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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 RESPONSE TO A&B'S POST HEARING MEMORANDUM AND PROPOSED FINDINGS**

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 Response to A&B's Post-Hearing Memorandum and Proposed Findings. A&B's Post-Hearing Memorandum and Proposed Findings is referred to herein as A&B's Post-Hearing Memo.

IGWA's Response provides argument in response to four main areas in A&B's Post-Hearing Memo. First, A&B's argument that any analysis by the Director of its use of and need for water is a readjudication of its water right has been wholly rejected by the Supreme Court,

the Director and this Hearing Officer. Second, the party challenging the Director's finding of material injury or non-injury as in this case, bears the burden of persuading the Hearing Officer and the Director that the material injury determination is incorrect. In this case, A&B failed to make that showing. Third, the law and the facts of this case show that depletion does not result in material injury to A&B's water right and, finally, the Director correctly used his discretion to analyze A&B's water right as partially decreed on a system-wide-basis.

ARGUMENT

I. THE IDAHO SUPREME COURT ALREADY REJECTED A&B'S ARGUMENT THAT THE DIRECTOR'S DETERMINATION OF MATERIAL INJURY UNDER CM RULE 42 CONSTITUTES A "RE-ADJUDICATION" OF ITS WATER RIGHT.

A&B's position in this case is predicated on the false proposition that "depletion equals material injury." In A&B's view, the question of material injury is answered completely by whether there is depletion to the water supply. Accordingly, A&B criticizes the Director for considering the reasonableness of diversion and other factors in CM Rule[1] 42 in making a material injury determination in response to A&B's delivery call, arguing that by doing so the Director turned "the legal presumption in favor of A&B's decreed water right ... on its head" and also "turned the established burden of proof on its head." A&B's Post-Hearing Memo at 4. It is A&B's position that the Director cannot make a material injury determination under CM Rule 42 without causing a "re-adjudication" of its water right. A&B's Post-Hearing Memo at 4.

It is the same old tune. A&B made these very arguments to the Idaho Supreme Court in the *Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* ("*AFRD2*") case, 143

[1] The Rules for Conjunctive Management of Surface and Ground Water Sources are referred to herein as the "Conjunctive Management Rules" or "CM Rules."

Idaho 862 (2007), and they have been repeated in other recent water administration hearings held before the Department, always in an effort to force the Director to administer water by strict priority without any consideration of reasonableness or whether the calling senior water user is suffering material injury. Contrary to A&B's assertion, however, this is not the law and procedure that the Idaho Supreme Court upheld in its *AFRD2* decision. In fact, in *AFRD2* the Supreme Court took care to specifically note those portions of the district court's order that were *not* appealed by the parties, including that: "The district court rejected [the plaintiffs'] position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis." *Id.* at 441.

In *AFRD2*, A&B argued that by providing for a material injury determination, the CM Rules "are defective in giving the Director, in essence, the authority to negotiate with the senior water right holder regarding the quantity of water he will enforce under a delivery call – a quantity that in some instances, has already been adjudicated."[2] 143 Idaho 876. The Supreme Court flatly rejected the argument, stating, "[c]learly, the Director may consider factors such as those listed [in CM Rule 42] in water rights administration." Id. The Court recognized that "water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, <u>do not constitute a re-adjudication</u>." *Id.* at 876-77. "Moreover," the Court explained,

> a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source....Conjunctive administration 'requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water

[2] A&B's Post-Hearing Memo at 3-4 (the Director applied "no presumption to the SRBA decree" and erred in determining that the amount of water necessary for beneficial use can be less than the decreed quantity and erred in concluding that depletion does not equate to material injury.)

> sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources'.... That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.

Id. at 447-448 (emphasis added, internal quotations/citations omitted.)

A&B wrongly argues that the Director impermissibly shifted a burden of proof by undertaking the material injury analysis set forth in CM Rule 42, citing for support the statement in *AFRD2* that "[t]he Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has...." A&B's Post-Hearing Memo at 2. When read in context, however, this statement stands for precisely the opposite conclusion; namely, that even though the CM Rules "do give the Director the tools by which to determine how various ground and surface water sources are interconnected and how, when and where and to what extent the diversion and use of water from one source impacts [others]," that does not mean that the "Rules should [] be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has...." *Id.* at 448-49. The Court was making the point that it is not an impermissible shift of burdens or a violation of presumptions for the Director to make an initial material injury determination under CM Rule 42. Rather, the Court explained, "[o]nce the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *Id.* at 449 (emphasis added).

In the Department's recent administrative hearing in the Surface Water Coalition delivery call, the Hearing Officer likewise confirmed that the Director has the duty and authority to develop facts in order to determine whether the senior is suffering material injury: "[t]he Director

has the authority and the responsibility to investigate claims when a call is made that may result in curtailment. ... the Director had the authority and the responsibility to develop the facts upon which a well-informed decision could be made and to make a decision from the best information developed. To do otherwise would be irresponsible to the public interest and often unduly expensive to the parties." *In the Matter of Distribution of Water To Various Water Rights Held By Or For The Benefit 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, Opinion Constitution Findings of Fact, Conclusions of Law and Recommendation* at 27, 28. Similarly, in the Department's hearing on delivery calls made by Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc., it was determined that the "Director is not limited to counting the number of cubic feet per second in the decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of the consequences to the State, its communities and citizens." *In the Matter of Distribution of Water to Water Rights Nos. 36-02356A, 36-07210, and 36-07427 (Blue Lakes Delivery Call); In The Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B, and 36-07148 (Snake River Farm); And To Water Rights Nos. 36-07083 and 36-07568 (Crystal Springs Farm) (Clear Springs Delivery Call), Opinion Constitution Findings of Fact, Conclusions of Law and Recommendation* at 17. A&B specifically argues that the same conclusions of law in those decisions are wrong in this case.[3]

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[3] Compare CL 45 and 47 in the SWC Amended Order of May 2, 2005 to CL 9 and 21 in the Order of January 28, 2008. See also CL 23 of the July 8, 2005 Order in response to the delivery call by Clear Spring Snake River Farm and CL 24 of the May 19, 2005 Order in response to the delivery call by Blue Lakes.

The Supreme Court's holding in *AFRD2* and the conclusion that conjunctive administration is not simply a strict priority inquiry is rooted in the State's Constitution that sets forth the public policy that reasonable use of the state's water resource governs by establishing that there should be optimum development of the water resource in the public interest. Idaho Const., Art. XV, Sec. 5 and 7. The Legislature, in keeping with this Constitutional mandate enacted the state's Ground Water Act and specifically limited the application of priority by requiring full economic development of the under ground water resource. I.C. § 42-226.

In addition to the Court's conclusion in *AFRD2*, there are some other significant legal considerations in a ground water to ground water delivery call. As established by the Supreme Court in *Baker v. Ore-Ida*, "a senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development." *Baker* at 584. The Court also stated that, "although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected." Id. Finally, the Court noted that "the senior appropriators are not entitled to relief if the junior appropriators, by pumping from their wells, force seniors to lower their pumps from historic levels to reasonable pumping levels." Id. at 585. The Director, when looking to his duty to administer ground water rights, is to not just look at the priority date of the senior user, rather, the Director must equally guard all the various interests involved because "[w]ater [is] essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depend[s] upon its just apportionment to, and economical use by, those

making a beneficial application of the same [thus], its control shall be in the state, which, in providing for its use shall equally guard all the various interests involved." I.C. § 42-101 (emphasis added).

Thus, the law that applies in a delivery call under the Conjunctive Management Rules can be summed up as follows. While the senior user is presumed entitled to their decreed amount of water, there is no presumption of injury; and, the Director is given broad discretion to develop facts in response to a delivery call in order to apply the factors set forth in the CM Rules to determine *whether* a senior water right holder is suffering material injury. The law does not force the Director to "presume injury" and therefore does not demand that he provide a rote response to a senior's demand. This hearing officer has already ruled as a matter of law that the Ground Water Act applies to A&B's water right. *Order Regarding Declaratory Ruling* at 7. When analyzing whether a senior water right is being materially injured in a ground water to ground water delivery call, the Director must look at more than just water level decline and the maximum authorized rate under the water right.

II. A&B DID NOT MEET THE THRESHOLD SHOWING THAT ITS WATER RIGHT HAS BEEN MATERIALLY INJURED.

A&B makes its first argument on a flawed reading of the Court's decision in *AFRD2*. A&B states that the court in *AFRD2* determined that a senior user is "presumed injured" if they make a delivery call demand and allege they are short of water under oath. To the contrary, the Court did not tie the Director's hands in responding to a ground water to ground water delivery call in *AFRD2*. Instead, the Court carefully stated that while a senior user is presumed entitled to his decreed water right, Idaho Law requires that the Director be allowed to review all relevant information, develop facts and apply the CM Rule factors in order to evaluate whether or not

"material injury is occurring or will occur." *AFRD2* at 448-49. Moreover, while *AFRD2* upheld the facial constitutionality of the CM Rules, that case alone does not complete the picture involving the legal rights in a ground water to ground water delivery call which clearly requires a factual analysis. A&B's arguments that the lowering of the ground water table equates to material injury ignore the law and are simply wrong.

In this case, the Director correctly looked at A&B's own well capacity and diversion records and found that they showed that it has enough water to satisfy crop needs. Findings of Fact 37-39 and 44 found that A&B diverts roughly 3 acre-feet per acre over time. These findings were further developed and supported by evidence at the hearing. See IGWA Proposed Findings of Fact at 9-10. Finding 56 of the Order of January 29, 2008[4] found that owners of private ground water rights, in and around A&B use between 1.75 to 2.12 acre-feet per acre and this finding was further supported by testimony from Mr. Stevenson, Mr. Maughan and Dr. Petrich that showed that surrounding farmers use roughly 2 acre-feet per acre, an amount less than A&B demands. See IGWA Proposed Findings of Fact at 11, FF(o)-(q). Findings of Fact 61 and 62 recognize that the sum of peak season "low-flow" diversions have decreased since 1963 and 1982 (A&B concedes that its listed sums of low- or high-flow diversions do not occur at one time). However, the decreased diversions over the last 20 to 30 years coincide with substantial increases in irrigation efficiency, decreases in conveyance losses, and elimination of the need to pump water that was formerly injected as return flow from gravity-based irrigation systems. Furthermore, A&B's aggregate diversions have increased since 2005 despite continued modest decreases in water levels which highlights that there is sufficient supply in the aquifer; otherwise

[4] The findings of fact referenced herein refer to the numbered findings in the Order of January 28, 2008.

A&B would not have been able to increase its withdrawal. Ex. 409 and 430-C. These facts support the conclusion that there is water available to reasonably meet A&B's irrigation needs.

Moreover, while A&B complains of water shortage, it still expanded irrigated lands and still supplies water to its enlarged acres. Finding of Fact 33 shows that A&B developed additional water rights beyond its primary 1948 water right and Finding of Fact 58 found that the total number of enlarged acres was over 4,000 acres. Testimony of A&B's lay witnesses and Exhibits 366 and 405-407 show that A&B supplies water to these expanded acres, which undermines its present claim that its original acres do not have enough water. *See also* IGWA Proposed Findings of Fact and Conclusions of Law at 7, FF(m). In addition, the Director found that the areas A&B claimed as water short were supplied by other sources of water (FF 69, 72) or were not water short when compared to surrounding areas that had sufficient water (FF 80).

The Director's Conclusion of Law No. 9 of the January 28, 2008 Order that "a senior water right holder cannot demand that a junior ground water right holder . . . make water available for diversion unless that water is necessary to accomplish an authorized beneficial use" is supported by the fact that A&B's own well capacity records, diversion records, development and use of water show it has sufficient water to meet its irrigation needs. Further, the facts at hearing provided the basis for the Director's conclusion that A&B's "total average decrease in monthly well production . . . is attributable to increased irrigation system efficiencies . . . and the fact that A&B added nearly 4,100 acres of irrigation development beyond the 62,604.3 acres . . . under water right, 36-2080." CL 25.

These key determinations are fully supported by the facts developed at hearing and lead to the ultimate conclusion that A&B is not suffering material injury.

III. DIRECTOR'S CONCLUSION THAT THE GROUND WATER LEVEL DECLINE DOES NOT EQUAL MATERIAL INJURY IS WELL ROOTED IN THE LAW AND THE FACTS OF THIS CASE

The evidence A&B presented at hearing does not change the Director's conclusion that "depletion does not equate to material injury." CL 21. A&B's main evidence at hearing was that junior users contribute to a portion of water level decline and that A&B has had to address the water level decline by various means. Not only was ground water level decline A&B's primary focus at hearing, but it is also the main thrust of its argument throughout its Post-Hearing Memorandum. A&B argues ground water level decline proves material injury and requires administration and curtailment of junior-priority ground water users.

- "Ground water pumping under junior priority water rights has caused declines in ground water levels across the ESPA, including A&B . . . . Consequently, lowered ground water levels have resulted in reduced pumping rates in A&B's wells." A&B Post-Hearing Memo at 9.

- "Since A&B's landowners have a need for the delivery rate provided by A&B's decreed water right (0.88 miner's inch per acre), and since individual well capacities have been reduced by lowered ground water levels, the Director must recognize the injury to A&B's water right caused by junior priority diversion." A&B Post-Hearing Memo at 14.

- A&B has had to abandon wells, increase horsepower, drill more wells, deepen wells, replace pump bowls, add pumping columns and supply surface water to some areas. A&B Post-Hearing Memo at 10.

- A&B cannot deliver its maximum rate at peak to all of its acres. A&B Post-Hearing Memo at 10-11.

- Landowners have to manage their water more efficiently. Post-Hearing Memo at 11-13.

A&B argues that evidence of decline and its need to address the decline proves material injury. In other words, any one senior water user on the ESPA can hold the junior water users

hostage by simply showing that the ESPA has declined since the mid-1960s and that he has had to lower his pump or manage his water more efficiently. Such "evidence" which A&B points to simply does not prove material injury. A&B's assertion ignores the Ground Water Act and the Supreme Court's conclusion in *Baker* that a senior user is not entitled to historic water levels and may need to alter or modify its historic means of diversion. The law is clear that the Director has the duty and responsibility to develop facts to determine *if* A&B is suffering material injury. If all that was necessary was to show decline, then no factual development or discretion would be needed.

IV. THE DIRECTOR PROPERLY EXAMINED A&B'S WATER RIGHT ON A SYSTEM-WIDE BASIS

Although not reduced to a written decision, the Hearing Officer granted IGWA and Pocatello's Motion for Partial Summary Judgment which sought a legal ruling that "as a matter of law that it is was proper and within the Director's authority and sole discretion to conclude that A&B's water right must be examined in its entirety, and not on a well-by-well system basis, in making a determination of material injury."

A&B argues that because A&B and BOR developed the B Unit project to have certain lands tied to certain wells, IDWR must examine A&B's delivery call demand on a well-by-well system basis and cannot look at the water right on a system-wide basis. While providing no supporting legal authority, A&B argues that it has "decreed points of diversion" and that A&B is entitled to 0.88 miner's inches per "irrigable acre" within each well system. A duty of water or a guaranteed delivery rate per acre is not a decreed component of a water right. A&B's claim that it can demand a delivery of 0.88 miner's inches per acre is not only without legal basis, but is contradicted by the evidence and totally unfounded. Exhibit 413 shows that even at peak water

levels, A&B has never delivered 0.88 inches to a majority of its acres within its system. In addition, the historical record relating to the project contradict this claim. Early Bureau documents and A&B Board Minutes support the fact that what the project strived for was 0.73 to 0.75 miner's inches per acre and that with a 3-5% conveyance loss, the amount delivered to the farmer is roughly 0.71 to 0.65 miner's inches per acre. Exhibit 366 and IGWA Proposed Findings at 5, FF(c), (d), at 10.

A&B's evidence at trial is also inconsistent with the historical record and A&B's claim of 0.88 miner's inches per acre. On page 13 of A&B's Post Hearing Brief it states that A&B rectifies its well system to seek "between .85 and .90 miner's inches per acre." Yet, if A&B has a guaranteed "duty of water" at each well, why seek anything less than that? Why set a "rectification" criteria at 0.75? The fact is that A&B (and the Bureau) operated the B Unit knowing that some of the wells would produce less than was desired and others would produce more. In fact, this reality made it desirable to have the license issued without limitation on which wells could serve which lands, "it is impractical and undesirable to designate precise land areas within the project served only by each of the specific wells on the list." Exhibit 147, at 4398; *See* IGWA's Post-Hearing Brief at 8.

The fact is A&B's water right provides it with the ultimate flexibility to seek as much water as it can secure to irrigate its lands so long as its aggregate total does not exceed its volume and 1,100 cfs rate. A&B's water right allows it to add wells, move wells, transfer lands, interconnect wells and well systems to meet irrigation demands at its choosing. But, A&B's water right does not decree or ensure a "duty of water" at each well. A&B has never delivered this amount in the majority of well systems and to demand that now is unreasonable and without

basis. A&B's claim that it is injured if it cannot deliver 0.88 miner's inches per acre is without legal and factual basis.

CONCLUSION

A&B is not entitled to maintain historic water levels as a matter of law. Accordingly, a decline to historic water levels does not equate to material injury. Further, a senior user's historic means of diversion is not absolutely protected. The senior users' means of diversion and use of the water requires a factual analysis and the mere need to alter or modify the historic means of diversion to maintain a water supply does not equate to material injury. As A&B has historically been successful in maintaining an adequate supply of water utilizing various reasonable means despite declining water levels, the decline alone simply does not equate to material injury. A&B stubbornly adheres to the erroneous notion that because it is senior, it need not plan for water level declines, it need not consider the hydrogeology of the aquifer from which it diverts water and it need not utilize reasonable means that have been proven to be successful in the past or consider well system interconnection to utilize the available water resources to meet its irrigation requirements.

Establishing material injury requires more than a mere showing of depletion or ground water level decline and a senior's effort to address the decline. The Director went further, appropriately evaluating the available water supply and A&B's means of diversion and use of water and properly concluded that A&B was not suffering material injury and that A&B was not entitled to any remedy. The Director's Order should be affirmed.

DATED this 13th day of February, 2009.

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