

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

<b>IN THE MATTER OF THE PETITION</b>	)	
<b>FOR DELIVERY CALL OF A&amp;B</b>	)	
<b>IRRIGATION DISTRICT FOR THE</b>	)	
<b>DELIVERY OF GROUND WATER AND</b>	)	<b>ORDER GRANTING IN PART</b>
<b>FOR THE CREATION OF A GROUND</b>	)	<b>AND DENYING IN PART</b>
<b>WATER MANAGEMENT AREA</b>	)	<b>A &amp; B'S PETITION FOR</b>
_____	)	<b>RECONSIDERATION OF</b>
	)	<b>HEARING OFFICER'S OPINION</b>

A & B has filed a Petition for Reconsideration of the Hearing Officer's March 27, 2009, Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations. IGWA and Pocatello have filed Responses and A & B has filed a Reply. The Petition is granted in part and denied in part as set forth in this Order on Reconsideration. Those issues raised in A & B's Petition that are not specifically addressed in this Order are denied, relying on the record and reasoning relied upon in the March 27, 2009, Opinion.

**I**

**ERRORS IN THE PROCEDURAL BACKGROUND**

The Recommendation incorrectly cites the Motion to Proceed as having been filed in 2008 whereas the Motion was filed in 2007. Further, A & B correctly notes that the "Committee of Nine" is not a party to this case. These errors are noted and are corrected. Any final Order should reflect these corrections.

## II

### **THE “CATASTROPHIC LOSS” LANGUAGE IN PARAGRAPH 5 IS MISLEADING AND IS DELETED FROM THE RECOMMENDATION.**

The use of the term “catastrophic loss” in paragraph 5 is unfortunate, confusing, and does not accurately reflect the standard to be applied in the determination of whether there is material injury. A catastrophic loss is not necessary to establish material injury. Use of the catastrophic loss language constitutes editorial hyperbole, not the standard for material injury. That standard is set forth elsewhere in the Opinion. The following language in the Opinion is deleted: “To date there has not been a catastrophic loss of the ability to pump that has prevented the production of crops....The withdrawal of twenty acres with a significantly reduced yield was not catastrophic to the farming operation.”

## III

### **THE DECREED WATER RIGHT HAS NOT BEEN READJUDICATED**

It was not the intent of the Recommendation to either imply or hold that A & B’s decreed water right is reduced or readjudicated. The decreed water right remains. However, at this point when A & B has not been required to exceed reasonable pumping levels to obtain the amount of the decreed right the burden of curtailment or mitigation has not passed to the junior ground water users. This conclusion is supported by the fact that A & B currently utilizes fewer than the number of authorized wells to serve the project.

## IV

### **THE HEARING EXPANDED AND REVEALED INFORMATION BEYOND THAT AVAILABLE TO THE DIRECTOR AT THE TIME THE JANUARY 29, 2008, ORDER WAS ENTERED WHICH SHOULD NOW BE CONSIDERED IN THE FINAL ORDER THAT WILL BE ENTERED.**

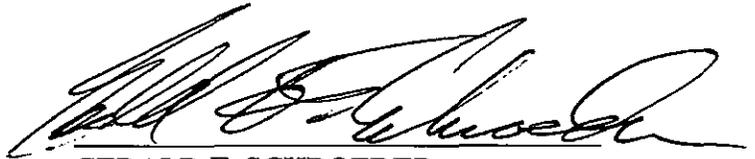
To the extent it is not self-evident that the Director should consider the record developed at the hearing in this matter leading to the Hearing Officer’s Opinion, that record should be considered

and the findings of the Director's Order entered January 29, 2008, reconsidered in light of the additional evidence and the findings in the Hearing Officer's March 29, 2009, Opinion, as amended by this Order.

### CONCLUSION

A & B's Petition for Reconsideration is granted to the extent set forth in this Order. The remaining portions of the Petition are denied.

Dated this 29 day of May, 2009.

A handwritten signature in black ink, appearing to read "Gerald F. Schroeder", written over a horizontal line.

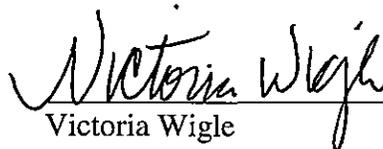
GERALD F. SCHROEDER  
HEARING OFFICER

## CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the attached document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 29<sup>th</sup> day of May, 2009.

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