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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) **DOCKET NO. 37-03-11-1**
DISTRICT FOR THE DELIVERY OF)
GROUND WATER AND FOR THE) **RESPONSE TO IGWA'S AND**
CREATION OF A GROUND WATER) **POCATELLO'S MOTION TO**
MANAGEMENT AREA) **LIMIT IDWR WITNESSES AND**
) **EXCLUDE ELMER MCDANIELS**
)
)
)
_____)

COMES NOW, A & B Irrigation District (“A&B” or “District”), by and through counsel
of record, and hereby responds to *IGWA’s and Pocatello’s Motion to Limit Number of IDWR
Witnesses and to Exclude Witness McDaniel* filed on November 7, 2008. For the reasons set

forth below, the motion should be denied.

RESPONSE

IGWA and Pocatello (hereinafter collectively referred to as “IGWA”) seek to exclude IDWR witnesses that participated in preparation of the Director’s January 29, 2008 Order on the basis that it would “aid in the efficient presentation of the parties case and will allow the hearing to be more reasonably concluded in the time allotted.” *IGWA Motion* at 2. This reason does not justify excluding IDWR witnesses that A&B would call for purposes of its case. It is clear that the witnesses IDWR identified in March contributed to various parts of the Order, by way of written findings or reports for the Director. A&B contests various findings in the Order and should be allowed to cross-examine any witness that provided information that was relied upon by the Director, not just those that IGWA seeks to call.

Moreover, Rule 600 provides that “[e]vidence should be taken by the agency to assist the parties’ development of a record, not excluded to frustrate that development.” IDAPA 37.01.01.600. Based upon the IDWR witnesses’ depositions, it is clear they have information that will assist in the development of a record for the hearing on the Director’s Order. As such, A&B has a right to call those witnesses for examination.

A&B agrees with IGWA that witnesses Tim Luke, Sean Vincent, and Allan Wylie should provide testimony at the hearing. A&B would also call Dale Ralston and Tony Morse. A&B would not seek to call Neal Farmer, Bill Kramber, or Rick Raymondi, however if another party requested to have those witnesses testify they should be provided that opportunity.

With respect to IGWA’s motion to exclude A&B’s former manager Elmer McDaniels, it is clear that IGWA is seeking to prevent a key witness from testifying in this case to assist in the

development of the record. A&B's counsel did not learn of Mr. McDaniels' current whereabouts until October 2008. At the October 22, 2008 hearing A&B's counsel informed the Hearing Officer and the parties that it was discovered that Mr. McDaniels was working for an irrigation district in Bend, Oregon and stated A&B's intent to call him as a rebuttal witness. A&B's counsel, after learning that the information was apparently not provided to IGWA's counsel based upon the assertions in IGWA's motion, provided Mr. McDaniels' contact information to the parties on November 9, 2008. *See* Exhibit A. There was no intent to conceal Mr. McDaniels' information (which was readily available in the public domain), and IGWA never requested it after the October 22nd hearing, including not at any of the witness depositions taken on October 27th, 28th, and 29th at A&B's offices in Rupert, Idaho.

To the extent the Hearing Officer considers "pre-decree" information in this case, which was relied upon by the Director in his Order, it is clear that Mr. McDaniels can provide testimony to assist the Hearing Officer in the development of a record. This is particularly important where the Director relied upon the Reclamation 1985 extensions land study (which references a 1984 letter from Mr. McDaniels):

However, page 43 of USBR's 1985 Hydrology Appendix to the North Side Pumping Division Extension report indicates as follows: "In a letter to the Bureau of Reclamation dated May 24, 1984, the district states that they cannot support a peak net farm delivery rate in excess of 0.357 inches per day [0.75 miner's inch], which is the rate at which the current project is designed and operate." In other words, 0.75 miner's inch represents the maximum rate of delivery, not the minimum as represented in the Motion to Proceed.

Se Order at 15, ¶ 63.

IDWR staff, and ultimately the Director, erroneously relied upon this study, and the reference to Mr. McDaniels' letter to claim that A&B could only physically deliver 0.75 miner's

inch per acre across the project. It is important to hear testimony from Mr. McDaniels to clarify IDWR's misinterpretation of his prior letter to Reclamation in 1984. Stated another way, incorrect assumptions about Mr. McDaniels' letter should not be allowed to go unexplained, particularly when he is available to testify and can be examined by all parties at the hearing.

The record should be fully developed on this issue particularly when IDWR's findings rely upon the 1985 Reclamation study and its reference to Mr. McDaniels' 1984 letter to make a finding about A&B's project delivery capacity that is not supported by the facts. Finally, in questioning A&B's expert John Koreny at his deposition, IGWA's counsel introduced the letter as an exhibit (Ex. 86) and further relied upon it in relation to the 1985 Reclamation extension lands study. *See* Exhibit B (Koreny Depo. Tr. p. 208-211).

Clearly, the author of the letter, Mr. McDaniels, should be allowed to testify to provide evidence and correct misinterpretations made by the Director which were ultimately relied upon to deny A&B's call. Accordingly, IGWA's motion should be denied.

DATED this 13th day of November, 2008.

BARKER ROSHOLT & SIMPSON LLP



Roger D. Ling
Attorney at Law

Attorneys for A&B Irrigation District



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

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of November, 2008, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email for those with listed email addresses:

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<p>Jeff Feld 719 Bitterroot Dr Pocatello ID 83201</p>	<p>Eugene Hruza PO Box 66 Minidoka ID 83343</p>	<p>Jerry R. Rigby Rigby Andrus and Moeller 25 N 2nd East Rexburg ID 83440 jrigby@rex-law.com</p>
<p>Robert E. Williams Fredericksen Williams Meservy & Lothspeich LLP 153 E Main St PO Box 168 Jerome ID 83338 rewilliams@cablone.net</p>	<p>Gregory P. Meacham McGrath Meacham & Smith PLLC 414 Shoup Idaho Falls ID 83405</p>	<p>Richard J. Kimmel 867 N. 800 East Shelley, ID 83274</p>
<p>James S. Lochhead Michael A. Gheleta Brownstein Hyatt Farber Schreck P.C. 410 Seventeenth Street Suite 2200 Denver, CO 80202 jlochhead@bhfs.com mgheleta@bhfs.com</p>	<p>F. Randall Kline P.O. Box 397 427 N. Main St. Pocatello, ID 83204</p>	


 Travis L. Thompson

Exhibit

A

Travis Thompson

From: Travis Thompson
Sent: Sunday, November 09, 2008 4:46 PM
To: Becky J. Harvey; dave.tuthill@idwr.idaho.gov; phil.rassier@idwr.idaho.gov; Bromley, Chris; John Simpson; Paul Arrington; rdl@idlawfirm.com; Hearing Officer Schroeder
Cc: Sarah Klahn; Randy Budge; Candice M. McHugh; Scott Smith
Subject: RE: A & B pleadings

Sarah, Candice

Elmer McDaniels is the manager of Tumalo Irr. Dist. in Bend, Oregon. I referenced that we found out he was a manager of an irrigation district in Bend, Oregon at the Oct. 22 hearing. The contact information for the district is as follows:

64697 Cook Ave.
Bend, Oregon 97701
Phone: (541) 382-3053

Although I don't have this information here at home, I did find it on the internet by simply conducting a search using Mr. McDaniels' name. I thought we had sent you the contact information following the hearing, so I was surprised by your filing on Friday. I further assumed you had the information since you never asked for it at any time after the Oct. 22 hearing. We'll respond to your motion but I wanted to be sure you had Mr. McDaniels' information since it is clear you were unable to locate him on your own.

Thanks,

Travis

From: Becky J. Harvey [mailto:bjh@racinelaw.net]
Sent: Fri 11/7/2008 3:32 PM
To: dave.tuthill@idwr.idaho.gov; phil.rassier@idwr.idaho.gov; Bromley, Chris; John Simpson; Travis Thompson; Paul Arrington; rdl@idlawfirm.com; Hearing Officer Schroeder
Cc: Sarah Klahn; Randy Budge; Candice M. McHugh; Scott Smith
Subject: A & B pleadings

Attached please find ***IGWA and Pocatello's Motion to Limit Number of IDWR Witnesses and to Exclude Witness McDaniel*** and ***IGWA's Request for Clarification of Order Regarding Discovery Motions and Order Amending Schedule*** regarding the A & B Delivery call case.

Becky Harvey
Paralegal

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11/12/2008

Attachment B

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 GROUND) Docket No. 37-03-11-1
WATER AND FOR THE CREATION)
OF A GROUND WATER)
MANAGEMENT AREA)
VOLUME I

DEPOSITION OF JOHN KORENY, P.E.
SEPTEMBER 22, 2008

REPORTED BY:
JEFF LaMAR, C.S.R. No. 640
Notary Public

1 APPEARANCES (Continued):
2
3 For Idaho Groundwater Appropriators, Inc.:
4 RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.
5 BY MR. RANDALL C. BUDGE
6 MS. CANDICE M. McHUGH
7 101 Capitol Boulevard, Suite 208
8 Boise, Idaho 83702
9 Also Present:
10 Gregory K. Sullivan
11 Christian Petrich
12
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1 THE DEPOSITION OF JOHN KORENY, P.E., was
2 taken on behalf of City of Pocatello, at the
3 offices of Racine, Olson, Nye, Budge & Bailey,
4 Chartered, 101 South Capitol Boulevard, Suite 200,
5 Boise, Idaho, commencing at 10:00 a.m. on
6 September 22, 2008, before Jeff LaMar, Certified
7 Shorthand Reporter and Notary Public within and
8 for the State of Idaho, in the above-entitled
9 matter.

10 APPEARANCES:

11 For A & B Irrigation District:
12 BARKER, ROSHALT & SIMPSON LLP
13 BY MR. TRAVIS L. THOMPSON
14 113 Main Avenue West, Suite 303
15 P.O. Box 485
16 Twin Falls, Idaho 83303-0485
17 For City of Pocatello:
18 WHITE & JANKOWSKI, L.L.P.
19 BY MS. SARAH A. KLAHN
20 511 Sixteenth Street, Suite 500
21 Denver, Colorado 80202
22
23 ///
24 ///
25 ///

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1 was prepared before the Bureau withdrew from this
 2 case?
 3 A. I have.
 4 Q. Pardon?
 5 A. I have.
 6 Q. And tell me what you know about it.
 7 A. If you ask me specific questions, I
 8 can -- it was a long time ago, almost six months
 9 ago by now.
 10 Q. Does it relate to the history of A & B
 11 construction, well construction? I don't want to
 12 play 20 questions. What's the area of --
 13 A. It deals with well construction,
 14 adequacy of well construction.
 15 Q. At the time of the beginning of the
 16 A & B project or currently?
 17 A. I can't remember about -- if it has --
 18 deals with historic -- I think it deals with
 19 current.
 20 Q. Does she have any information in that
 21 report about pump capacity -- current pump
 22 capacities or -- let's leave it there.
 23 A. I don't think so.
 24 Q. How about irrigation requirements?
 25 A. I don't think so.

1 Q. Anything on the crop --
 2 A. I don't think so.
 3 Q. -- requirement side?
 4 Have you reviewed the surrebuttal that
 5 Mr. Sullivan disclosed?
 6 A. No.
 7 Q. You were on vacation, weren't you?
 8 A. I was busy, and it's my understanding
 9 that that's not a -- there's some dispute about
 10 whether that will be admitted or not. So I
 11 didn't.
 12 Q. Are you preparing any surrebuttal?
 13 A. I don't know.
 14 Q. This is from the pile of stuff that we
 15 talked -- that you handed us this morning that you
 16 brought along with you that was in response to the
 17 notice and subpoena. And this is a map.
 18 And I just have never seen it before,
 19 and I wonder if you could tell me what it is and
 20 where it came from?
 21 A. Sure. Just give me a minute so I can
 22 give you a complete explanation.
 23 Q. Sure.
 24 A. So I asked Mr. Temple for a list of
 25 wells and the location of wells that have been

1 abandoned or deepened or replaced. And he gave me
 2 this map that you showed me that I brought today.
 3 And we talked about it quite a bit.
 4 He made a number of revisions. And then that
 5 became figure 3-32 in our report.
 6 Q. It looks old.
 7 Is it?
 8 A. Well, the base map is old, but the
 9 checks and notations on it are current.
 10 Q. Okay. So by looking at figure 3-32,
 11 we already have at least the base map of this old
 12 map that you produced today?
 13 A. Yes.
 14 Q. Okay.
 15 A. And this is probably outdated because
 16 there's been a number of changes since then that
 17 are shown on figure 3-32.
 18 Q. Okay. Thank you. You can have that
 19 back.
 20 Do you remember which exhibit is the
 21 1984 letter?
 22 THE COURT REPORTER: From today?
 23 MS. KLAHN: Uh-huh.
 24 THE COURT REPORTER: It's right here.
 25 Q. (BY MS. KLAHN): Okay. This morning

1 we talked about Exhibit 86, which was this 1984
 2 letter.
 3 And you told me that you thought it
 4 was confusing, I think -- is that right? -- the
 5 intention of the manager.
 6 A. I think I said I didn't understand it.
 7 Q. Okay. I'm going to show you page 43
 8 of the 1985 Hydrology Appendix. And this is a
 9 thing I've tabbed, but your notes, I believe, are
 10 in here and your highlighting.
 11 Would you read that paragraph, please?
 12 A. "Peak farm delivery rate of .434 inch
 13 per day was estimated during the course of this
 14 study."
 15 Keep going?
 16 Q. Yeah.
 17 A. "This rate is well within acceptable
 18 limits. However, the ABID views the development
 19 of the extension lands as a completion of the
 20 original project. In the letter to the Bureau of
 21 Reclamation dated May 24th, 1984, the District
 22 states that they cannot support a peak net farm
 23 delivery in excess of .357 inch per day, which is
 24 the rate at which the current project is designed
 25 and operated. Therefore, a peak farm delivery of

1 .357 inch per day was adopted for use in this
2 study. This rate represents the capacity at the
3 turnouts. Additional capacity is required for
4 conveyance losses in the laterals and canals."

5 Q. And the date of the letter we talked
6 about this morning, Exhibit 86, is May 24th, 1984,
7 is it not?

8 A. That's what it says.

9 Q. And your notes in there actually
10 indicate that you've done the math to figure out
11 that .434 inches per day are about the .19 miner's
12 inches, and .357 inches per day that was adopted
13 by the Bureau is .75, is that true, that your
14 notes indicate that on there?

15 A. I don't think those notes are correct.
16 Well, they may or they may not be. But I have the
17 right information in the report, in my expert
18 report. .3 -- 434 inch per day is .90 miner's
19 inch per acre.

20 Q. Okay. And .357, which was actually
21 the rate used by the Bureau in the 1985 Hydrology
22 Appendix, do you have that in your report?

23 A. It says .75 miner's inch per acre.

24 Q. Okay. Can I have your report back so
25 I can see what my next question is?

1 And again, on page 64 of the 1985
2 Hydrology Appendix is a paragraph that starts "The
3 existing project." I'd just like you to read that
4 and confirm that according to this paragraph the
5 Bureau believes that the project was designed to
6 deliver .75.

7 A. "The Existing project was designed and
8 constructed on a peak farm delivery of .357 inches
9 per day, which compares with the SCS data. In the
10 letter from the A & B Irrigation District to
11 Bureau of Reclamation dated May 1984, the District
12 views development of the extension lands as
13 completion of the original project and recommends
14 a peak farm delivery no greater than .357 inch per
15 day."

16 Do you want me to read the whole
17 thing?

18 Q. No. That's it. Thank you.

19 A. That statistic is quoted incorrectly.

20 Q. What statistic is quoted?

21 A. We talked about this morning the
22 design is actually .77 to .78 at the turnout, and
23 it's .82 at the pump.

24 Q. And all I'm asking you is whether it's
25 true that the Bureau's 1985 hydrology report

1 relies on .357, which your report indicates is .75
2 miner's inches; is that right?

3 A. It incorrectly does that. That's not
4 the actual design rate.

5 Q. All right. On page 27 you have some
6 highlighting and a note. And again, this is from
7 the 1985 hydrology report, your copy that was
8 provided to us this morning.

9 Would you just read the highlighting
10 and the note?

11 A. Yeah. It says, "Present net pumping
12 is estimated about 1.4 million acre-feet per year
13 and recharge estimated about 8 million acre-feet
14 per year. Thus, the aquifer can accommodate a
15 substantial increase in ground water pumping
16 without showing alarming declines."

17 My note says, "Shows they don't
18 understand that aquifer could be
19 overappropriated."

20 Q. In your mind, at what point is an
21 aquifer overappropriated?

22 A. When it can't sustain and meet the
23 demands, all the demands on it. And the fact that
24 they compare present net pumping and a recharge
25 amount shows that they don't understand aquifer

1 hydraulics.

2 Q. Was the ESPA overappropriated in 1992?

3 A. Probably.

4 Q. Was it overappropriated in 1980?

5 A. I don't know.

6 Q. What would you have to do to know?

7 A. Run a demand-supply calculation.

8 Q. Demand-supply --

9 A. Calculation. Look at all the demands
10 on the aquifer and the ability of the aquifer to
11 meet the demand.

12 Q. Is that data available?

13 A. Sure.

14 Q. How about pump-capacity data, is that
15 available?

16 A. That's a different subject.

17 Q. I understand that.

18 Is that available too?

19 A. A & B's pump-capacity data?

20 Q. Everybody in the aquifer's
21 pump-capacity data.

22 MR. THOMPSON: If you can get it from
23 Randy, I'll take it.

24 THE WITNESS: I don't know. I believe it
25 is.

.76.789 IRRIGABLE ACRES



A & B Irrigation District

P. O. BOX 575

RUPERT, IDAHO 83350

DIAL 436-3152

May 24, 1984

*Findlay
#63*

Mr. Larry Vinsonhaler
Regional Planning Officer
Bureau of Reclamation
Box 043, 550 West Fort St.
Boise, ID 83724

Dear Mr. Vinsonhaler:

This is in response to your request for our comments on the 0.75 miner's inch per acre design peaking criteria being proposed for the new Extension lands.

A & B Irrigation District began operation in 1960, and all existing project lands were developed under gravity irrigation and were in production by 1963. The design criteria for these lands was set at 0.75 miner's inch per acre (1 cubic foot per second per 65 acres) delivered to the farm unit. There is general concern among A & B irrigators that for gravity irrigation this flow is inadequate or "tight" during the peak demand period, although there has been no noticeable restriction in crop yields.

With regard to the design criteria for the new lands and considering sprinkler irrigation rather than gravity, we would support the 0.75 rate even though on farm efficiencies will be considerably higher with sprinkler. Our experience with sprinkler irrigated land is that the 0.75 rate is adequate. About 30 percent of our lands are now sprinkled. We would not advocate establishing either a lower or a higher rate than the presently served land. We view development of the Extension lands as merely completing our project. From the standpoint of efficiency in managing the district, it would be preferable to keep the same design criteria on the new lands which are intermingled with existing project lands.

Sincerely yours,

Elmer
Elmer G. McDaniels
Manager

EGM:dw

Date	86 9/27/08
Name	Koreny
M & M Court Reporting	