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DEPARTMENT OF WATER RESOURCES

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City of Pocatello

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

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

No. 37-03-11-1

IGWA'S AND POCATELLO'S
MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT

By their Joint Motion for Partial Summary Judgment, the Idaho Ground Water Appropriators, Inc. and its Ground Water District ("Ground Water Users") members on behalf of their respective members and City of Pocatello ("Pocatello") seek a determination as a matter of law, that it was proper and within the Director's authority and sole discretion to conclude in the January 29, 2008 Order, ("Order") that A&B Irrigation District's ("A&B") water right no. 36-2080 must be examined in its entirety, not on a well-by-well basis, in making the determination of no material injury.

I. INTRODUCTION

On July 26, 1994, A&B filed a Petition for Delivery Call (“Petition”)¹ with IDWR based on water right 36-02080. On March 16, 2007, A&B filed a Motion to Proceed (“Motion”) alleging that, *inter alia*, “the decreed diversion rate under A&B’s ground water right is necessary to provide a reasonable quantity for beneficial use of the water in the irrigation of lands within A&B” and “[t]here are no post-adjudication circumstances or unauthorized changes in the elements of A&B’s partial decree under Water Right No. 36-2080”. Motion at ¶¶11.d and 11.j. The Director of IDWR investigated the matter and found no material injury resulting to A&B. The *Order*, found that there was no injury to A&B. See, Order, Conclusions of Law at ¶¶ 29 and 38. A&B petitioned for a hearing on the matter. *A&B Irrigation District’s Petition Requesting Hearing on Director’s January 29, 2008 Order*. A hearing on A&B’s delivery call is scheduled to commence December 3, 2008.

The Director properly analyzed A&B’s delivery call and claim of injury to Water Right No. 36-2080 by looking at the water right’s elements as partially decreed and subsequently amended via Transfer No. 72566, and properly determined that A&B is authorized to divert from any of its 188 points of diversion up to a maximum amount of 1,100 cfs provided that amount of water is needed for beneficial use. Under its partial decree², A&B is entitled to delivery of a maximum of 1,100 cfs for irrigation purposes on 62,604 acres within A&B’s described place of use. The partial decree provides A&B with maximum flexibility insofar as it allows delivery of ground water pumped from *any* point of diversion onto *any* of A&B’s 62,604 acres. A&B is authorized to divert up to 1,100 cfs from its 188 points of diversion, however, if it chooses not to

¹ Available at:

http://www.idwr.idaho.gov/Calls/A&B_Irrigation_Call/A&B_2007_Filings/Court_docs/Attachment%20B.pdf.

² References to the partial decree also include the transfer no 72566, Exhibit G to McHugh Aff. that was approved at A&B’s request to add additional points of diversion (i.e. wells) to A&B’s place of use and to insure that all points of diversion were listed on water right no. 36-2080

maximize the use of water available from the aquifer by not improving existing wells or drilling new wells or improving its conveyance system, then A&B cannot claim shortage on a well-by-well system basis.

A&B and its representatives, including A&B's manager, Mr. Temple, and its experts, Mr. Koreny and Mr. Brockway, admit that A&B's water right allows them to divert up to their maximum diversion rate under any one well or combination of wells and that the 1100 cfs was appurtenant to all of A&B's lands, not tied to specific farm units. Mr. Temple testified that:

A: "I've always had this understanding from counsel that the district's 1100 cfs was for the whole project. It wasn't tied to the lands. It was for the 62,000 or whatever it was. That's always been my understanding."

See Exhibit A to Affidavit of Candice McHugh ("McHugh Aff."), Deposition of Dan Temple, p. 232, lines 21-25. See also, Exhibit B to McHugh Aff., Deposition of John Koreny, p. 255, line 3- p. 256, line 2, nothing in A&B's partial decree limits quantity from a specific well. Mr. Brockway, A&B's long-time consultant also testified:

Q: "Would you agree that A&B has the option of and the right to pump as much or as little out of any of these points of diversion that they may choose?"

A. "I think that's right."

See Exhibit C to McHugh Aff., Deposition of Charles E. Brockway, p. 121, lines 24 – p. 122, lines 1-3, see also, p. 121, lines 7-20, the partial decree limits the total diversion rate but does not limit any single "pumping unit" (i.e. well.). Yet, despite the terms of its water right and A&B's own understanding, A&B has requested administration on well specific rates of diversion for irrigation of the lands it assigned to specific wells or well systems.

In keeping with the terms of A&B's water right and A&B's assertions, IDWR's January 29, 2008 Order properly declined to analyze the delivery call by reference to well-specific delivery rates.

II. UNDISPUTED FACTS

1. The Bureau of Reclamation's ("Bureau") 1949 Project Planning Report for the North Side Pumping Division (now known as Unit B of the A&B project) states, at page 70:

In the best interests of the Division as a whole, it appears that rights of individual wells should be retained in the name of the Division rather than being made appurtenant to any particular parcel of land. This would permit a more satisfactory distribution of water to lands and maximum over-all development.

Exhibit D, McHugh Aff.

2. The Bureau of Reclamation's 1958 Definite Plan Report states, at page 73³:

In the best interest of the Division as a whole, the permit is upon the basis that all the wells will, as a group, be appurtenant to all the lands of the entire Division, rather than being made appurtenant to a particular parcel of land. This would permit a more satisfactory distribution of water to lands and maximum over-all development.

Exhibit E, McHugh Aff.

3. A&B holds a partial decree for Water Right No. 36-2080 entered in the Snake River Basin Adjudication ("SRBA"). Consistent with the Bureau of Reclamation planning documents, the A&B partial decree provides for 1,100 cfs, to be pumped from multiple points of diversion to serve any lands within the entire service area within A&B's boundaries.

Exhibit F, McHugh Aff.

4. Transfer No. 72566 authorized A&B to divert its senior right, 36-2080, along with numerous junior rights⁴ for use on any of the 66,686.2 acres authorized as place of use under either 36-2080 or the junior rights referenced below. Exhibit G, McHugh Aff.

³ The 1955 Definite Plan Report contained the same reference and an excerpt of that report is included at the end of Exhibit E to McHugh Aff.

⁴ The junior rights are: 36-15127A, 36-15127B, 36-15192, 36-15193A, 36-15193B, 36-15194A, 36-15194B, 36-15195A, 36-15195B, 36-15196A, 36-15196B.

5. A&B is authorized to divert a maximum of 1,100 cfs from 188 points of diversion (i.e. wells). Id.
6. A&B diverts water from only 177 points of diversion (i.e. wells). Petition at 1, ¶ 2; see also Exhibit G, Transfer No. 72566.
7. In Paragraph 1 of the January 29, 2008 Order, the Director noted that the A&B partial decree makes water right no. 36-2080 appurtenant to all 62,604 acres of land in the place of use, based on A&B's own admission:

On July 26, 1994, A&B filed a Petition for Delivery Call ("Petition") with the Department. The boundary of the A&B Irrigation District is depicted in Attachment A. According to the Petition, A&B "is the beneficial owner of Water License No. 20736, now known as A-36-02080, which entitled the Irrigation District to divert eleven hundred (1100) cfs from on hundred seventy-seven (177) wells for the irrigation of sixty-two thousand six hundred four and three tenths (62,604.3) acres within the irrigation district with a priority of September 9, 1948." Petition at 1, ¶ 2.

8. In deposition, Mr. Dan Temple, manager of the A&B Irrigation District testified that the entire A&B's water right no. 36-2080 was appurtenant to all 62,604 acres described in the partial decree. Exhibit A, McHugh Aff.

There is no material dispute of fact that A&B's 1,100 cfs decreed rate of diversion for water right 36-2080 is appurtenant to all 62,604 acres. There is also no material dispute of fact that A&B's decree and subsequent transfer do not limit delivery to any particular rate of flow from any point of diversion.

III. ARGUMENT

As the Idaho Supreme Court reiterated in *American Falls Reservoir Dist. No. 2*, 143 Idaho 862, 876-77, 154 P.3d at 447-48 (2007), a decree provides delivery of a maximum amount, not a guaranteed amount of water. See also *Nettleton v. Higginson*, 98 Idaho 87, 93, 558 P.2d 1048, 1054(1977) ("the right of appropriation does not carry with it an unconditional guarantee of water regardless of supply of water available.") Thus the decreed amount of a water right is a maximum and, in the event of injury as a result of junior ground water diversions, the Department need only deliver so much of the senior water rights as is required for the decreed

beneficial uses. *Glavin v. Salmon River Canal Co. Ltd.*, 44 Idaho 583, 589, 258 P. 532, 534 (1927) (“public policy demands that whatever be the extent of a proprietor’s right to use water until his needs are supplied, his right is dependent upon his necessities, and ceases with them.”). The Department’s discretion to make these determinations arises from the constitutional provisions limiting an appropriation to that amount necessary for beneficial use, as well as the policy of maximum utilization of Idaho’s water resources. As the Supreme Court put it:

As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.

AFRD#2 at 451.

The Director’s discretion also applies in interpreting other elements of a decree for purposes of developing the assumptions to be used in determining whether there is injury to a senior water user. In the January 29, 2008 Order, the Director determined that A&B requires 0.73 inches/acre and that based on *all* the supplies available to A&B from the 139 well systems, with 177 individual wells, serving the B unit, there is ample supply available to meet the B unit’s irrigation requirements for *all* lands. The Director properly exercised his sole and exclusive discretion consistent with Idaho law.

By contrast, A&B argues through its pleadings and its expert disclosures that the Director erred in his analysis because he failed to evaluate shortage by reference to each individual well system. A&B claims it is entitled to delivery of 0.88 miner’s inches/acre from each of its points of diversion. A&B’s experts’ opinions hinge on a separate shortage analysis performed for each well system and “is a critical aspect of the analysis” done by A&B’s experts. A&B Irrigation District Expert Report at 4-1.

As shown below, the Department's interpretation of the A&B decree for purposes of performing its injury analysis is appropriate under AFRD #2, and A&B's theory is erroneous as a matter of law.

A. A&B'S DECREE TERMS SPECIFY THAT THE 1100 CFS DIVERSION RATE IS APPURTENANT TO ALL 62,604 ACRES, AND PROVIDES THAT THIS IS A *MAXIMUM* RATE OF DIVERSION.

A&B's Partial Decree, provides:

- A&B is "limited to a combined total diversion rate of 1100cfs and a total combined annual diversion volume of 266,744.8 acre-feet in a single irrigation season." Exhibit F, McHugh Aff.
- A&B's decreed place of use is "within the boundary of A&B Irrigation District Service Area...limited to the irrigation of 62,604.3 acres within the A&B Irrigation District boundary in a single irrigation season." Id.
- A&B's total diversion rate of 1100 cfs is a *maximum combined* total diversion rate to be used when available.⁵

Notably, A&B's decree does not specify a particular amount of water to be delivered from any particular point of diversion, but instead provides for a combined maximum rate of delivery of 1100 cfs. A&B's decree provides the place of use upon which A&B *may* apply water from any of its 188 points of diversion⁶. Rather than tying A&B's hands by limiting each well to a particular rate of diversion for the lands associated with each individual well system, the decree authorizes A&B, at its request and as originally contemplated by the BOR, to spread water diverted from any well to any of the acres across the B unit.

In the Spring User's case, the hearing officer determined that the partial decrees are conclusive as to the matters determined therein. *Order Granting in Part and Denying in Part*

⁵ The conditions on quantity and service area were not changed by Transfer No. 72566. Transfer No. 72566 added points of diversions so that all of A&B's wells were described and made appurtenant to all 62,604 acres. See Exhibit G, McHugh Aff.

⁶ Note that although A&B has 177 points of diversion, 11 points of diversion are not in use.

Joint Motion for Summary Judgment and Motion for Partial Summary Judgment, at 5 (IDWR Nov. 14, 2007). Given the water right's terms, it would be unacceptable for the Director to limit A&B's operations by requiring that A&B apply water from a specific well to a specific tract of land, and to not allow A&B internal flexibility to interconnect farm units as it has done in the past. A&B's water right no 36-2080 allows A&B to divert water from any well and deliver it to any land within its place of use. It is equally unacceptable, however, to allow A&B to complain that individual wells are short thereby causing "injury" to its water right when there is plenty of water in the ground under A&B to divert and apply to beneficial use. It is A&B's refusal to maximize its delivery system or because A&B's choice of well location and farm unit configuration that makes it difficult to deliver water to certain fields, not injury from junior ground water pumping.

In addition to the fact that the Director's methods are consistent with Idaho law and with A&B's decree, Idaho law provides that a senior may not demand curtailment of junior users if water would otherwise be available if the senior fully developed its diversion facilities. *Ward v. Kidd*, 87 Idaho 216, 227, 392 P.2d 183, 190 (1964) ("It is the policy of the law to prevent waste and to secure the maximum beneficial use of the waters of the state...").

B. THE A&B PARTIAL DECREE IS CONSISTENT WITH BUREAU OF RECLAMATION PLANNING DOCUMENTS FOR THE B UNIT.

The Bureau planned and developed the A&B Irrigation District, including both the surface water (A unit) and ground water (B unit) portions of the district. On September 9, 1948, the Bureau made application to the Idaho Department of Reclamation (now known as the Idaho Department of Water Resources) for a permit to appropriate ground water in the area of Unit B. Exhibit E, McHugh Aff. 1955 Definite Plan Report at 73. In permitting its new ground water right, the Bureau had at least two approaches from which to select. For example, it could have

requested a permit that would assign a specific delivery rate to each well, and make the use of ground water associated with each well appurtenant to the particular lands to be served by the well.

However, instead of seeking to limit flexibility by imposing well-specific rates on Unit B water users, or by limiting the application of ground water from particular wells to particular lands, the Bureau instead sought a maximum diversion rate of 1100 cfs to be shared amongst all the wells in Unit B. It also made the application and use of the ground water pumped from any well in Unit B appurtenant to any of the lands served by Unit B. The Bureau determined that this approach would maximize the flexibility for Unit B groundwater users. *Id.* This flexibility was maintained by A&B and confirmed by the Partial Decree and by Transfer No. 72566.

C. THE DIRECTOR CORRECTLY ANALYZED A&B'S DELIVERY CALL BY IMPLEMENTING ITS DECREE WHICH PROVIDES THAT THE 1100 CFS WATER RIGHT IS APPURTENANT TO ALL 62,604 ACRES OF A&B'S IRRIGATED LAND.

The Director's Order evaluated the irrigation requirements of the A&B lands by reference to several concepts familiar to the Hearing Officer from the Surface Water Coalition delivery call case: assumption of on-farm efficiency based on the nature of the delivery system, consumptive irrigation requirements, and conveyance losses. The Director also examined the A&B delivery call by reference to certain Bureau documents that set forth the intended capacity of the delivery system, and evaluated whether A&B's diversions over time were consistent with the Bureau information regarding system capacity. While the Director evaluated the A&B delivery call using both engineering methods and Bureau documents, in all cases his evaluation examined whether there was sufficient water available to A&B to serve *all* lands—not just the lands that might be served by a particular well or well system.

For example, the Director found:

The mean annual amount of ground water pumped by A&B from 1994 through 2007 was 180,095 acre-feet, or 2.88 acre-feet per acre per year for 62,604 acres. Average ground water use for the 62,604 acres in 2006 and 2007 was 2.76 and 2.94 acre-feet per acre.

Order, Paragraph 38.

Given a weighted consumptive irrigation requirement of 2.17 acre-feet per acre, and assuming an overall irrigation efficiency of 75 percent (including on-farm irrigation efficiency and conveyance losses), the total average ground water diversion requirement for lands in Unit B would be 2.89 acre-feet per acre. This is equivalent to the 2.88 acre-feet per acre average annual water use between 1994 and 2007 for 62,604 acres in Unit B, as reference above in Finding 38.

Order at Paragraph 52.

The indicated total water supply of 970 cfs equates to 0.77 miner's inch per acre for the 62,604.3 ground water irrigated acres in the delivery call. Assuming a conveyance loss of 5%, the net farm delivery for the acreage in a delivery call is 0.74 miner's inch per acre, which is more than 98% of the stated farm delivery capacity of 0.75 miner's inch per acre.

Order at Paragraph 64.

While the parties may quarrel about the results of the Director's analysis, as a matter of law the framework of the analysis—total water supply available to serve 62,604 acres—was consistent with the terms of the A&B partial decree and thus represents an exercise of appropriate discretion on the part of the Director.

IV. CONCLUSION

A&B sought and obtained a license, and subsequently a partial decree (and a transfer) that allows it maximum flexibility. There is no question that they did this for their own benefit and intentionally chose to have the partial decree and subsequent transfer so reflect. Exhibit E, McHugh Aff. Definite Plan Report at 73 and Exhibit D, McHugh Aff. 1949 Project Planning Report for the North Side Pumping Division at 70. Now, instead of capitalizing on that

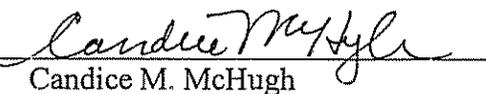
flexibility, A&B seeks to externalize its cost of operation by seeking ESPA-wide curtailment of junior ground water users. By curtailing juniors, A&B hopes that ground water levels under its lands will rise at some future time, which may allow it to reduce or avoid the costs of improving its means of diversion by interconnecting the few wells systems that are poor performers with wells systems that have robust production capacities, improving existing wells and/or drilling new wells.

IDWR's analysis of A&B's claims of shortage by reference to the decree terms making A&B's ground water use appurtenant to all lands, and setting a maximum diversion rate cumulatively across all wells, was correct. To the extent A&B seeks to curtail junior well users in order to avoid developing its delivery system to maximize its water right under its partial decree, it is externalizing its costs of operation. Such demands equate to waste and are a violation of maximum beneficial use.

Administration of the A&B water delivery call by analyzing the water right as decreed with maximum flexibility for A&B is consistent with the terms and conditions of the water right. Therefore, Pocatello and the Ground Water Users request that the Hearing Officer grant the motion for summary judgment and find as a matter of law that the Director's Order properly interpreted A&B's delivery call in accordance with its partial decree; and, further that the Director acted properly and within his discretionary authority in determining that A&B's water right must be examined in its entirety, not on a well-by-well basis in making the determination of material injury.

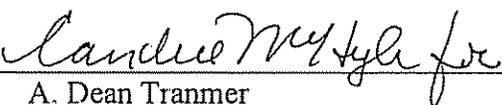
DATED this 3rd day of October, 2008

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& BAILEY, CHARTERED

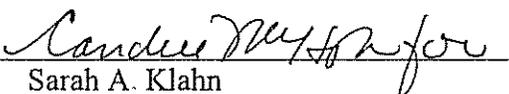
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