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ATTORNEYS FOR THE CITY OF
POCATELLO

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

IN THE MATTER OF THE PETITION)	DOCKET NO. 37-03-11-1
FOR DELIVERY CALL OF A&B)	
IRRIGATION DISTRICT FOR THE)	
DELIVERY OF GROUNDWATER AND)	CITY OF POCATELLO'S
FOR THE CREATION OF A GROUND)	CLOSING BRIEF
WATER MANAGEMENT AREA)	
_____)	

The City of Pocatello, by and through its attorneys, submits its Closing Brief in the A&B Irrigation District delivery call matter. The City's Proposed Findings of Fact, Conclusions of Law, and Order are submitted contemporaneously with this brief.

INTRODUCTION

This trial involved A&B Irrigation District's delivery call to remedy its claims of injury to Water Right No. 36-2080. The delivery call was initiated in 1994 and stayed in 1995 on the basis of a stipulation between the parties and the Idaho Department of Water Resources

("IDWR"). However, the matter was not concluded or dismissed, but instead held in abeyance subject to a motion to proceed filed by any party to the stipulation.

In March 2007, A&B filed a Motion to Proceed. In August 2007, A&B filed a writ of mandamus with the Gooding County District Court. After briefing and argument, Judge Butler made the writ absolute in November 2007 and ordered the Director to make findings regarding A&B's claims of injury to Water Right No. 36-2080 by January 15, 2008. On November 16, 2008, the Director requested certain information and data from A&B; A&B provided much of that information on December 14, 2007. Subsequently, several meetings were held between IDWR personnel and A&B representatives, including one on January 4, 2008. A&B also provided an estimate of costs incurred as a result of declining groundwater levels in late January of 2008. The Director issued his Order on January 29, 2008 ("Order" or "A&B Order"), finding no injury to A&B's Water Right No. 36-2080. A&B petitioned for a hearing on the Director's Order. Discovery, motions practice, and trial followed.

In its Motion to Proceed and through subsequent filings with the Hearing Officer and submissions of information to the Director, A&B made the following claims for relief in the context of the delivery call:

1. Rates of flow ranging from:
 - a. 0.75 miner's inches/acre (Motion to Proceed, ¶ 11.d);
 - b. 1100 cfs (*Id.* at ¶ 11.c. and d);
 - c. 0.89 miner's inches/acre at each well system (the rate asserted by A&B's experts in their various reports as the amount required to avoid injury).
2. Water levels:
 - a. historic water levels (Motion to Proceed, ¶ 11.b.d, g and i);
 - b. reasonable pumping levels and establishment of a Ground Water Management Area (*Id.* at ¶ 11.f and i.)

3. Costs associated with actions taken to maintain and improve A&B's wells:
 - a. based on expenditures under Accounts #472 and 445.

Prior to trial, A&B's claim to historic water levels was rejected by the Order Regarding Declaratory Ruling dated May 26, 2008. The remaining claims—A&B's entitlement to rates of water delivery in excess of those found by the Director in Order, FOF 62, reasonable pumping levels, and costs—are still subject to resolution by the Hearing Officer. However, these remaining claims are without merit because of factual and legal reasons described in this brief. In summary, to grant the relief A&B seeks requires construction of a three legged stool:

- First, the adoption of A&B's irrigation requirements analysis, which asserts shortage and injury if farmers do not receive 0.89 miner's inches/acre at their field headgates. However, the analytical framework for A&B's irrigation requirements analysis is inconsistent with the appurtenance terms of the partial decree and inconsistent with the doctrine of "reasonable use" as articulated in the Idaho constitution and Conjunctive Management Rule ("CMR") 20 (IDAPA 37.03.11.020). As a factual matter, A&B's inputs to its irrigation requirements are unreliable and predict shortages that even A&B's experts agreed were erroneous.
- Second, disregard for the legal standard under *American Falls Reservoir Dist. #2 v. Idaho Dept. of Water Resources* ("IDWR#2"), 143 Idaho 862, 154 P.3d 433 (2007) which held that the decreed amount is a maximum, and in a delivery call, the petitioner is entitled only to that amount that can be beneficially used. Here, A&B also claimed it was entitled to 1100 cfs as averaged across of all of its acres, or 0.88 miner's inches/acre. However, A&B failed to show that it required these rates of flow in order to avoid injury.

- Third, disregard for the limitations on the Director's discretion that require a finding of injury before establishment of reasonable pumping levels. There is no independent entitlement to water levels of any kind; A&B failed to establish that ground water level declines have led to decreases in well capacities.

Because there is no support in either the record or the law for any of the foregoing provisions, much less all three, the Director's Order finding no injury to Water Right No. 36-2080 must be affirmed.

I. A&B'S EVIDENCE ASSERTING INJURY TO ITS WATER RIGHT IS LEGALLY UNSUSTAINABLE INSOFAR AS ITS ANALYSIS DISREGARDED THE APPURTENANCE PROVISIONS OF A&B'S PARTIAL DECREE FOR WATER RIGHT NO. 36-2080.

A&B's testimony and evidence regarding irrigation requirements and shortage hinged on the erroneous legal argument that the Director should have ignored the partial decree and evaluated the shortage on a well system-by-well system basis. By contrast, the Director's evaluation in the final order as well as Pocatello's experts' analysis approach the injury question using a system-wide analysis, which was based in part on the terms of the partial decree making all ground water pumped appurtenant to all acres in the place of use. The Director's system-wide approach was also the framework for the Bureau's analysis in the 1955 Definite Plan Report. Exhibit 108.

The appurtenance provisions of A&B's license and partial decree for Water Right No. 36-2080 create maximum flexibility in A&B to arrange its delivery system in a way that satisfies its water users. As evidence at trial established, the Bureau of Reclamation bargained for those terms and conditions in order to maximize the flexibility of the project. Exhibit 157B and D. A&B has taken advantage of this flexibility insofar as it interconnected some of its well systems and drilled several supplemental wells to serve unreliable well systems. However, A&B now

seeks to ignore that flexibility inherent in its water right and treat its system as if it had separate and distinct water rights for each of its approximately 135 well systems. Had the Director analyzed the delivery call on a well system-by-well system basis, any finding of shortage would have penalized juniors and rewarded A&B for its failure to maximize its system flexibility.

In light of the appurtenance provisions in the partial decree, the Director properly considered injury on a system-wide basis. IDAPA Rule 37.03.11.40.03 of the CMR requires the Director to examine the operations of the petitioner to see whether the petitioner is “diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42.” A&B’s decree promotes the District’s ability to be flexible in its water delivery system and water delivery decisions; the Director should assume that A&B—as a matter of “reasonable use”—would rely on these provisions to provide water supplies from systems that have sufficient water to those that do not. The Director’s evaluation of A&B’s claims in this delivery call on a system-wide basis was appropriate as a matter of decree interpretation and required under the law of “reasonable use”.

II. A&B WAS UNABLE TO ESTABLISH THAT ITS ENTIRE DECREED AMOUNT OF 1100 CFS WAS REQUIRED IN ORDER TO AVOID INJURY TO ITS BENEFICIAL USES.

The Director properly evaluated the quantity of water required by A&B to satisfy its beneficial uses. Under *AFRD #2*, the decreed amount represents the maximum amount of flow that may be diverted, but is not necessarily a maximum and not the measure of the entitlement under a delivery call. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. By its terms, the *AFRD#2* standard acknowledges that the amount required to make beneficial use of water can be less than the decreed amount. A&B, by contrast, took the position that the decreed amount represented an absolute entitlement. The Director’s determinations were correct.

The *AFRD#2* beneficial use formulation is consistent with Idaho case law. Idaho courts have declined to include in the definition of “beneficial use” amounts of water that an irrigator has relied on out of habit. *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475, 485 (1944) (“[t]he amount of water that a water user and consumer has been in the habit of using and applying to his lands cannot be accepted as the true test of the duty of water...[i]n determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation.”) (internal citation omitted).

Idaho courts have also declined to adopt rates of water that would make it easier for the senior to irrigate:

In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use and application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water.

Farmers Co-op. Ditch Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 P. 481, 483-84 (1909). *See also Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073, 1076 (1915).

These cases stand for the proposition that the beneficial use inquiry is more than “can the farmer use more water than he has available?” As Mr. Stevenson testified all farmers would prefer to have more water—it makes it easier to irrigate. Stevenson, Vol. X, 2106:2-7; Pocatello’s Proposed Findings at § II.D.48-59. And, of course, no one is suggesting that the A&B farmers are “indolent”—quite the contrary. As the evidence showed at trial, the A&B farmers work very hard and, as a result, have crop yields in excess of the county averages. The A&B farmers also have lands that are “prepared and reduced to reasonably good condition for irrigation”, specifically through their use and management of soil moisture to get them through

the peak demand periods. The evidence at trial showed that the Director properly concluded that the supply of water available to the A&B farmers is adequate to satisfy beneficial uses. A&B's injury analysis is unreliable and does not provide a basis to replace the Director's finding of no injury. *See* Pocatello's Proposed Findings at § II.F.

A. Director's conclusions regarding irrigation requirements were proper.

The Order examined the water supply available to A&B based on the well capacities reported in the Annual Reports and compared the water supply to crop irrigation requirements calculated on an average annual basis. The Order concludes that A&B has never had average well capacities of 1100 cfs. (Order, FOF 62). The Order also examined changes in diversions in light of increased efficiencies employed by A&B through improvements in its canal delivery system and by the increase in sprinklers on the project (Order, FOF 42). The Order also examined historical diversions in light of the provisions contained in technical and planning documents to determine what rates of delivery A&B historically believed to be adequate (Order, FOF 63). Through these evaluations, the Director determined that A&B was not short of water under its Water Right No. 36-2080. These evaluations were consistent with Idaho law limiting water rights' holders to the amounts (and rates) of water that can be beneficially used.

B. Mr. Sullivan's crop irrigation requirements analysis supports the conclusion that A&B is not injured. [Proposed Findings § II.E.]

Mr. Sullivan's analysis found that during the peak demand period, a water supply of 0.65 miner's inches/acre is adequate with careful irrigation scheduling and management. The Director found that 0.75 miner's inches/acre was an adequate rate of flow on average (Order, FOF 63-64] and Mr. Sullivan's analysis is not inconsistent with that finding.

Mr. Sullivan's irrigation requirements analysis was similar to that used by A&B with three important differences. First, his analysis (like the Director's) compared water supply

(pump capacity) to irrigation requirements. This is significant because the question posed by A&B's delivery call is not whether the farmers ordered enough water to meet irrigation requirements—the question is whether A&B had an adequate water supply to meet irrigation requirements. In the B Unit, the water supply is measured by pump capacity. Koreny, Vol. XI, 2169:20-25. Second, Mr. Sullivan's irrigation requirements analysis used a district-wide basis framework, rather than a well system-by-well system framework. This is consistent with the appurtenance provisions of the partial decree, and was the same analytical framework selected by the Director. Finally, Mr. Sullivan's analysis incorporated soil moisture as a water supply input to the irrigation requirements. This was consistent with the testimony of the farmer lay witnesses in this matter, and also consistent with CMR.Rule 42.01e that require the Director to consider all water supplies available to the petitioner in a delivery call.

C. The Director's conclusions regarding irrigation requirements were confirmed by the farmer lay witness testimony and are consistent with the assumptions used by Mr. Sullivan. [Proposed Findings § II.D.]

The evidence presented at trial demonstrated that the crop yields of B unit farmers are equal to or higher than Minidoka County averages. Pocatello's Proposed Findings at § II.D.54. None of the farmer witnesses pointed to physical effects of water shortage, such as documentation of crop yield reductions, fallowed land, or crop damage. Pocatello's Proposed Findings at § II.D.53. A&B's farmers testified that their lands were "prepared and reduced to a reasonably good condition for irrigation" by, *inter alia*, irrigating to fill the soil profile in order to meet peak crop demands. See Pocatello's Proposed Findings at § II.D.52. The A&B farmer lay witnesses did testify that a higher rate of water delivery would make it easier to schedule irrigations, but supplying a rate of flow to make easier to irrigate is not a colorable basis for curtailing junior ground water users under Idaho law.

D. Unlike the Director's and Pocatello's irrigation requirements analyses, A&B's irrigation requirements analysis asked the wrong question. [Pocatello's Proposed Findings § II.C., E. and F.]

The Director's irrigation requirements analysis (as well as Pocatello's) compared the capacity of the A&B system to crop irrigation requirements. Pocatello's Proposed Findings at § II.E. By contrast, A&B's analysis compared water deliveries at the field headgate with irrigation requirements. *See, e.g.*, Appendix M, A&B's Expert Report, July 16, 2008. By disregarding well capacities—the water supply for B unit farmers—A&B's experts found for quantities of water that, based on diversions at other times of the year, the capacity of the well could easily have satisfied.

E. As a factual matter, A&B's analysis is unreliable and resulted in erroneous shortages.

A&B set out to perform a well system-by-well system analysis but its input values were—with the exception of acreage—based on district-wide data. This led to numerous logical disconnects, such as shortages calculated when there was no irrigation demand because of the crops grown. Pocatello's Proposed Findings at § II.F.66. This is a fundamental flaw in the A&B irrigation requirements analysis, and essentially calls all the shortage conclusions into question. The unreliability of this analysis is independent of the conclusions—in other words, even if it could be shown that A&B required 0.89 miner's inches/acre to avoid material injury, as their consultants opined, the analysis provided by A&B is so unreliable that it could not be relied upon to replace the Director's or Pocatello's analysis.

Further, A&B's experts conceded that the computed shortages are incorrect when irrigation requirements are evaluated on a district-wide basis. In response to questions about whether A&B's experts calculated erroneous "shortages" because they used a system-wide crop

distribution but applied that to each well system¹, Dr. Brockway testified that “we’re in trouble when we assume that this whole system is connected” and that A&B “looked at the integrated shortages by adding up individual well shortages”. Brockway, Vol. XI, 2263:8-11. Further, A&B could have avoided shortages by pumping more water “if they would have hooked up all of the wells together, but they didn’t and can’t.” Brockway, Vol. XI, 2262:2-4.

Finally, A&B did not include soil moisture in its irrigation requirements analysis. Soil moisture is an important water supply, and must be considered by the Director under the Conjunctive Management Rules, Rule 42.01. In addition, the farmer lay witnesses all testified that they rely on soil moisture in making irrigation scheduling decisions on both a long term and short term basis—by filling soil moisture prior to the irrigation season to have a reservoir to draw from and by checking soil moisture weekly (or oftener) during the peak demand period to schedule irrigations properly.

F. A&B was unable to refute the Director’s conclusion that 0.75 miner’s inches/acre is both a design criteria and a rectification threshold. [Proposed Findings § II.B.]

Through its Pre-Trial Brief and evidence adduced at trial, A&B took the position that the the Order adopted 0.75 miner’s inches/acre as proper rate of flow for A&B to avoid injury to its water rights based on the Director’s erroneous conclusion that 0.75 miner’s inches/acre was a physical limitation on A&B’s ability to delivery water. This is a straw-man and knocking it down will not assist A&B. As Mr. Luke testified at trial, the terminology used in the Order, FOF 63 might have been awkward, but the Director’s intent in FOF 63 was that 0.75 miner’s inches/acre was a design criteria and not merely a rectification criteria. The volume of evidence established that the District’s has long relied on 0.75 miner’s inches/acre as a design criteria.

¹ And thus, irrigation requirements were calculated assuming each well system had the same distribution of crop types as the entire B unit. This led to a number of erroneous shortages. See, Pocatello’s Proposed Findings at § II.F.66.a.ii.2 [describing Mr. Maughan’s testimony vis a vis irrigation requirements].

Further, Mr. Vincent's testimony regarding various historical documents, including A&B Board meeting minutes and Bureau of Reclamation planning documents, incorporated 0.75 miner's inches/acre as a District design criteria supports the Director's findings on this point. Pocatello's Proposed Findings at § II.B.

III. A&B IS NOT ENTITLED TO REASONABLE PUMPING LEVELS BECAUSE IT FAILED TO SHOW INJURY TO ITS WATER RIGHTS.

A&B presented evidence of ground water declines and sought "reasonable pumping levels" as one of its claims for relief. Upon establishment of reasonable pumping levels, if investigation showed A&B's pumping levels were unreasonable—this would have provided an additional basis to claim costs or to restore ground water to "reasonable" levels. However, the Director's January 29, 2008 Order properly considered only the threshold question: Is A&B's water right short of water? The Order concluded that Water Right No. 36-2080 was not short of water, and thus the remainder of A&B's claims were without merit. Following a 12 day trial, there is still no evidence of an inadequate supply under Water Right No. 36-2080. Under Idaho law, having failed to satisfy that threshold factual showing, the Director's establish reasonable pumping levels has not been triggered and, accordingly, A&B is not entitled to any relief in the form of reasonable pumping levels or costs.

A. A&B's evidence of ground water declines does not in and of itself establish injury to its water right.

A&B's evidence of ground water declines (Exhibit 225) by itself was inadequate to establish injury to its water rights. Under Idaho law, A&B's delivery call triggers the Director's authority to determine A&B's entitlement to a particular quantity of water. Idaho law does not support a delivery call to obtain particular water levels. *AFRD #2*, 143 Idaho at 880, 154 P.3d at 451; *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 120 (1912). Further, even at common law, prior to adoption of the Ground Water Act, A&B could not have demanded

particular water levels in the absence of injury (*Nampa Meridian Irr. Dist. v. Petrie*, 37 Idaho 45, 223 P. 531, 532-33 (1923)), although upon a showing of shortage, A&B may have been entitled to request historic water levels as a means of relief from injury. Compare *Bower v. Moormen*, 27 Idaho 162, 147 P. 496 (1915), with *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933).

As Pocatello argued in its trial brief, the legislature refined the nature of prior appropriative ground water rights when it adopted the Ground Water Act, I.C. § 42-226 *et seq.* Under *Baker v. Ore-Ida*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973), the Supreme Court interpreted the Ground Water Act to have codified the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. The practical effect of this decision on appropriative ground water rights was to eliminate restoration of historic water levels as a form of relief from material injury to a water right. *Id.* at 634-36 (“[a]pparently our Ground Water Act was intended to eliminate the harsh doctrine of *Noh*... We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest ... [and] inconsistent with the Ground Water Act.”).

The Director interpreted his duties under the Ground Water Act stepwise: first he made an examination of the water supply available to A&B in light of its decreed beneficial uses. FOF 35-80. Finding no injury, he next looked to issues related to the District’s hydrogeology, well construction and well maintenance practices in order to determine whether there might be other problems related to A&B’s allegations. Order, FOF 81-142. Finally, he concluded that in the absence of a showing of shortage, there was no factual basis for his exercise of discretion with regard to determining “reasonable pumping levels”. Order, COL 21, 37, 38. In light of the Director’s interpretation of Idaho law as reflected in the January 29, 2008 Order, the Director properly declined to address reasonable pumping level or cost claims by A&B.

B. In any event, A&B did not link ground water level declines to injury to its water rights. [Pocatello's Proposed Findings § III.]

As described in § III of Pocatello's Proposed Findings, A&B presented evidence of ground water level declines, and asserted that these declines resulted in injury and shortage to its water right, but the causal link was never forged. In fact, as described previously, the A&B injury analysis must be disregarded as both factually unreliable and inconsistent with the law. The Director's economy in responding further to A&B's claims upon finding non-injury was proper. In the absence of a finding of injury, the Director had no authority to establish reasonable pumping levels.

CONCLUSION

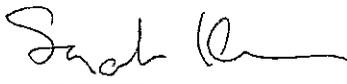
For the reasons described herein, and based on Pocatello's Proposed Findings submitted contemporaneously, Pocatello respectfully requests that the Director's Order be affirmed.

Dated this 23rd day of January, 2009.

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