "Ground Water Users"), through counsel, and hereby submit the following Post-Hearing Brief.

I.
PROCEDURAL HISTORY

The procedural history of this delivery call case is uncontested, described elsewhere and need not be reiterated in detail.¹ Only the highlights will be mentioned here. On July 26, 1994, A&B Irrigation District ("A&B") filed a *Petition for Delivery Call* ("Delivery Call") with the

¹ A detailed procedural history is set forth in FF1-9 of the Director's *Order of January 29, 2008* and also in the Background section of IGWA's Pre-Hearing Brief filed November 25, 2008

Idaho Department of Water Resources (“Department”). The Delivery Call requested that the Director of the Department take those actions “necessary to insure the delivery of ground water to [A&B] as provided by its water right to . . . protect the people of the State of Idaho of depletion of ground water resources which have caused material injury to [A&B], and to designate the Eastern Snake Plain Aquifer as a ground water management area. . . .” *Delivery Call* at 3.

IDWR issued an Order of January 29, 2008 (“January 29 Order”) denying A&B’s Delivery Call and Motion to Proceed finding that A&B had not suffered any material injury. The January 29 Order determined through application of the Rules for Conjunctive Management of Surface and Ground Water Resources, (IDAPA 37.03.11)² that A&B had not suffered any material injury and was not short of water.

On March 21, 2008, A&B filed a Motion for Declaratory Ruling and Brief in Support contending that the Idaho Ground Water Act, I.C. §§ 42-226 *et. seq.* is inapplicable and that its provisions for “reasonable ground water pumping levels” was likewise inapplicable. On May 26, 2008, the Hearing Officer declared that:

The Idaho Ground Water Act is applicable to the administration of the water rights involved in this case, including those rights that pre-existed the adoption of the Ground Water Act in 1951, and are subject to administration consistent with subsequent amendments to the Act.

Order Regarding Motion for Declaratory Ruling at 7.

At the evidentiary hearing conducted December 3-17, 2008 before Hearing Officer Gerald F. Schroeder, A&B challenged the January 29 Order, which was supported by multiple parties including the Ground Water Users, City of Pocatello and upper Snake River water users

² Referred to herein as the Conjunctive Management Rules, or CM Rules.

as well as many other interested parties.

II. INTRODUCTION

The Ground Water Users are simultaneously submitting Proposed Findings of Fact and Conclusions of Law (“FF/CL”) which contains extensive references to substantial evidence presented at the hearing which strongly supports the Director’s conclusion that A&B has not suffered any material injury and show that the denial of the delivery call was proper. Accordingly, to avoid duplication and in the interests of brevity, this brief will contain limited references to the factual record, instead addressing some of the key legal and factual issues presented.

A&B’s irrigation system consists of two separate and distinct water supplies and irrigation systems. The A Unit is supplied by surface water rights delivered from the Snake River and the B Unit is a complex irrigation system supplied by ground water rights. Only the B Unit 1948 priority ground water right no. 36-2080 is the subject of the delivery call and at issue in this case.

Water right no. 36-2080 has been “Partially Decreed” in the SRBA. After the entry of the partial decree, water right no. 36-2080 at A&B’s request was subject to a transfer proceeding before IDWR; the approved transfer provides for an authorized maximum rate of diversion of 1,100 cfs and allows A&B to use up to 188 authorized points of diversion. A&B currently operates 177 wells to provide irrigation water to its members to irrigate up to 66,686.2 authorized acres under water right no. 36-2080 and A&B’s beneficial use and enlargement water rights. See *January 29 Order FF 23-24 and IGWA’s Proposed Findings of Fact and*

Conclusions of Law, FF(g) – (m) and CL(a).³

A&B has a long history of improving its delivery system and efficiencies in order to provide an adequate supply of irrigation water to its members who have and continue to raise productive crops. FF(e), (f), and (n). A&B throughout its history has needed to replace worn or failing pumps, motors and well equipment, deepen existing wells, drill new wells, eliminate drains and open ditches, interconnect at least eight well systems, and shift land from less productive well systems to more productive well systems. These improvements were driven in part by the conversion from flood to sprinkler irrigation and the improved efficiencies allowed its members to enlarge irrigation to over 4,000 expanded acres. In the southwest area where well yields have been historically less and improvements are less feasible due to hydrogeology problems, A&B has converted some lands to surface water. The evidence is overwhelming that these efforts have and continue to be successful in maintaining reasonable and adequate water supplies, as readily admitted by A&B's manager Dan Temple. FF (gg). The associated costs incurred to continue to operate the system successfully were normal, expected and consistent with operational expenses incurred by farmers outside the A&B system.

Suddenly and without a reasonable explanation or factual support in the record, A&B now advocates their new strategy with the objective of curtailing of junior ground water users in the ESPA in order to maintain A&B's historic water levels and to force junior ground water users to pay A&B's normal and reasonable expenses associated with operating its system and maintaining its water supply.⁴

³ References to IGWA's Proposed Findings of Fact and Conclusions of Law will be designated with an "FF" or "CL" followed by the number or letter used in IGWA's Proposed Findings of Fact and Conclusions of Law.

⁴ It is noteworthy that A&B left entirely unchallenged and unexplained the admission of its expert witness John Koreny testified to by IDWR personnel at the January 4, 2008 meeting that the delivery call was not about shortage,

A&B has failed to demonstrate an inadequate water supply or the inability to exercise its water right due to the actions of junior ground water users and therefore does not meet the threshold test of establishing material injury. Despite claims of water shortage based upon an authorized maximum diversion rate of 0.88 inches per acre, an amount that has never been delivered for even one day, the very evidence presented by A&B's own witnesses contradicts their allegations of shortage. FF35-63 and FF(n)-(t) and CL21 and CL(b). The cross examination of A&B farmer witnesses Adams, Eames, Kostka and Mollhman clearly established no verifiable evidence of any fallowed ground or unharvested crops and in fact, their crop yields have increased steadily over the years and exceed the county average. FF(n) and (r). They have had a steady, and reliable headgate delivery of 3 acre-feet per acre exceeding the crop requirements of adjacent farmers who only use 2 acre-feet per acre. Id. FF(o)-(q).

Since no injury to A&B's water right was established, the questions of reasonable pumping levels and operating costs are not at issue. Even if they were, only the Director has authority to establish reasonable pumping levels for the aquifer, an issue of technical expertise not presented at the hearing nor proper for the Hearing Officer to address.

III. SUMMARY

The only conclusion that can be reached based on the evidence presented at the hearing is that A&B's senior water right no. 36-2080 is not suffering material injury for three primary reasons: First, water right no. 36-2080 allows A&B to irrigate any acre within its service area from any well. FF(g)-(m) and CL(a). By having multiple points of diversion to supply a single service area, A&B cannot lawfully claim material injury when a few wells are short according to

but instead about the payment of A&B's operating costs. Luke, Tr. p. 1306, L. 19-23.

a contrived, internal delivery criteria. Second, A&B's own system design (or the Bureau of Reclamation before A&B took control of the irrigation district) caused production problems in some wells which were sited in areas having low water producing characteristics and naturally problematic hydrogeology. These characteristics were known at the time the project was built, yet, A&B (or Reclamation) failed to anticipate water level declines resulting from its own pumping and operational changes, changes to irrigation practices and periodic droughts. Further, A&B has failed to adjust its well design and construction methods to account for the problematic hydrogeology. FF (z)-(ff). Third, there is no evidence of an inadequate water supply. Yet, A&B now apparently wants to self-create a water shortage by abandoning its rectification program, by not drilling additional wells, by internally restricting its water right, without undertaking or even considering further efficiency improvements or other reasonable means of conveyance and diversion such as interconnection of wells and well systems and installing more closed delivery systems. FF(gg)-(jj)

Without justification, A&B now is refusing to consider further interconnection of certain wells or well systems, claiming this would be impractical or not possible yet, has not even asked that such a study be considered by engineers. FF(j). However, notwithstanding some decrease in well yield in some wells in certain parts of the B Unit, A&B farmers raise healthy crops, enjoy yields at or above county averages and divert more water to irrigate their crops than other area farmers. FF(n), (o)-(q), (r). Whether one compares the acres irrigated per well or well system with the amount of water diverted, or whether one compares the B Unit "water short lands" with surrounding non-water short lands, or whether one looks at A&B's actual diversion records, the conclusion is the same: A&B has failed to establish it has suffered any material injury. FF35-63, FF(o)-(y). In fact, A&B's records show that it has never diverted, let alone needed, the

maximum amount of water under its water right. FF36-38. Simply, A&B's claim that it is entitled to its maximum rate of diversion for all of its wells at all times is simply not legally supportable since a water right quantity is an authorized not a guaranteed amount.

IV. DISCUSSION

This Post-Hearing Brief will briefly discuss two areas. First, the application of the Conjunctive Management Rules. Second, because the Groundwater Act applies in this case and A&B is not entitled to historic water levels, depletion cannot equate to material injury. Finally, as stated in IGWA's Pre-Hearing Brief, the evidence at the hearing showed that: 1) that the ESPA has an adequate supply of water for A&B; 2) the amount of water A&B diverts is sufficient to meet crop demands; 3) A&B's water right has not been materially injured.

A. APPLYING THE CM RULES TO THE FACTS OF A&B'S DELIVERY CALL SHOWS THERE IS NO MATERIAL INJURY TO WATER RIGHT NO. 36-2080

CM Rules 40.01 and 40.01.a state that the Director only has authority to regulate the use of water in accordance with priorities when there has been a finding that the petitioner is suffering "material injury" Until the Director has made a finding of material injury, there exists no legal authority to curtail junior ground water users in response to a delivery call.

1. A&B's Water Right Itself Provides A&B's Answer to Its Water Supply Concerns.

CM Rule 14 defines material injury as "hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho law, as set forth in Rule 42." (emphasis added). The question to be answered is whether the diversion and use of water under a junior water right is causing a senior user the inability to exercise his water right. Junior users are not interfering with A&B's exercise of water right no.

36-2080.

In this case, there is no showing that the water supply is inadequate; A&B has demonstrated a continuing ability to secure its necessary water supply exercising means of maintaining and improving its diversion and delivery systems. Present or future shortfalls, if any, will only be a result of A&B's refusal to use ready and available options and alternatives available to fully utilize the flexibility enjoyed under its water right.

Water right no. 36-2080 is unique in many respects. Although the Bureau of Reclamation ("Bureau) or A&B could have limited water right no. 36-2080 to tie certain wells to certain lands, they chose not to. When the Bureau developed the A&B ground water project, it intentionally obtained one water right for the entire project. Ex. 157B; FF(g)-(h). During the licensing process, the Department requested that the Bureau provide a specific well and land list. By letter dated December 21, 1964 the Department stated:

This department is desirous of issuing a license as specified above upon receipt of a list of the wells and lands to be submitted by the licensee, and therefore asks that said list be submitted not later than January 15, 1965.

Ex. 157, at 4398. In response to that letter, the Bureau replied stating:

We emphasize that the project is one integrated system, physically, operationally, and financially. Some lands, depending on project operational requirements, can be served from water from several wells. Therefore, it is impractical and undesirable to designate precise land areas within the project served only by each of the specific wells on the list.

Ex. 157D (emphasis added); FF(g)-(h). Ultimately, the Department issued the very license the Bureau desired and did not limit the place of use for any well. Ex. 157B. The license simply stated "177 wells" for "62,604.3 acres." Id. There is no dispute that water right no. 36-2080 was licensed, partially decreed and then transferred to specifically allow A&B to irrigate any or all of its lands from any or all of its wells. FF(g)-(h). A&B's internal restriction which designates

certain wells or well systems to certain tracts of land does not effect the flexible use provided for under the water right and now provides no legal basis to claim material injury to the exercise of water right no. 36-2080.

A&B has the ability to fully exercise the use of water right no. 36-2080, regardless of ground water declines which have averaged less than a half foot per year since A&B began operating. January 29, Order, Figure 2.

2. Although Water Right No. 36-2080 Is Senior, Its Use and Exercise Must be Reasonable Under Idaho Law.

A&B's use of water under its senior priority water right is subject to "conditions of reasonable use . . . as provided in Article XV, Article A, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law." CM Rule 20.03.

Further, "the Director shall consider, whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of . . . groundwater as described in Rule 42." CM Rule 40.30. A&B's conduct and use of water must be evaluated when determining whether or not its water right is suffering material injury.

In this case, the overwhelming weight of the evidence presented demonstrates that there is a small area within the southwest portion of A&B's service area that has a unique hydrogeology and physical characteristics causing natural difficulties in accessing ground water. FF(z)-(ff). Although the Bureau chose to site some wells within a challenging hydrogeologic environment, A&B's water right allows it to supplement that supply by interconnecting its wells or wells systems, to add additional points of diversion as needed or to replace abandoned or low

yielding wells. FF(dd). Yet, A&B has refused to employ hydrogeologists to help it solve this problem that has been ongoing since the inception of the projection. FF(ii) and FF(yy).

Dr. Ralston testified using Exhibit 159 which is a map of the B Unit of A&B. Exhibit 159 was also Figure 6 in his report titled, *Hydrogeologic Analysis of the A and B Irrigation District Area* dated January 2008. This report is Exhibit 121. Exhibit 159 was used to show an array of information, including those lands that A&B has converted to surface water irrigation as well as the various wells that A&B claims are “water short.” When one looks at this map, it becomes obvious that A&B’s demand in its delivery call is unreasonable. First, the lands that A&B has converted to surface water in the southwest area consist of 1,446 acres or 2.26 square miles. Second, the lands that A&B claims are water short in the southwest area are just over 8 square miles. By comparison, the entire ESPA is 11,447 square miles. FF(ee). These water short areas are in many cases in close proximity to other wells or well systems that have a surplus supply. Ex. 415, 416; FF(i)-(k). Finally, other allegedly water short well systems outside the southwest area are also in close proximity to wells or well systems that have ample water. Exhibit 481 shows that interconnecting some of these well systems is possible; yet, A&B has not even requested that such an evaluation be done. FF(i)-(k). Rather, A&B wants to demand that junior ground water users be curtailed in order to guarantee A&B some undefined historic ground water level.

Until A&B demonstrates that the available water supply is inadequate and that it has exercised all reasonable means of accessing the supply using the multiple options and flexibility afforded it under water right no. 36-2080, no material injury can be established and no legal basis exists for curtailment of junior ground water users.

3. Application of CM Rule 42 Demonstrates A&B Is Not Water Short; Water Right No. 36-2080 Is Not Suffering Material Injury

Conjunctive Management Rule 42 lists a variety of factors that can be used to evaluate material injury and whether or not a petitioner is using water efficiently and without waste.

a. **Source.** Rule 42.01.a allows the Director to evaluate the amount of water available from the source from which the water is diverted. FF(a) and (b). Plainly stated, many of A&B's problems accessing water is driven by the location of the B Unit. As the evidence established at the hearing, the vast majority of the aquifer underlying A&B is a highly productive water-bearing basalt aquifer. However, in the southwest portion of the B Unit, there are sedimentary interbeds that require site-specific considerations of the hydrogeology to determine whether or not A&B is using the best available means to withdraw water from that source. FF(z)-(ff).

When the Bureau developed the A&B Irrigation District project in the late 1940s and early 50s, there was an understanding that the service area for the A&B Irrigation District encompassed a variety of lands and that the aquifer underlying A&B had a variety of characteristics. FF(aa), (bb) and (ff). Historical documents show that at the time of development the Bureau chose to develop wells in the high producing basalt aquifer located primarily in the northern portion of the B Unit and later moved to the "922 problem area" in the southwest portion. Ex. 152P and QQ; FF(aa) and (bb). When the Bureau developed the wells in the southwest portion, it was known that the water-bearing characteristics of the aquifer underlying the southwest portion differed from the hydrogeologic setting for a majority of the B Unit. *Id.* Yet, the Bureau consciously decided to drill wells in the sedimentary zones of the southwest

area. Ultimately, the Bureau re-drilled nearly 50% of its wells throughout the project within a ten-year period. Ex. 404; FF96-108, FF(gg)-(jj).

Although withdrawing water from the sedimentary interbeds is more difficult than the higher transmissive areas located in the northern part of the B Unit, A&B is not without remedy. FF(dd). First, A&B could employ hydrogeologic consultants to determine whether or not small or supplemental wells would result in additional well yield for its water short wells. Further, A&B could consider the interconnection of its wells or well systems in order to supplement its supply. Finally, that A&B developed its project near the peak of the ground water level and it is undisputed that the ESPA is still above the pre-development level.

Thus, as part of the evaluation of the source of water, A&B's effort to access the source is relevant. In this case, A&B falls short.

b. Diversion. CM Rule 42.01.d states that if the water right is "for irrigation, the rate of diversion compared to the acreage of land served, the annual volume water diverted, the system diversion and conveyance efficiency, and the method of irrigation of water application" should be evaluated.

When one compares the rate of diversion by A&B to the acreage of lands served, it shows there is no shortage. FF(a), FF27-30, FF(c)-(f), FF36-43, FF57-63. These facts were established by testimony from IGWA lay witnesses, Tim Deeg, Lynn Carlquist, Orlo Maughan and Dean Stevenson, concerning their own practices as well as other farmer members of Magic Valley Ground Water District that surrounds A&B's service areas. FF(q)-(t). These farmers irrigate with a lower rate of diversion and use in the range of 2 acre feet per acre to raise their crops as compared with A&B which claims their 3 acre foot per acre delivery rate is somehow inadequate. FF(q)-(s). In fact, as IGWA and A&B farmer Dean Stevenson testified, because

A&B provides an ample supply of water, but he can “replace water with management” on his private farms where he uses less water and manages it more closely. Stevenson, Tr. p. 2102 L. 2-8; FF(q).

Finally, A&B’s system diversion and conveyance efficiency and method of irrigation are important considerations. Initially, A&B’s wells were located on high points within the project to accommodate flood irrigation. FF30. A&B’s internal physical characteristics such as irregular shaped farms and its 24 hour order requirement cause inefficiency. FF(x). With the advent of sprinkler irrigation, however, A&B has been able to increase the number of acres irrigated and develop additional water rights. FF(m), FF27; FF41-43.

c. Authorized Maximum. A water right’s quantity is an authorized maximum not a guaranteed amount. Further, the extent, measure and limit of a water right is its beneficial use, or the amount of water actually needed. CM Rule 42.01.e encompasses these concepts and states that the Director should evaluate “the amount of water being diverted and used compared to the water right.”

A&B’s diversion records show that it has never diverted 1,100 cfs continuously on one day nor has it exceeded its volume under its water right. FF36-37 . Furthermore, A&B’s historical diversion records show that it has never approached the .88 cfs average per well that it is currently demanding. Ex. 155A, Ex. 476; FF36-37. In fact, A&B has diverted roughly 3 acre-feet over time. Ex. 407, 408, 200U, FF37-38.

Despite its complaints of shortage, A&B was able to enlarge the amount of land it was serving because of the more efficient sprinkler application Ex. 349-353; FF27, FF(m)at . Yet, when there is a shortage on a well or well system, A&B does not require that the junior acres curtail to keep the original lands at a higher per acre rate. FF(m).

The application of CM Rule 42 factors shows that the ESPA has ample water to supply A&B's needs but A&B's efforts have not been reasonable to secure an adequate supply. Further, A&B's diversions show that is able to meet crop needs without diverting its maximum authorized rate or volume; and in recent years, despite declining water levels, A&B's aggregate diversion has increased. FF(a); Ex. 409, 430-C. The conclusion reached after application of these CM Rule 42 factors is that Water Right No. 36-2080 has not suffered material injury.

**C. A&B IS NOT ENTITLED TO HISTORIC WATER LEVELS
THUS DEPLETION CANNOT EQUAL MATERIAL INJURY**

The Idaho Ground Water Act, codified at I.C. §§ 42-226 *et. seq.* applies in this case. *Order Regarding Motion for Declaratory Ruling* at 7. Thus, the provision that requires full economic development of the state's ground water resource and its restriction on the doctrine of "first in time is first in right" clearly applies. Equally clear is that A&B is not entitled to its historic water levels.

It logically follows then, that depletion or a lowering of the water table cannot equate to material injury. CL(c). With that in mind, A&B's insistence that its senior priority water right may demand that junior users be curtailed to restore its ground water table is without basis. In fact, absent a finding of material injury, ground water level declines are only marginally relevant and need not be addressed in this proceeding. *Id.* Rather, the inquiry should only focus upon whether or not A&B has been materially injured. In other words, can A&B exercise its water right in order to secure adequate water to irrigate its shareholder's crops? If it were determined that A&B cannot exercise water right no. 36-2080, then, the question would be is A&B pumping from reasonable pumping levels and is there any remedy that would not block the full economic development of the ESPA? Such a determination is not presented in this case, would require

extensive technical analysis give the broad impacts on the entire ESPA and can only be addressed by the Director.

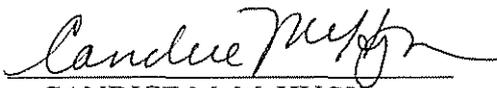
V.
CONCLUSION

The overwhelming weight of the evidence presented at the hearing in this case, supports IGWA's statements in its Pre-Hearing Brief that there is ample water in the ESPA to allow A&B to exercise its use of water under water right no. 36-2080 and that A&B is not water short and is not suffering material injury. A&B's own diversion records, the testimony by all lay witness farmers, examination of evapotranspiration data and A&B's means of diversion, clearly and convincingly demonstrate that A&B diverts enough water to meet crop demands, that A&B crop yields have steadily increased overtime and equal or exceed county averages, that B Unit farmers divert the same or more water than surrounding farmers and A&B has never in fact diverted nor needed the authorized maximum diversion rate or volume under Water Right 36-2080 at every well.

The application of the CM Rules and the Ground Water Act coupled with the evidence established at hearing shows that the Findings and Conclusions reached in the January 29 Order are supported by the substantial weight of the evidence and the finding of no material injury should be affirmed.

DATED this 23rdth day of January, 2009.

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