

Roger D. Ling, ISB #1018
ATTORNEY AT LAW
P. O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Petitioner A&B Irrigation District

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

IN THE MATTER OF THE PETITION FOR)
DELIVERY CALL OF A&B IRRIGATION)
DISTRICT FOR THE DELIVERY OF) **DOCKET NO. 37-03-11-1**
GROUND WATER AND FOR THE) **A&B IRRIGATION DISTRICT'S**
CREATION OF A GROUND WATER) **PETITION REQUESTING**
MANAGEMENT AREA) **HEARING ON DIRECTOR'S**
) **JANUARY 29, 2008 ORDER**
)
)
_____)

COMES NOW the Petitioner, A & B Irrigation District ("A&B"), by and through its attorneys of record, pursuant to Idaho Code § 42-1701A, and hereby requests a hearing on the Director's January 29, 2008 *Order* (hereinafter "Order"), in which the Director responded to A&B's *Petition for Delivery Call*, filed July 26, 1994, and its *Motion to Proceed*, filed March 16,

2007 on the grounds and for the reasons that the Director's Findings of Fact and Conclusions of Law have no basis in fact or law and are contrary to the undisputed facts of this case and the law applicable to this delivery call, including but not limited to the following.

A&B reserves the right to supplement its issues for hearing.

INITIAL LEGAL ISSUES

1) The Director erred in applying provisions of the Conjunctive Management Rules ("CM Rules") that are unconstitutional and contrary to the laws of the State of Idaho as applied to the groundwater right of A&B in responding to A&B's request for water right administration to satisfy its decreed senior ground water right (#36-2080) with a September 9, 1948 priority date.

2) The Director erred in refusing to protect the historical ground water levels to which A&B is entitled under its 1948 ground water right that have been lowered by diversions from the ESPA by junior ground water right holders and by his refusal to acknowledge and apply the elements of A&B's senior ground water right #36-2080 which were decreed by the SRBA Court on May 7, 2003, in responding to the delivery call of A&B.

3) The Director erred in failing to recognize that Idaho's Ground Water Act, I.C. § 42-226 *et seq.*, does not apply to A&B's senior ground water right #36-2080, and to the extent the CM Rules attempt to incorporate provisions of the Ground Water Act to apply to A&B's water right, the application of the same is unconstitutional and contrary to Idaho law. The Director erred in failing to recognize that A&B is entitled to maintain its historic pumping level or be compensated for expenses incurred by reason of lowered water tables and changed methods of diversion caused by pumping under junior priority ground water rights.

4) The Director erred in reviewing and applying pre-decree information to find that A&B's senior ground water right #36-2080 was not injured by reason of out-of-priority junior ground water diversions.

5) The Director erred in determining that a 1985 USBR Report (Minidoka Project, Idaho-Wyoming, North Side Pumping Division Extension, Hydrology Appendix), not the elements of the water right as decreed by the SRBA Court on May 7, 2003, defines A&B's "maximum rate of delivery" to each irrigated acre in the district.

INITIAL ISSUES WITH FINDINGS OF FACT

The Director's Order relies upon a partial agency record that contains over 3,500 pages of material, including several historic reports. The partial record was produced to A&B on February 8, 2007. Included in this partial record is a 72-page report prepared for the Department entitled *Hydrologic Analysis of the A & B Irrigation District Area* (January 2008). A&B is entitled to a meaningful opportunity to discover the basis for the Department's findings and gather additional facts to prepare and develop its case for hearing.

The Eastern Snake Plain Aquifer

p. 3, ¶¶ 12-13

1) The Director's characterization of the ESPA and average annual "recharge" and "discharge" fails to take into account recent hydrologic conditions occurring after 2002.

p. 4, ¶¶ 14-15

2) The Director's statements erroneously conclude that reduced surface water diversions have resulted from changes in irrigation systems and that less water is needed at the present time than was needed in the 1960s to 1970s.

p. 5, ¶ 18

3) The Director provides no basis or criteria for the statement that ground water levels in the ESPA “exceed reasonable ground water pumping levels required to be protected under the provisions of Idaho Code 42-226.” Moreover, the Ground Water Act’s “reasonable pumping level” provision does not apply to A&B’s senior ground water right.

Creation and Operation of Water District Nos. 100, 110, 120, 130, and 140.

p. 6, ¶¶19-20

4) The Director has yet to issue a final order creating Water District 140, after the initial order issued in December 2006 was challenged. The Director’s creation of water districts in accordance with chapter 6, title 42, Idaho Code does not replace or render ground water management areas unnecessary. The Director’s dissolution of the Thousand Springs and American Falls Ground Water Management Areas in 2003 has been contested and is pending before the Department. The Order fails to acknowledge that there is no standard for ground water administration outside of a Ground Water Management Area and that pumping of junior wells has exceeded the “reasonably anticipated average rate of future recharge.” I.C. § 42-237g.

Conjunctive Management Rules

p. 6-7, ¶¶ 22-26

5) The Director’s application of the CM Rules to A&B’s senior ground water right #36-2080 through the Order violates Idaho law.

6) The Director failed to acknowledge that A&B is entitled to its historic pumping levels and that application of the CM Rules to find otherwise is an unlawful and unconstitutional application.

The A&B Irrigation District

p. 7, ¶¶ 27-31

7) The Director’s general description of the A&B project fails to specifically identify how water is pumped and distributed in Unit B. Contrary to the implication, water pumped from individual wells in Unit B cannot be distributed throughout the project to any acres. A&B operates individual well and distribution systems for specific acres. A&B’s distribution system is not interconnected and a supply at one distribution system can not make up the shortages at another. Also, A&B does not operate “pressurized pipe systems to convey water”. Furthermore, the Order erroneously concludes that A&B provides for the irrigation of 82,610 acres, 66,686.2 acres of which are entitled to ground water.

Water Rights Held by or for the Benefit of A&B

p. 8-9, ¶¶ 32-34

8) The SRBA District Court issued a partial decree for water right #36-2080 on May 7, 2003. A&B holds the other water rights listed. In particular, A & B does not have sufficient information upon which to reply to paragraph 34 and the assertions contained therein, and therefore it must object to said paragraph. It is necessary that A & B be provided an opportunity to inquire of the information and understanding of IDWR before responding further.

Analysis of Diversions

p. 9-15, ¶¶ 35-64

Numerous findings contain factual statements for which no citation or information is provided. As such it is impractical for A & B to respond further without discovering the basis for such statements. Notwithstanding the disclosure of information, A & B provides the

following preliminary objections with the right to amend as additional information becomes known.

9) The Director erred in his use and analysis of the diversion data provided by A&B. The Directory totaled the ground water pumped by all wells under water right #36-2080 to evaluate whether there is sufficient water being delivered to A&B's lands to meet irrigation demands – rather than evaluating the amount of water that can be supplied to specific lands served by specific wells. As stated under No. 5, A&B's irrigation system is not interconnected and so a shortage in one system can not be made up by water supplied from another system. Water pumped under these wells cannot be distributed across the project as implied by the Director. The Director provides no basis for such a finding. The Director's findings further fail to address monthly and peak water delivery at individual well systems. The Director's findings also fail to evaluate irrigation requirements at individual well systems based on climate, ET crop requirements, acreage, conveyance and distribution methods. Instead, the Director simply compared total ground water use every year to the average annual crop requirements from 1990 to 2002 to conclude that there was a sufficient water supply in all years but three. This methodology is inappropriate.

10) A&B objects to the Director's analysis of the acres that A&B has converted to surface water. A&B irrigates with surface water approximately 1,323 acres formerly served by ground water – not 1,447 as claimed by the Director. These lands were formerly served with ground water, but due to inadequate ground water supplies caused by lowered ground water levels, A&B has been forced to irrigate these acres with surface water on a short-term emergency basis.

11) The Director failed to analyze and identify the reasons for reduced ground water diversions by A&B between 1960-2007. The statement that conversion to sprinkler irrigation, both within and outside of A&B, is the only identified reason for the declines is erroneous. The Director fails to account for and acknowledge that the declining trend in diversions is also due to out-of-priority ground water diversions by junior ground water right holders.

12) A&B disputes the Director's use and analysis of the referenced 1985 USBR Report as defining crop irrigation requirements or farm efficiency for A&B. A&B has not had the opportunity to review the report and information used by the Director. A&B disputes the implication that the use of sprinklers "was expected to reduce the per acre water requirement by 19.6 percent". A&B further objects to the Director's use of the 1985 USBR Report as limiting or reducing the water that can be put to beneficial use under A&B's decreed senior ground water right. The 1985 USBR Report does not control the use and administration of A&B's decreed senior ground water right.

13) A&B objects to the Director's computed "mean weighted consumptive irrigation requirement of 2.17 acre-feet per acre" and the "total average ground water diversion requirement for lands in Unit B would be 2.89 acre-feet per acre". The computation does not accurately reflect cropping patterns in A&B since 2002. A&B objects to Figure 5 where the total annual water use is compared to average diversion requirements. A&B further objects to the Director's use of this computed ground water diversion requirement as limiting or reducing the water that can be put to beneficial use under A&B's decreed senior ground water right. The Director has not provided the spreadsheets used to make these computations.

14) A&B objects to the Director's finding that the 1985 USBR Report's 2.59 acre-feet

per acre water diversion requirement identifies some threshold water duty to demonstrate A&B had sufficient water in all but three years since 1960. The finding further fails to take into account climatic conditions in 1995, 1998, and 2005 to evaluate total diversions in those years. The Director has not computed irrigation requirements for per month based on the actual crop irrigation requirements for each well delivery system.

15) A&B disputes and objects to the Director's use of information related to private wells and the stated "average water duty estimates" if used as a means to limit or reduce the water that can be put to beneficial use under A&B's decreed senior ground water right. In addition, A&B disputes the reliability of the information cited in Paragraph 55 and the Director's use of that information to compare water duties between A&B and private ground water right holders.

16) A&B objects to the Director's findings and analysis of A&B's peak monthly water use and the statement that the reduced well production "is not unreasonable" due to A&B's increased irrigation efficiencies. The Director failed to analyze whether the reduced well production was due to lowered ground water levels and the unavailability of water in certain wells. A&B's inability to pump water in certain wells does not reflect reduced demand as implied by the Director.

17) A&B objects to and disputes the Director's analysis of A&B's peak season or "low flow" well discharge data.

18) A&B objects to the Director's finding in Paragraphs 60 and 61 since the Director has failed to account for the actions taken by A&B since 1995 to rectify wells. The Director ignored the fact that A&B was required to improve wells and well delivery systems because of

falling ground water levels and ignored the costs incurred by A&B to make such improvements. The Order ignores the fact that the deepening of wells occurred in order to maintain the reduced diversion of 970 cfs.

19) A&B objects to and disputes the Director's statement that the 1985 USBR Report defines the "maximum rate of delivery" as being 0.75 miner's inch per acre to lands within the district. The Director's finding fails to consider the original well design specifications.

20) A&B objects to the Director's finding that a water supply of 970 cfs, or 130 cfs less than A&B's decreed diversion rate, can provide 0.77 miner's inch per acre for the 62,604.3 acres. The Director fails to recognize that water pumped from individual wells within A&B cannot be distributed equally to all acres, and that A&B's water distribution system is not interconnected as this finding suggests. Accordingly, the Director's calculated "net farm delivery for the acreage in the delivery call" erroneously assumes the water can be provided equally from every well to every acre throughout the project. Moreover, the Director's finding fails to consider A&B's decreed water right and the existing well design requirements.

21) It is unclear whether the Director considered the mitigation plan submitted by A & B in consideration of irrigated acres. Therefore, it must be assumed that IDWR failed to account for the actions detailed in the plan.

Examination of Polygon Information

p. 15-19, ¶¶ 65-75

22) A&B objects to the Director's claimed "discrepancy" between the acres in the data submitted by A&B in December. The Director erroneously identified 22,663 acres in the A&B GIS table. This number represents the total area, not the irrigated acres identified in the

data provided by A&B. The Director wrongly assumed that 22,663 acres was the irrigated area, not the 18,525 acres identified by A&B. Accordingly, the Director failed to properly analyze this information and refused to examine the individual wells and acres served by the 39 wells that cannot provide the district's criteria of 0.75 miner's inch per acre. In addition, the Director's finding fails to account for the explanations on this information provided by Dan Temple to IDWR staff at the January 4, 2008 meeting.

23) A&B objects to and disputes the Director's findings relative to private ground water rights identified in Paragraph 69. The amount of private wells that are able to serve lands within A&B's boundaries is far less than the amount cited in the Order. Further, A&B has no control or responsibility for the use of private ground water rights on A&B's lands and such wells do not relieve A&B of their responsibility to deliver water to land within the District. The Director's finding further fails to account for the explanations on this information provided by Dan Temple to IDWR staff at the January 4, 2008 meeting.

24) A&B objects to and disputes the Director's statement regarding 135 private wells irrigating 27,235 acres within A&B's boundary. This statement implies that up to 27,235 acres of A&B's irrigated area may be irrigated with private wells also. Most of the privately irrigated lands within A&B's boundary is not located within A&B's irrigated service area. The Director failed to identify where those private wells and lands are located. The failure to do so, along with the example from Figure 6, leaves the false impression that all private lands are located and irrigated in a similar manner. The Director ignored the explanations on this information provided by Dan Temple to IDWR staff at the January 4, 2008 meeting and in subsequent meetings with Department staff.

25) Irrigation of A&B lands with private junior priority ground water rights does not excuse or justify the Director's failure to distribute water to A&B's senior ground water right.

26) A&B objects to and disputes the Director's analysis regarding Figure 7 and the shapes identified as "areas supplied water by A&B". The shape files (black line areas) created by the Department do not define the lands that are served by A&B.

Examination of Evapotranspiration Data

p. 19-23, ¶¶ 76-80

27) A&B objects to and disputes the Director's use of and analysis of three days of ET data to define whether or not crops within A&B's project were "water short".

Hydrogeology

p. 23-27, ¶¶ 81-95

28) A&B objects to the information cited and analyzed by the Director. A&B further objects to the findings to the extent they misrepresent the understanding of State and Federal officials at the time the A&B project was developed in the 1940s and 1950s.

Well Design, Drilling, Construction and Abandonment

p. 27-31, ¶¶ 96-108

29) A&B disputes and objects to the Director's findings.

Water Level Declines, the ESPA Ground Water Model, and the A&B Scenario

p. 31-33, ¶¶ 109-122

30) A&B disputes and objects to the Director's findings. Furthermore, the model scenarios were run by IWRRI or staff at the Department, not the EHMSC. Moreover, the Department has represented to water right holders including A&B that the ESPAM needed to

revised and enhanced for purposes of water right administration. The Department has used the ESPAM for water right administration and water right transfers.

Well Rectification and Re-Direction of Waste Water

p. 33-35, ¶¶ 123-133

- 31) A&B disputes and objects to the Director’s findings.

Cost Issues

p. 35-36, ¶¶ 134-136

- 32) The Director has not acknowledged or considered the considerable costs (in excess of \$8 million) borne by A&B to improve well and well delivery systems and the increased power costs caused by declining ground water levels.

Use of Hydrogeologic Consultants

p. 36-37, ¶¶ 137-142

- 33) A&B disputes and objects to the Director’s findings.

INITIAL ISSUES WITH CONCLUSIONS OF LAW

p. 37, ¶ 1

- 1) The Director’s incorporation fails to identify the “findings of fact” that IDWR deems conclusions of law.

p. 38, ¶ 9

- 2) The Director’s definition of “injury” is contrary to Idaho law.

p. 38, ¶ 10

- 3) The Idaho Supreme Court’s decision in *AFRD #2* did not address the constitutionality of the CM Rules as applied by the Director. The Director’s application of the

CM Rules in this case, as applying provisions of the Ground Water Act to A&B, is unconstitutional and contrary to law.

p. 39, ¶ 12

4) The Director's statement that A&B's delivery call is "complex" does not excuse lawful administration or application of the proper standards and law relative to A&B's senior ground water right. Further, to the extent that the Director is making a "fact" finding, the Order provides no factual basis for such finding.

p. 39, ¶ 13

5) The CM Rules, as applied by the Director are not in accordance with Idaho's Constitution or statutory authority.

p. 42, ¶ 19

6) The Director's analysis of whether A&B is suffering material injury fails to account for the proper legal standards applicable to A&B's senior ground water right. The Director ignored the applicable law and standards regarding A&B's historic pumping levels.

p. 43-44, ¶ 21-23

7) The Director erred as a matter of law in stating that "the establishment of injury is a threshold determination that must be established by prima facie evidence". The Director's finding fails to recognize the proper burdens of proof and evidentiary standards in water right administration.

8) The Director erred as a matter of law in determining that the 1985 USBR Report defines A&B's "maximum rate of delivery" rather than its partial decree issued by the SRBA Court on May 7, 2003.

9) The Director erred as a matter of law in stating that because A&B's diversion rate of 970 cfs is "near the maximum authorized rate of diversion, there is a sufficient quantity of water to irrigate" the water right's place of use. A&B disputes and objects to the Director's statement that A&B's inability to irrigate some portions of that place of use is attributable to "an inefficient well and delivery system".

p. 44, ¶ 24

10) The Director failed to account for "self-mitigation" measures A&B has employed over the years and the costs for those measures due to lowered ground water levels. The Director wrongly excuses the decrease in peak monthly well production since 1994 caused by out-of-priority ground water diversions by junior ground water right holders.

p. 44, ¶¶ 25, 26

11) A&B disputes the Director's findings relative to the reasons for the "total average decrease in peak monthly well production".

p. 44, ¶ 27

12) The Director's erroneously used three days of ET data to determine that areas identified by A&B "were not short of water" in 2006. Idaho law does not require a senior water right holder to burn up a crop to demonstrate injury to a water right.

p. 44, 45 ¶¶ 28-29

13) A&B disputes the Director's statement that a "consultant" is necessary for the design and installation of wells. A&B's staff and drilling contractors have extensive experience in drilling wells in the A&B project. A&B further disputes the Director's finding that cable tool drilling technology is "not well suited for use" in the southwestern portion of the District. The

Director's finding wrongly implies that A&B is limiting its own access to available water supplies. Further, A & B disputes the citations as basis for the conclusions.

p. 45, ¶ 30

14) A&B disputes the Director's finding that the "failure to take geology into account is a primary contributor to A&B's reduced pumping yields". A&B is using appropriate drilling techniques and has exhausted all means to recover water in certain parts of the project. The Director has failed to identify how a "comprehensive hydrogeologic study of its service area" would provide additional water to A&B or raise ground water levels in areas where A&B has deepened and re-drilled wells that cannot produce sufficient water. Further, A & B disputes the citations as basis for the conclusions.

p. 45, ¶ 31-34

15) A&B disputes the Director's finding regarding the original production wells and the statement that A&B is not using "reasonable well drilling standards". When the first wells were drilled in the 1950s ground water levels were rising. The Director's finding implies that A&B should have known that ground water levels would have declined to the levels being experienced today when the project was initially designed. A&B has deepened wells over time and has employed appropriate technology and well drilling standards.

p. 45, ¶ 36

16) The Director failed to consider the costs incurred by A&B as a result of water level declines and the proper legal standard for A&B's senior ground water right. Further, A&B disputes the citations as basis for the conclusions.

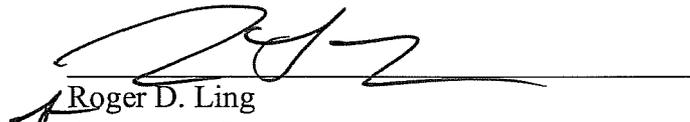
p. 46, ¶¶ 37-38.

17) A&B disputes the Director's conclusion that junior ground water right holders are not injuring A&B's senior ground water right.

Creation of a Ground Water Management Area

1) A&B disputes the Director's determination that since "water districts . . . are in place across all of the ESPA, no additional relief to A&B would be provided for through the creation of a ground water management area encompassing all of the ESPA". The Director's finding is erroneous both as a matter of fact and as a matter of law and fails to take into account the standard for creating a ground water management area and the need to protect the ground water resource.

DATED this 13th day of February, 2008.


Roger D. Ling
Attorney at Law

BARKER ROSHOLT & SIMPSON LLP


John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for A & B Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2008, I served the original/ true and correct copies of the foregoing **A&B IRRIGATION DISTRICT'S PETITION REQUESTING HEARING ON DIRECTOR'S JANUARY 29, 2008 ORDER**, by the method indicated below, and addressed to the following:

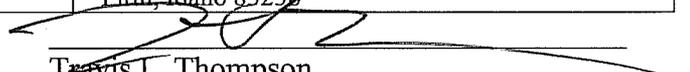
BY EMAIL AND U.S. MAIL

Hon. Gerald F. Schroeder
c/o Victoria Wigle
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
fcjschroeder@gmail.com
victoria.wigle@idwr.idaho.gov

BY U.S. MAIL

B.J. Driscoll McGrath Meacham & Smith PLLC 414 Shoup PO Box 50731 Idaho Falls ID 83405	Michael Patterson, President Desert Ridge Farms, Inc. PO Box 185 Paul ID 83347
Randall C. Budge Racine Olson Nye Budge & Bailey PO Box 1391 201 E Center Street Pocatello ID 83204-1391	Candice M. McHugh Racine Olson Nye Budge & Bailey 101 S Capitol Suite 208 Boise ID 83702
Todd Lowder 2607 W 1200 S Sterling ID 83210	Neil and Julie Morgan 762 West Hwy 39 Blackfoot ID 83221
Charlene Patterson, President Patterson Farms of Idaho 277 N 725 Lane W Paul ID 83347	William A. Parsons Parsons Smith & Stone, LLP 137 West 13 th Street PO Box 910 Burley ID 83318
A. Dean Tranmer City of Pocatello Box 4169 Pocatello ID 83201	Sarah A. Klahn White & Jankowski LLP 511 Sixteenth Street Suite 500 Denver CO 80202
Winding Brook Corporation C/o Charles W. Bryan Jr. UBS Agrivest LLC PO Box 53 Nampa ID 83653	James C. Tucker Idaho Power Company 1221 West Idaho Street Boise, ID 83702-5627

James S. Lochhead Michael A. Gheleta Brownstein Hyatt Farber Schreck P.C. 410 Seventeenth Street Suite 2200 Denver, CO 80202	City of Castleford PO Box 626 300 Main Castleford, ID 83321
F. Randall Kline PO Box 397 427 North Main St Pocatello, ID 83204	Larry S. Larson Hopkins Roden Crockett Hansen & Hoopes PLLC PO Box 51219 Idaho Falls, ID 83405-1219
Josephine P. Beeman Beeman & Associates P.C. 409 West Jefferson Street Boise, ID 83702	City of Basalt PO Box 178 Basalt, Idaho 83218
M. Jay Meyers Meyers Law Office PLLC 300 North Seventh Avenue PO Box 4747 Pocatello ID 83205	John J. Hockberger Jr. Kathleen Marion Carr Office of the Field Solicitor U.S. Department of the Interior 960 Broadway Avenue, Suite 400 Boise, ID 83706
LaDell and Sherry R. Anderson 304 N 500 W Paul ID 83347	Denise Glore, Attorney U.S. Department of Energy 1955 Fremont Avenue MS 1209 Idaho Falls, ID 83415-1510
Mary Ann Plant 480 N 150 W Blackfoot, ID 83221	O.E. Feld & Berneta Feld 1470 S 2750 W Aberdeen, ID 83210
Jeff Feld 719 Bitterroot Drive Pocatello ID 83201	Eugene Hruza PO Box 66 Minidoka ID 83343
Jerry Rigby Rigby Andrus and Moeller 25 North Second East Rexburg, ID 83440	Robert E. Williams Fredericksen Williams Meservy & Lothspeich LLP 153 East Main Street PO Box 168 Jerome ID 83338
Gregory P. Meacham McGrath Meacham & Smith PLLC 414 Shoup Idaho Falls ID 83405	Fred & Phyllis Stewart 300 Sugar Leo Road St. George, UT 84790
Richard J. Kimmel 867N 800E Shelley, ID 83274	City of Firth Box 37 Firth, Idaho 83236


Travis L. Thompson