

**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 WATER AND)
FOR THE CREATION OF A GROUND)
WATER MANAGEMENT AREA)**
_____)

**OPINION CONSTITUTING
FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATIONS**

PROCEDURAL BACKGROUND

Hearing was held commencing December 3, 2008, and concluding on December 18, 2008, on the A&B Irrigation District's Petition Requesting Hearing on the Director's January 29, 2008, Order. The initial proceedings began when the A&B Irrigation District filed its Petition for Delivery call dated July 26, 1994, requesting that the Director of the Department of Water Resources take action to insure the delivery of ground water to A&B as provided in its water right and to do what was "reasonably necessary and appropriate to protect the people of the State of Idaho from depletion of ground water resources which have caused material injury to Petitioner...." The Petition also requested the Director to designate the Eastern Snake Plain Aquifer as a ground water management area and to otherwise supervise the allotment and use of water from the ground water management area to insure the full utilization of A&B's water rights. The Petition for Delivery Call made these allegations:

6. By reason of the diversion of water by junior ground water appropriators located with the Eastern Snake Plain Aquifer, the Petitioner is suffering material injury as the result of the lowering of the ground water pumping level within the Eastern Snake Plain Aquifer by an average of twenty (20) feet since 1959, with some areas of the Aquifer lowered in excess of forty (40) feet since 1959, reducing the diversions of A&B Irrigation District to nine hundred seventy-four (974) cfs, a reduction of one hundred twenty-six (126) cfs from the diversion rate provided in the water right above referred to.

OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

7. That the reduction in diversion rate as the result of the reduction in the ground water tables has reduced the diversions from forty (40) wells serving approximately twenty-one thousand (21,000) acres to a diversion rate which is less than is required for the proper irrigation of lands served by the said wells.

Proceedings on the Petition for Delivery Call were stayed pursuant to a Pre-Hearing Conference Order dated May 1, 1995, which set forth various conditions and provided that, "IDWR retains jurisdiction of the petition for the purpose of continued review of information concerning water supply, the impact of use of ground water on other uses of the resource and the determination and designation of the ESPA as a ground water management area." The Pre-Hearing Conference Order provided that "[a]ny party may file a Motion to Proceed at any time to request the stay be lifted."

On March 16, 2008, A&B Irrigation District filed a Motion to Proceed requesting the Director to lift the stay and to proceed "in the administration of the Eastern Snake Plain Aquifer (ESPA) in such manner as to provide ground water to A&B under its ground water rights that are being interfered with and materially injured by junior ground water appropriators in the ESPA..." The Motion renewed the request in the Petition for Delivery Call that the Director designate the ESPA as a ground water management area and reiterated the allegations in the Petition for Delivery Call. A&B made additional allegations:

During 1995 through 2006, A&B has expended approximately \$152,000 per year for well rectification efforts to divert water from the declining aquifer, and has expended in the years 2002 through 2005, approximately \$388,205 per year in drain well rectification, and reductions in operational waste to increase water supplies to meet a part of the shortages occurring as the result of declining ground water tables. Since 1980, and primarily since 1994, A&B has made numerous attempts to solve the reduction in ground water irrigation supply caused by declining well yields. A&B drilled 8 new wells to replace wells that would no longer provide an adequate water supply as the result of the lower ground water tables, has deepened 47 wells, has replaced the bowls on 109 pumps in wells that are now pumping from substantially lower water levels, 137 pumps have been lowered to increase their capacity as a result of declining ground water tables, and 7 wells have been abandoned because they no longer provide adequate water. Deepening of wells with declining well yield problems (caused by falling ground water levels) has not provided an appreciable rectification of declining well yield, and since 1994 the total water supply from the A&B wells has declined to 970 cfs. Many of the wells that have been drilled deeper, some to depths of 800 feet, because of low transmissivity and low well yields deeper in the aquifer, do not produce additional water. All of these issues cause A&B to suffer water supply shortages during peak demand periods.

The Motion to Proceed asserted ground water level declines on average since 1999 of over 12 feet, 22 feet since 1987, and between 25 to 50 feet since the early 1960's. According to the Petition, "A&B is unable to divert an average of 0.75 of a miner's inch per acre which is the minimum amount necessary to irrigate lands within A&B during the peak periods when irrigation water is most needed."

As a consequence of the Motion to Proceed the Director conducted a status conference on September 20, 2007, and issued an Order Lifting Stay, Setting Hearing Schedule, and Appointing Independent Hearing Officer. Parties who wished to remain parties following the Motion to Proceed were required to respond affirmatively in writing of their intent to do so.

Proceedings in District Court resulted in an Order issued October 29, 2007, requiring the Director "to make a determination of material injury, if any, in accordance with Rule 42 of the Conjunctive Management Rules on or before January 15, 2008." This deadline was subsequently extended for two weeks by the District Court. On November 16, 2007, the Director issued an Order Requesting Information from A&B dating back to 1959, and A&B provided information to the Director. On January 29, 2008, the Director entered the Order at issue in this case, determining among other things that A&B Irrigation District had not suffered material injury as a consequence of junior ground water pumping and denying the request for designation of the ESPA as a ground water management area. A&B Irrigation District's Motion Requesting Hearing on the January 29, 2008, Order resulted.

I

THE PARTIES

1. The A&B Irrigation District is an irrigation district formed by the landowners of the Northside Pumping Division of the Minidoka Project, a federal irrigation project, to operate and maintain the project and to repay the United States for the construction costs of the project. A&B was formerly called the Minidoka North Side Pumping Division. Operation of the project was transferred from the U.S. Bureau of Reclamation to A&B in 1966 under a repayment agreement that has approximately fourteen more years to run before it is completed. There are 500 to 550 landowners within A&B which is divided into two units – the A unit which provides surface water

for irrigation and the B unit which provides water for irrigation from ground water pumping. The ground water rights of Unit B are in issue in this case. There is tension between the irrigators in Unit A and Unit B as a consequence of surface water being used from Unit A to meet needs in Unit B on 1377.8 acres. There is apparently an effort by landowners in Unit A to split from Unit B. That conflict is not at issue in this proceeding but is an indication of difficulties Unit B has at times in meeting the needs of its irrigators.

A&B is the beneficial owner of Water License No. 20736, now known as 36-2080, which was partially decreed in the SRBA Court May 7, 2003, entitling A&B to divert 1,100 cfs, 250,417.20 acre feet per year, for the irrigation of 62,604.3 acres with a priority date of September 9, 1948. The 62,604.3 acres was based upon the irrigable acres in the original farm units. The development of sprinkler technology has enabled the irrigation of additional lands which were not practical for irrigation with gravity flow. A subsequent transfer proceeding allows A&B to irrigate up to 66,686.2 acres under water right 36-2080, including 4,081.8 enlargement and beneficial use acres. The maximum rate of diversion of 1,100 cfs remained. A&B's ground water right contains a total of 188 authorized points of diversion, and A&B currently uses 177 wells. Additionally there are six or seven temporarily abandoned wells and five or six wells that were initially constructed as injection wells but that have been repermited as production wells if needed.

2. The Idaho Ground Water Appropriators, Inc. (IGWA) is an Idaho non-profit corporation organized in 1984 composed of ground water districts, municipal users, industrial users and dairies who utilize ground water and whose ground water rights are junior to the rights of A&B. The primary purposes of IGWA have been to represent ground water users in court proceedings and legislative activities, as well as help in providing mitigation resources for its members. The rights of IGWA members to continue pumping or alternatively an obligation to provide mitigation will be affected if A&B is found to have suffered material injury as a consequence of the junior users' pumping. The ground water district members include the American Falls-Aberdeen, Bingham, Bonneville-Jefferson, Clark-Jefferson, Madison, Magic Valley, and North Snake Districts who have 1,695 members irrigating 823,637 acres. The Goose Creek Irrigation District and the Southwest Irrigation District are also members. Industrial users include Busch Agricultural Resources, Inc., Jerome Cheese, and United Water Idaho, Inc. Municipalities include the cities of American Falls, Blackfoot, Chubbuck, Heyburn, Jerome, Paul, and Rupert. Exhibits 483-485. IGWA appears in

this proceeding to support the January 29, 2008, Order entered by the Director denying the delivery call made by A&B.

3. The Committee of Nine and Fremont-Madison Irrigation District represents interests of irrigators who may be impacted by the decision in this case.

4. The City of Pocatello is a municipal corporation that utilizes ground water pumping to meet its present and future needs. The City serves in the area of 51,000 people within its boundaries. It has ground water rights that are junior to A&B's rights which could be adversely affected if A&B is found to have suffered material injury as a consequence of junior users' pumping.

Pocatello's municipal water supply is provided from wells in the Lower Portneuf River Valley Aquifer and one well in the ESPA. Although the wells in the Lower Portneuf River Valley are currently outside the administrative boundary for the ESPA, the Director has indicated that the administrative boundary will likely be expanded to include wells on various tributaries to the Snake River.

Pocatello also owns several wells northwest of the city in the ESPA that provide water to the Pocatello Airport and for land application of biosolids from the city's wastewater treatment plant. The wells are within the administrative boundaries of the ESPA and subject to potential curtailment.

Pocatello also has surface water rights which are not implicated in the A&B delivery call.

II

HISTORICAL BACKGROUND

The history leading to the present dispute harkens to a post-war era when people thought and performed large, with the view that big problems required big solutions.

1. The Definite Plan Report. A few excerpts from the Minidoka Project North Side Pumping Division Definite Plan Report give the flavor of the vision that dominated the era. In Chapter I the Report describes the area and the project:

The North Side Pumping Division of the Minidoka Project would provide for the irrigation of 77,650 irrigable acres of potentially productive, dry sagebrush land on the Snake River Plain in southeastern Idaho. **The lands of the Division share the physical characteristics which have made possible elsewhere in the Upper Snake River Valley one of the most successful irrigation developments in the United States.**

Further, the project would benefit veterans of two wars:

Nearly 695 new farm units can be made available for settlement by development of the North Side Pumping Division. Almost all of them will be on Federal public domain and, consequently, would be made available for homestead entry. Under prevailing law, veterans of World War II and the Korean conflict would have preference in acquiring the new farms in this manner.

2. The need for water. As noted in the Definite Plan Report, Chapter I, page 6, “The development of irrigated land years ago outran the supply of water available during summer from the natural flow of the Snake River, and a series of storage projects were undertaken.” And “on the basis of present water use and rights, the Upper Snake River Basin is approaching full utilization of its surface water resources.” In sum, there were vast amounts of fertile but arid land suitable for agricultural development if water were available.

3. The homesteads. In the present state of knowledge and in the atmosphere of sophisticated litigation it is possible to lose the perspective that the development of the Eastern Snake Plain Aquifer was in many respects more akin to the old west than present day. This description of the homesteading of Unit B by Virgil Temple suggests the time:

What they done is they had a – what you call a homestead drawing. To be eligible to be in this drawing, you had to be a Veteran. You had to have, I think two years’ of experience bucking hay or picking potatoes on a farm. And maybe it was 1,200 or \$1,300 worth of cash asset. Then you was eligible to put your name in for a drawing. Down in the Rupert square down in the middle of Rupert, they would have these celebrations, and they would have all these names in a big old tub, and they would roll them around like that (indicating), and they would pull out a number – or a name – excuse me. And if that was your name, you was eligible to draw a farm unit.

Then after that occurred, they took the first group that drew. You’ve got to remember, there was only certain groups brought in at certain times. The whole project was not constructed at one time. The first groups was being operated and farmed as the second and third was just getting the wells drilled, and the laterals constructed.

So then you’d get on a bus, and you would run out through the sagebrush, and look out the window. And they say, we., there is a farm unit over there. It might run from that high brush to this one, and you would select it. There was no county roads. There was no – no

roads, whatsoever, other than what the well drillers made driving back and forth through the sagebrush to get out the wells.

Then once you got that, you had to move on to the property. You had to establish a living quarters. And you had to farm that for, I think, three years, somewhere in that vicinity, and then you could apply for a patent, and the land was actually transferred to you.

That was the homesteaders that was – that had drew up the land, and was getting ready to build a chicken coop, or whatever they built in those days. Some of them was chicken coops to live in, because there was nothing out there except sagebrush.

Transcript, page 320

4. Development subsequent to A&B. The promise of progress and prosperity extended well beyond the North Side Pumping Division. Entities and individuals represented by IGWA had the same opportunities to develop immense quantities of additional dry land with the availability of inexpensive electrical power and the technology for deep well production of water. As the promotional literature of Idaho Power proclaimed, this development could “make the desert bloom,” and that blossoming was encouraged by State policy. In fact the desert did bloom with productive agricultural development and the growth of communities around that development. Now the conflict exists as to whether the subsequent development has infringed upon the water rights of the earlier A&B Irrigation District project.

III

THE BURDEN OF PROOF

1. There is a presumption that a senior water user is entitled to the amount of water set forth in a license or decree. *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 878, 154 P. 3d 433, 449 (2007), addressed the threshold burden in a water adjudication in discussing the Conjunctive Management Rules when there is a decree. A&B’s water right has been determined in a partial decree.

The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has. We note that in the Initial Order entered in this case, the Director requested extensive information from American Falls for the prior fifteen irrigation seasons, to which American Falls objected in part. While there is no question that some information is relevant and necessary to the Director’s determination of how best to respond to a delivery call, the burden is not on a

senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right.

2. The senior water right holder must allege material injury under oath setting forth the basis of that belief. *Id.* 878. A&B asserted material injury as a consequence of declining aquifer levels which it attributed in part to junior ground water pumping. This required the Director to respond and determine if A&B had suffered material injury as a consequence of junior ground water pumping. According to *AFRD#2*, 879, “Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior’s call.” The language of *AFRD#2* is that after “the initial determination” of material injury is made the junior has the burden of establishing a defense to the senior’s call, not that the allegation of material injury constitutes that determination. The allegation of material injury under oath invoked the Director’s authority and responsibility to develop the facts upon which a well-informed decision could be made as to the existence of material injury and the consequences if there were material injury.

3. The parties may rely on facts developed by the Director, and in the absence of more persuasive contradictory evidence the Director’s findings are accepted. The hearing process developed some information that was not available to IDWR when the Director entered the January 29, 2008, Order. The record that was made available to the Director was included as part of the record for the hearing. The Director’s findings are accepted as part of this recommendation unless the recommendation explicitly finds differently or the Director’s findings are inconsistent with the findings in this recommendation.

IV

APPLICABLE PRINCIPLES

1. Prior to this proceeding the Hearing Officer has made recommendations in the Spring Users case and the Surface Water Coalition case. The recommendations in those cases included interpretations of the State Constitution, Idaho statutes and the Conjunctive Management Rules. Those interpretations will be the subject of judicial review and may be modified or found to

be in error. However, for now the interpretations in the prior recommendations are incorporated in this recommendation to the extent that they are relevant. To the extent necessary for clarity they will be repeated. Further explanation will be made as necessary for the particular issues in this case.

2. In a declaratory ruling prior to this hearing the Hearing Officer rejected A&B's claim of entitlement to historic pumping levels, concluding that "[t]he Idaho Ground Water Act is applicable to the administration of water rights involved in this case, including those rights that pre-existed the adoption of the Ground Water Act in 1951, and are subject to administration consistent with the subsequent amendments to the Act." May 26, 2008, page 7. The protection to A&B's pumping levels arises at the point it must exceed "reasonable pumping levels" to satisfy its water right, consistent with the Idaho Ground Water Act.

V

THE DECLINES IN THE AQUIFER

1. A&B was developed when the levels of water in the aquifer were near their peak. At the time the project was developed that resulted in the creation of A&B, aquifer levels were high. Gravity flow surface irrigation resulted in substantial amounts of water from the Snake River entering the aquifer. There was very limited ground water pumping to withdraw water from the aquifer. The major drought of the 1930's had abated.

2. There have been declines in the aquifer level since the completion of the A&B project attributable to reduced incidental recharge, a sustained period of drought and ground water pumping. As a general proposition a rule of one-thirds has commonly been stated. That is, one third of the decline in the aquifer is attributed to each factor. That, however, is an over simplification and cannot be applied as a scientific principle to determine issues in this case. It is a convenient concept that focuses on the reality that there are multiple interrelated causes for the declines in the aquifer.

3. The model scenario. At the direction of the modeling committee, Dr. Wylie ran an A&B scenario to determine whether more of the drawdown observed at A&B was due to pumping at A&B or whether it was due to all the other pumping on the Eastern Snake River Plain. See transcript, pages 1381-89. The effects of ground water pumping in the ESPA vary spatially. The

drawdown in areas of the southern portion of Unit B was significantly greater as a result of not being hydraulically connected to the Snake River and the fact that boundaries of the area do not let in much additional ground water. Actual measurements indicate that the model run exaggerates the impact of ground water pumping. The model run does not substitute for actual measurements of the declines that have occurred.

4. Actual measurements. Figure 2 to the Director's Order shows the aquifer changes from the Spring of 1980 to the Spring of 2005 based on actual measurements that range between fifteen and twenty-five feet, a portion of which is attributable to ground water pumping. Information gathered from the United States Geological Survey reflected in Exhibit 159 reflects declines of about 38 feet. In figure 8 the decline is forty feet. Figure 9 shows a decline of 50 feet. Finding 112 of the Director's Order determines that the average water level decline for the original production wells is 25.2 feet based on the A&B spreadsheet. "Based on the most recent available data, the total water level decline since the wells were installed ranges from 8.5 feet to 46.4 feet. The average decline for the period 1999 to 2006 is 12.6 feet." Finding 112. That finding is supported by credible evidence.

5. Annual recharge of the aquifer exceeds the withdrawals from ground water pumping. At the present time recharge of the aquifer far exceeds the depletion from ground water pumping. That does not mean that there cannot be declines in the aquifer that impact A&B. Indications are that there is less water coming into A&B than there is leaving the area around A&B. Dr. Wylie responded to questions concerning this condition:

A. The only way you can have the declines is if the water leaving the aquifer is greater than the water coming in. And you can still have that when pumping is much less than recharge.

Q. So in particular to the A&B area, would it be fair to say that the water coming into A&B is less than the water that's either being pumped out or leaving the A&B area through the ground water table?

A. That's correct.

Q. And that results in those declines that we're observing in those figures from the Dr. Ralston report?

A. That's correct. The clear indication that there's less water coming into A&B than there is leaving the around A&B.

OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

VI

THE CLAIM OF MATERIAL INJURY

1. A&B maintains that it has suffered material injury as a consequence of junior ground water pumping. A&B asserts that it is entitled to and needs the full rate of delivery that is authorized by the partial decree during the peak periods of demand when the weather is hot and dry. Under the water right that rate would be 0.88 miner's inches per acre. The range of the dispute as to whether the irrigators in Unit B suffer material injury if less than 0.88 miner's inches are delivered is represented by the expert testimony. Dr. Brockway computed the amount to be 0.89 miner's inches per acre to avoid crop loss or yield reductions. Mr. Sullivan concluded that 0.65 miner's inches would be adequate with proper management of the water. The Director adopted a rate of 0.75 miner's inches. These amounts were water at the well. Conveyance losses to the farm turnouts were estimated to be between zero and five percent. Three percent is a proper figure to use.

2. The question of material injury depends on a number of factors beyond the fact that A&B is not receiving 0.88 miner's inches from all well systems in Unit B during the peak period.

VII

MATERIAL INJURY

1. Conjunctive Management Rule 10.14 defines material injury as "Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42." CM Rule 42 provides:

DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).

0.1. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

- a. The amount of water available in the source from which the water is diverted.
- b. The effort or expense of the holder of the water right to divert water from the source.
- c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior priority surface or ground water right. This may include the seasonal as well as the multi- year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply. (emphasis added).**
- d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.
- e. The amount of water being diverted and used compared to the water rights.
- f. The existence of water measuring and recording devices.

CM Rule 42.1.c. extends the relevant factors for consideration in determining the issue of material injury to disputes between senior and junior ground water users.

2. The Director could consider information prior to the partial decree in considering material injury. It is clear that some historical factors prior to the partial decree are relevant in determining whether there was material injury. Changes in irrigation efficiencies are relevant to a determination of whether crops can be raised with less water. The addition of acreage to be irrigated is relevant to the question of whether the water supply is adequate. History informs. It does not change the water right. A&B's water right is as stated in the partial decree.

VIII

THE HYDROGEOLOGIC SETTING

1. The A&B Irrigation District is located in a transition zone where the subsurface to the north and northwest is mostly basalt and the subsurface to the south and southwest has zones of sediment. According to a 1985 U.S. Bureau of Reclamation report the aquifer is made up of sediment and basalt. When the basalt flow sheets are "deposited one upon another to form a relatively thick sequence, and where the basalt is highly fractured and/or contains numerous rubble or cinder zones, the water yield is large, up to several thousand gallons per minute. Where the flow sheets are made up of dense, and massive basalt and/or is covered, penetrated, or innerbedded with

OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

fine sediment, the water yield is small to moderate. One such area is in the southwest part of Unit B located mostly in T9S/R22E where several low yielding wells are found.” Exhibit 121: Hydrogeologic Analysis of the A and B Irrigation District Area, prepared for the Idaho Department of Water Resources, January 2008, page 1079, quoting the Reclamation Report.

2. The composition of the subsurface is important as it influences the initial yield of a well and the likelihood of success in increasing the yield by deepening the well:

The first step in the analysis of well deepening potential is to examine the subsurface stratigraphy. Water producing zones are not present in most of the sedimentary interbeds because they are composed dominantly of clay. Thus, the presence of a clay interbed that extends hundreds of feet below the present depth of a well makes the probability of successful well deepening very low. Conversely, the presence of basalt (absence of clay interbeds) in the depth interval below the bottom of a well means that there is a reasonable chance that well deepening can be successful.

Hydrogeologic Analysis, p. 1089.

A consequence of this analysis is that reductions in the productivity of well yields following decreases in the level of the aquifer are not necessarily remedied by simply drilling the well deeper. Unless productive flow zones can be reached by well deepening the effort and expense is wasted and the remediation fails.

3. A&B has problems in some well systems in the southern portion of Unit B where sedimentary deposits are present. Two wells in township 9 south, range 22 east were drilled to 700 and 1,000 feet and abandoned. This is indicative of the problems in the southern portion of Unit B. In this area about 1,300 acres have been taken out of service from ground water pumping and have been converted to surface water irrigation with water from Unit A.

4. In general the wells in township seven south and eight south have relatively high specific capacities which is the ratio of the discharge divided by the drawdown. What this means is that wells with a higher specific capacity have a greater ability to produce water because there is less drawdown from pumping – replacement water enters the zone from which the water is being pumped more rapidly than in lower specific capacity wells. Wells with a lower specific capacity do not replenish as quickly, the cone of depression is deeper, and there is more likelihood of wells in proximity interfering with one another. The effects of pumping from wells with a low

specific capacity are more localized, whereas wells with a high specific capacity spread the effect over a more regional range of the aquifer.

5. Well deepening is likely to be successful in the northern portion of the project and relatively low in parts of the southern portion of the project. Overlying these generalizations is the fact that the influences on the productivity of water are under the surface where they cannot be seen. Identifying preferential pathways for the movement of water is not possible with precision. What is going on beneath the surface as it influences the productivity of water from a particular well site may be inferred from the general characteristics of the area but cannot be known with certainty. Well driller reports which details geologic and hydrologic information are a valuable source of information for reckoning what conditions exist in a particular area.

6. Unit B wells were sited with significantly less information from drilling reports than is now known. Regardless, as noted in Dr. Ralston's testimony, the general characteristics of the southern portion of Unit B were known prior to its development, albeit without the extent of information now available:

Q. The last question on this particular subject, Dr. Ralston. Would the presence of these early lake bed sediments be understood at the time the project was being considered and developed?

A. The 1948 report by Nace, I quoted that in my document, indicated that the presence with the – the lake bed sediments were there. The extent and importance of the, I suspect was only known as you started to go more and more west. But the general concept of the fact that this was a low energy depositional environment with sediments was known based on the 1948 report by Nace.

Nonetheless, Dr. Ralston was asked "whether the design of wells as they were designed in 1950, whether that design was reasonable based upon information, knowledge and techniques available at that time?" Dr. Ralston answered, "Yes, I think they were reasonable." Transcript, pp. 143-44.

7. This was a pioneering project with some risks for shortages in the southwest portion of the project known. Unit B was a pioneering project on a large scale. Much less was known about the interrelationship between pumping and the quirks of the aquifer. However, in the late 1940's Nace made several recommendations including drilling test wells to evaluate whether or not the Burley lake beds, or other lake bed sediments, extended northward into Unit B. He did not think it likely, but it was a concern that has been justified. Problems were encountered as early 1960,

OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

indicating that the depth and productivity of wells in the southwest area was limited in an area that otherwise had very desirable agricultural land. Exhibit 152BB.

8. The need to import water to areas of low well production was considered early in the project and is now evident. The idea of importing water into an area of desirable agricultural land with limitations on the productivity of wells in that area was expressed by the Regional Director to the Construction Engineer in a letter dated March 15, 1960. Exhibit 152QQ. On October 9, 1961, the project superintendent in Burley wrote the Regional Director a Final Report of Deep Well Pump Performance, 1961 Irrigation Season, stating "The downward trend in pumping water levels is readily apparent, and the absence of any tendency of ground water levels to stabilize is of considerable concern." Exhibit 152BBB. It is now clear that the transmissivity is lower, the water levels lower, and the pumping lift is greater and more expensive. Sean Vincent summed up the problems, observing that "the southwest area in relation to the northeast area of the project is problematic in terms of initial well drilling, in terms of well yield, in terms of maintenance on pumps. Basically, everything that you want a well to do, is more difficult in the southwest area." Transcript, pages 1756-57.

9. Shortages in the water available from pumping in the southwestern part of Unit B and the potential need to import water from more productive areas were foreseeable. The practicality of greater interconnection of wells early in the project is not shown in the record. However, the potential for that need was known. The water right made all the wells appurtenant to all the land within the project. The decision not to tie the water right to particular pumps serving particular parcels of land within the project indicates that importing water from other locations within Unit B might be necessary.

IX

THE NATURE OF WATER RIGHT NO. 36-2080

1. Unit B is divided into well systems which are independent delivery systems that stand alone, consisting of one or more wells and pumps that convey water to particular farm units that are served by that system. Approximately eighty-eight of the systems have a single well. For the farm units within that system that well is the only source of water from the district.

Approximately forty of the systems have two wells which pump water into a common delivery source. There are two or three farm units that have three wells that pump into a common delivery source. In sum, Unit B has approximately 130 well systems that operate independently.

2. A&B currently operates 177 wells. It is authorized to use 188 wells if needed.

3. A fundamental issue is whether the right established in no. 36-2080 should be measured in the aggregate. That is, if the amount that can be pumped from all wells is totaled and that total when averaged over the acres in Unit B would meet crop needs, is the right satisfied even though some well systems within the project may not provide the amount of water necessary to meet crop needs? Or should the right be analyzed on a system by system basis? That is, if a particular well system cannot supply the amount necessary to meet crop needs, is there material injury, even though on average there might be enough to meet crop needs. Either approach taken to the extreme can produce results inconsistent with the history and understanding of the water right.

4. It is proper to consider the system as a whole, but consideration of individual well systems is necessary. The history of the licensing process makes it clear that the Unit B system is not tied to a particular well providing water only to particular land. The Definite Plan Report's analysis of the water supply made this statement at page 73 with regard to ground water filing for Unit B:

In the best interests 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.

However, on page 74 of the Definite Plan Report the Bureau stated that, "The water supply for Unit B will be pumped from ground water beneath the Unit by means of a number of deep wells ranging in capacity from about 0.8 to 10.6 cubic feet per second. The area served by each well will be so limited that all wells will be able to supply the maximum monthly requirement of their respective service areas." The Definite Plan Report also makes reference to subdivision of the project with the anticipation that each well would serve on average four farm units. Further, "Each well will have a small lateral system which will be interconnected, where practicable, with the lateral systems of wells serving contiguous areas." Report, page 82.

A letter from the Department to the Bureau of Reclamation dated December 21, 1964, requested a specific well and land list:

This department is desirous of issuing a license as specified above upon receipt of a list of the wells and lands to be submitted by the licensee, and therefore asks that said list be submitted not later than January 15, 1965.

The Bureau made this response:

We emphasize that the project is one integrated system, physically, operationally, and financially. Some lands, depending on project operational requirements, can be served from water from several wells. Therefore, it is impractical and undesirable to designate precise land areas within the project served only by each of the specific wells on the list.

5. The license and the partial decree did not limit the place of use. The license that was issued did not limit the place of use for any well. The partial decree lists a number of points of diversion and designates the place of use as “the boundary of A&B Irrigation District service area pursuant to Section 43-323, Idaho Code.” The structure of the right allows water from a particular pump to be used anywhere within the authorized acres. However, it is also clear that the project was not designed for all pumps to be interconnected to distributed water to all parts of the project. The project was designed around the concept of well systems with one or more wells providing water to one or more farm units. The Definite Plan Report, Chapter I, page 3 describes some of the problems of distribution from a main canal and lateral system, contemplating supplies of water coming from particular pumps to particular geographic areas:

The eastern portion of the Division has numerous, small, high areas which would complicate distribution of water from a main canal and lateral system. This topographic feature, however, will not affect water from wells located on these high points...The southwestern portion of the area is made up of flat to gently rolling land bodies surrounding a few large, high areas. In contrast to the eastern portion, it is well suited to the distribution of water from an ordinary canal system.

This view of how water would be distributed is set forth at page 48, discussing distribution losses:

On the average, five farm units will be served from each well in Unit B. As a result of the grouping of farms about the well, the length of canal required to make delivery will be very short. The average well will require not more than one mile of canal with a capacity of 5.6 cubic feet per second to make its deliveries.

6. Consideration of the system as a whole must also account for the effect upon individual systems when the number of short systems would constitute a failure of the project. The geography of the land within Unit B, the design of the system, and the practices in utilizing the system prior to entry of the partial decree indicate that the water right adjudicated is not satisfied by showing that the combined total of water that can be pumped from all the wells is equal to the amount necessary to avoid material injury if the water were equally distributed. It is proper to consider the entire system, but that consideration must account for the fact that water from one pump is not accessible to the entire acreage. Pumping water from wells in excess of what can be beneficially used on the property to which the water can be delivered would be waste, so counting excess water that cannot be utilized towards the water right would be improper. The theoretical right to apply the water from any pump to any land must be tempered by the reality of the system as it was designed and utilized and partially decreed. If the entire well system could be interconnected economically the issue of material injury would be gauged by the total capacity of the system to produce water.

7. The ability to interconnect the entire system has not been shown, but the ability to interconnect greater portions of the system remains a question. According to Dan Temple, the manager of A&B Irrigation District since 1997, a complete interconnection would be difficult and prohibitively expensive:

Q. What are the limitations that A&B has to interconnect its well systems and distribute water across the project entirely or even partially?

A. Well, one naturally is the cost. There would be tremendous cost to do that. There is the right-of-ways, there is the easements, the pipelines that we've described here earlier that we've put in in conveyance facilities. More times than not we have to hire rock saws. There is a lot of rock right under the ground, so we can't get the depth for the pipe and we have to saw that rock to install pipes. Easements that would be – all those costs.

Transcript, page 481.

According to Mr. Temple there was a \$360 million estimate prepared by an engineering firm for IDWR to convert Unit B from a ground water irrigation system to a surface water system – a cost he believed would be similar to interconnect all of the pumping systems, except for the cost of a diversion structure from Lake Walcott and several miles of piping from Lake Walcott to the district. Transcript, page 482. Those costs are not reflected in this record and must be considered speculative. Nonetheless, the feasibility of a complete interconnection of the system in Unit B has not been shown. There is a rendering of potential partial interconnections within the system, also without an estimate of cost sufficient to determine in this hearing. The evidence does not demonstrate a level of certainty that the partial interconnections could be implemented. The rendering of partial interconnections does, however, indicate that some of A&B's water short wells are in proximity to Unit B wells that pump over 0.83 inches per acre. Exhibits 416, 427-9. It is likely that a greater level of interconnection can be achieved than has been accomplished.

There are also legal problems within the contract with the Bureau of Reclamation on pressurization of water and engineering problems of mingling water from pumps that produce greater and less pressure on the water entering the system. Neither the extent of these problems nor the solution to these problems is reflected in this record.

8. A&B has not undertaken an engineering analysis or other study to determine the feasibility of moving water from a long system to a short system. Transcript, page 704, Temple testimony. In light of the manner in which the water right was defined in the license and partial decree it should do so. IDWR should lend whatever expertise it has to that effort.

9. A&B's duty to interconnect the system before calling for curtailment. It appears that interconnection of the entire pumping system is not simple or inexpensive either legally or practically. Considering the fact that the project was developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury. However, it is equally clear that the licensing requested by the Bureau of Reclamation envisioned flexibility in moving water from one location to another. Consequently, there is an obligation of A&B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from junior users. A&B has some

interconnection within the system to utilize the water it can pump, but the record does not establish whether further interconnection is either financially or technically practical.

10. The portion of short wells in the project is not sufficient to show a failure of the project. There is evidence that in 2007 there were 5,000 acres in Unit B that were being served by well systems that delivered less than 0.75 miner's inches per acre. The limited amount of this acreage is a consequence of costly rectification efforts. Temple testimony, pages 666-67. The wells that are short in the production of water that are unlikely to be susceptible to successful remediation are limited to the southern portion of the project. They do not serve a sufficient portion of the project to deem their failure a failure of the project as a whole considering the terms of the license and partial decree.

X

DRILLING THE WELLS

1. Cable tool drilling was appropriate. At the outset of the project wells were sited by the Bureau of Reclamation for drilling at the high points of the property, since gravity flow was the method of irrigation to be utilized. Cable tool and mud rotary were the two methods of well drilling in the 1950's when Unit B entered the stage of reality. Mud rotary was not practical for the drilling in Unit B. Cable tool was the technique used which involves raising and lowering a heavy weight which pulverizes the rock in the bottom of the hole and the sediments. This debris is bailed out, and the process continues. Cable tool was the system available at the initiation of Unit B. There was one attempt to use a rotary rig in 1955 or 1956 by a driller from California. The attempt failed for lack of power to develop sufficient air to move the cuttings to the surface. The California driller returned to California. Virgil Temple, transcript, p. 272-73. There was no fault or lack of judgment in using cable tool rigs. The cable tool system is still in use, and in instances is an acceptable technique, though now some techniques significantly shorten the time for new drilling or rectification and avoid the narrowing of the drill hole which is sometimes a problem.

2. Alternatives to cable tool drilling have been developed which in some circumstances are preferable to cable tool drilling.

a. In the 1950's the direct rotary method developed which utilizes a rotating steel bit that grinds up the material it encounters. Air then circulates up the hole. This method requires casing in any unstable environment. As noted, the attempt to use such a system in the 1950's on the Unit B project failed. It was not a viable alternative at that time.

b. In the 1970's to 1980's an air hammer approach developed, utilizing a percussion hammer that breaks up the rock it encounters. This technique speeds drilling significantly. As this system developed it allowed driving casing in simultaneous with the drilling.

c. Variations in technique have developed. The most recent and significant for this case is the dual rotary system which allows the operator to spin the casing, generally in the opposite direction of the drill bit, which permits drilling through hard rock and advancing the casing to the areas where needed. An advantage of this process is that casing can be taken where necessary without narrowing the hole that is being drilled as is sometimes necessary with the cable tool method.

3. A&B utilizes acceptable drilling techniques. A&B is aware of the various methods of drilling for new wells and the rectification of existing wells. Depending on availability and cost, it utilizes appropriate drilling techniques for the conditions that exist.

XI

THE OPERATION OF THE WELL IRRIGATION SYSTEM

1. The system in Unit B was designed as an open delivery discharge system in which water from the aquifer is discharged into a large pool where it is measured. Water then flows across cipollotti weirs out of the pond down an open conveyance lateral system to the individual farm gates. The flow ranges from two to ten cfs, depending on the particular well system and the land that needs to be served.

2. The closed delivery system exists now. An alternative system in use today is a closed system in which water users have hooked their pumps directly to the district pumps and move the water through their sprinkler systems to the farm units, eliminating the open conveyance facility.

3. Another alternative that has developed is the installation of pipelines in the open conveyance facilities, injecting the water into the pipeline where it flows to the farm units where it is pumped onto the fields by the farmers.

4. The alternative systems that have been developed by A&B over the years are more efficient than the open conveyance system, eliminating ditch loss and evaporation. The current system wide conveyance loss of water is between three and five percent.

5. There has been a transformation from a gravity flow system to the use of sprinklers. Initially irrigation was accomplished by gravity flow. As time has passed this has been replaced by sprinkler systems which are more efficient in the use of water. By 2007 only about 3 to 4 percent of the irrigation in Unit B was irrigated by gravity flow.

6. There has been a significant reduction in the laterals and drains since the project was developed. According to exhibit 200L the original conveyance system included 109.71 miles of laterals and 333 miles of drains. Exhibit 200K, which shows the current system, indicates 51 miles of laterals, 138 miles of drains and 27 miles of distribution piping.

7. A&B has eliminated 69 drain water injection wells for water quality protection purposes. Exhibit 114. This water may now be used for other purposes.

XII

USE OF THE WATER RIGHT

1. Under the annual operation and maintenance assessments the landowners within Unit B are allocated three acre feet per season delivery volume. A&B tracks the total of all acre feet pumped and all acre feet delivered to every landowner on a monthly basis, notifying each of the amount used. There is an excess charge for any amount above the three acre feet entitlement.

2. A&B delivers water on a demand system, running typically from April 15 through October 15, subject to some variation based on climatic conditions. A&B delivers water based on written orders from its water users. The requests for water must be made twenty-four hours in advance. Peak season is reached during a period in June and July and may extend through the latter part of August.

OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

3. Typically the demand for water from irrigators exceeds the amount that can be pumped, and the irrigators go on allotment, receiving a proportional amount of their share of the pump's total output. The amount will vary from pump system to pump system depending on the particulars of the well's capacity to produce water. There is no system in place to limit irrigation of the water spread acres from the amount of water allotted.

4. Measurement of water levels is taken throughout the year utilizing an air line down all the wells in the project. There are three key readings – the spring before pumping starts, the peak season, and the fall after the water is shut off.

5. As an irrigation district A&B can change its irrigation district boundary without filing a transfer with IDWR.

Q. Okay. And with a digital boundary, what that does is it sets forth the area – the outside area that – within which A&B is allowed to irrigate a certain number of acres; is that correct?

A. Right.

Q. And A&B enjoys the opportunity to move around those acres so long as it doesn't exceed the maximum number of acres within that boundary; is that true?

A. They could move acres around? Is that your question?

Q. Yes.

A. Yes. Large canal companies enjoy that same privilege.

Q. Right. But A&B also enjoys that privilege to do that?

A. Yes.

Transcript, pages 1314-15.

XIII

THE CAPACITY OF THE PUMPS

1. There is a dispute over whether A&B is asking for curtailment or other mitigation for a lack of water that the system is not designed to deliver. This focuses on language in the A&B records which indicates that 0.75 is a design criterion for the pumps in the system. If that were the case the design of the system would not produce the 0.88 that A&B claims that it is entitled to receive. A&B's records over a period of years have identified the 0.75 as a design

criterion. However, A&B maintains that this misinterprets the intent which is that the 0.75 is a rectification criterion – that is, when the production of a well falls below 0.75 steps should be taken to increase the output.

2. IDWR has proceeded on the basis that 0.75 is what A&B is trying to deliver, according to Tim Luke:

A. You know, I think it's – you know, from all that's been discussed about this, it seems clear that the .75 is the current goal I guess, of what A&B is trying to deliver.

Q. If they can do better, great, but .75 is what they're trying to get?

A. Right.

Q. Right.

A. And I think that's a reasonable amount. That's from my discussions with farmers, with water district watermasters, with sprinkler people in that area. Three-quarters of an inch per acre is what the systems are typically designed for, and that's what a lot of people use. Some use more, some use less.

Q. Uh-huh.

A. But that's a reasonable number.

3. The 0.75 is a minimum amount A&B seeks from the pumps, below which rectification is necessary. Despite the language in A&B's records, the 0.75 is a measure for rectification when the productivity of the well falls below that level. It is unlikely that the Bureau of Reclamation would adopt a standard (which it set at 0.73) to produce less water than the licensed amount of the right. With the pressure that irrigators within the project put on A&B for the delivery of water it would not adopt a self-limiting standard below the licensed and decreed right. Words must be read in context. The context makes it clear that A&B adopted a policy to attempt to increase the output of a well when it fell below the 0.75, not that it designed the system to only produce that amount. A&B seeks to reach 0.85 to 0.90 and has gone as high as 0.95.

4. The 1985 USBR characterization of the 0.75 miner's inches as a maximum rate of delivery ignores its own history and the water right. The conclusion in the 1985 USBR report is based on a May 24, 1984, letter from the district stating, "that they cannot support a peak net farm delivery in excess of 0.357 inch per day [0.75 miner's inch], which is the rate at which the current project is designed and operated." This is certainly a statement inconsistent with A&B's position in

this hearing, but it is not conclusive. Acceptance of the conclusion that 0.75 is a maximum rate of delivery for the system would in effect rewrite the water right down from a 0.88 miner's inch rate of delivery to 0.75. A&B is entitled to the higher rate of delivery if its delivery system can produce the higher rate and that amount can be applied to a beneficial use. The question of whether A&B suffers material injury as a result of junior ground water use if it cannot produce the higher rate of delivery is a separate question.

XIV

THE IMPACT THAT DECLINES IN THE WATER LEVEL HAVE HAD

1. The initial estimates of future ground water decline were short of what has occurred. In the initial development of Unit B, USGS and the Bureau of Reclamation underestimated the magnitude of the decline in the aquifer level that would occur. Multiple factors contributed to the underestimation. The project was developed at the peak of the aquifer level when substantial incidental recharge occurred. The extent of irrigation efficiencies that have developed that reduce the amount of water entering the aquifer were not anticipated. Extreme drought conditions developed. It is also unlikely that planners anticipated the extensive growth in pumping from the aquifer under the encouragement of Idaho Power and State policy.

2. The initial drillings were often inadequate. The initial drilling of the wells often fell short of long term needs. When it became apparent that the first drillings were in many instances inadequate, the Bureau undertook substantial redrilling before turning the project over to A&B. A question presented is whether the redrillings that occurred were adequate or insufficient. There is an intersection of the ideal and economics. Drilling and redrilling is very expensive. It was not clear that the redrills would fall short of long term goals, particularly considering the three factors of reduced recharge, drought, and extensive ground water pumping which all were outside reasonable anticipation. The issue was summed up in Dr. Petrich's testimony:

If we were to – we can in retrospect, look back, and say yes, those wells should have been drilled deeper. There were economic decisions made to not drill them deeper.

But what comes along with that decision, is an implicit recognition, that if wells need to be deepened – or that there may be some wells that need to be deepened, and that the costs of those deepenings then would be incurred as part of that decision to not have made them all deeper in the first place.

Transcript, pages 1972-1973.

3. The wells delivered the desired amounts of water for some time. There was a substantial period of time in the 1960's and 1970's when the wells delivered more than three-quarters of an inch. Most delivered above that level until about 1990. The full impacts of irrigation efficiencies which would reduce incidental discharge and the drought to come were not evident. Although there was a moratorium on licensing wells in 1990 the full effects of ground water pumping had not been and still have not been fully felt. It is difficult to fault the well depths chosen when they worked successfully for a number of years. However, this is not an issue of fault.

4. The issue is risk, not fault. The issue of the adequacy of the wells when turned over to A&B for operation is not a question of fault. It is a question of risk. Well informed people made decisions based on the information they had at the time. When those decisions fall short of the desired results the question is whether Unit B should bear the burden of the costs of rectification or whether junior ground water users should bear the burden either through curtailment or contributing to the costs of rectification.

5. The decline in water levels has not resulted in the need to withdraw significant amounts of land from cultivation. To date there has not been a catastrophic loss of the ability to pump that has prevented the production of crops. According to Timothy Eames, who farms in Unit B, "We've always had enough water to water all the ground, but we have had to stretch our watering schedule over certain pump systems because their criteria would not deliver more than this quantity here. Our systems require more to run, therefore, some of the more sensitive crops we've seen a reduction in yield." Transcript, page 817. The claim is that during the peak season all irrigation systems cannot run at the same time, requiring rotation of those systems which results in a loss of yield by stretching out the watering system. Timm Adams testified that during allotment on a recent occasion he dried up a twenty acre parcel of barley to get quality crops on the remaining property which produced about double what the dried up acres produced. There were eighty acres served by the water from the dried up acres. The total acres of barley in his farming operation amounted to about 950 acres, and his total farming operation involved 1,650 acres. The withdrawal of twenty acres with a significantly reduced yield was not catastrophic to the farming operation. It would be difficult to classify the withdrawal and crop reduction as material when the scope of the farming operation is considered.

OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

6. There have been increases in crop production. Despite water supply difficulties across the Eastern Snake River Plain, there has been a general increase in crop production. This does not mean there have not been shortages in water. It shows that farmers have managed well and utilized techniques such as sprinkler irrigation in place of gravity flow to maximize the benefits of the water they receive. Additionally there have been improvements in the genetics of the crops grown and better techniques in fertilization. Likely there are other crop improvements that have contributed to the general increase. Only speculation would say how much would be grown if all irrigators had all the water they desire when they want it.

7. The ability to obtain more complete crop yield information for highly relevant periods was precluded by a “gag” order in place in the federal courts. Three of the four lay witnesses for A&B are plaintiffs in a federal lawsuit claiming crop damage and yield reductions due to the application of the herbicide “Oust.” An exceptionally broad order in the federal lawsuit precluded inquiry into crop yields and the circumstances surrounding those yields for the period from 2001-2005 which is a significant span of time in this dispute and very near current conditions. Consequently, this proceeding was deprived of what may have been persuasive evidence one way or the other.

8. Comparisons with other irrigated areas. In the course of investigating the A&B delivery call IDWR utilized remote sensing analysis to compare the evapotranspiration on A&B lands claimed to be water short, the Item G lands, with the surrounding areas. According to William Kramber, the remote sensing analyst for IDWR, the evapotranspiration shown on the Item G lands was comparable to surrounding lands. This would lead to the conclusion that the Item G lands were not water short in comparison to the other lands that were not identified as being water short. This is not conclusive, because it is a snapshot of limited days in 2006 and it is comparative to other lands, not a showing that any area is or is not water short. It does, however, have weight together with other evidence indicating that crops could be grown and that the lands in question were in no worse condition than the surrounding areas.

9. The decline in water short wells. According to information contained in Exhibits 413 and 414 the number of well short systems delivering less than the 0.75 has been declining since 2004. This has been during a time when there have been declines in the aquifer. This indicates that

the substantial rectification efforts made by A&B have been successful and that there is water in the aquifer that is reachable through those rectification efforts. In 2005 well production was approximately 150,000 acre-feet and approximately 180,000 acre-feet in 2007 according to Exhibit 410. This is not conclusive evidence that the increase is attributable to the rectification efforts, since climatic conditions in 2005 may have reduced the need, whereas the need was greater in 2007, a hot, dry year. However, it is more likely than not that effective steps in rectification played a part.

XV

THE CONSIDERATION OF PRIVATE WATER RIGHTS

1. The Order considered private water rights. Finding 69 in the Order expresses concern that, “At least five of the 39 wells that A&B claims do not provide the minimum irrigation requirement are used on lands that are also irrigated by private ground water rights and wells.” The so-called Pou-a-b-id shape file provided by A&B was in error and subsequent information submitted to IDWR corrected the errors. Transcript, page 577. The evidence on the land within the boundaries of Unit B irrigated by private water rights is unclear. Transcript, pages 1277, 1278. Not all lands within the digital boundary are entitled to be irrigated by A&B’s rights. There are private lands, and probably State lands, that do not receive A&B water. Tim Luke testified concerning private water rights on A&B:

A&B, because of the on-demand system, it does seem a little strange to me why there would be a lot of supplemental rights. And I don’t think there are that many supplemental rights, but there are some.

Transcript, page 1280.

The question is whether the supplemental rights constitute a factor significant enough to impact A&B’s delivery call. Evidence submitted by A&B indicates only 3% of A&B’s project lands have supplemental water rights. See A&B Expert Report at 4-26 to 4-27.

2. The impact of private water rights is a legitimate factor to be considered in addressing A&B’s delivery call, but having said that, the evidence does not establish that those rights have a significant impact on lands served by A&B and should not impact the outcome of the call.

XVI

COMPARISONS TO WATER USAGE OUTSIDE A&B

1. Differences in the operation of private systems and A&B. The evidence indicates that farmers outside the A&B project are often able to raise crops to full maturity on less water than is used on the Unit B lands. On a private system there is more flexibility. Dean Stevenson gave this explanation:

Well, a lot of it's, number one, is I'm paying – I'm paying for every inch under the private system. And number two, it's because of the way the A&B system is set up. It's more – it's difficult to manage. I mean, I can't – 24 hour notice on water, you know – when the wind blows really hard, if I don't want to irrigate, I turn it off and send it down the drain well, or send it down to the drain. I don't have the ability to control the water like I do under a private system.

Q. So just so I understand that correctly. In your private system, if you need the water, you flip the switch and turn the pump on?

A. Yeah.

Q. And if you want to turn it off, you shut it off?

A. That's correct.

Q. What happens on the B Unit when you shut off the pump system, for example? Where does the water go?

A. Unless I've ordered the water off, you know, with the 24-hour notice. On the B Unit system we operate, if I shut the pump off, it goes down a pipe and into a drain ditch.

Q. Do you find that there is not the motivation on A&B to use less than three acre-feet than on your private lands?

A. Oh, yeah. Yeah, I – it's a pretty clear financial deal. You've got three acre-feet, whether you use a half an acre-foot or three acre-foot, it's one price, other than your pressurization. It's a lot smaller cost. But there is no price differentiation in the whole – in the whole scheme there. So it's just –

Q. Are there differences between the crop yields you receive on average on your B Unit property as compared to your private land?

A. No, they are comparable.

Transcript, pages 2089-90.

Similar testimony from Orlo Maughan who farms land on and off A&B indicates that the system in place on A&B provides no financial incentive to use less than the three acre feet to which the irrigators are entitled:

But due to the limitations with A&B, it's difficult many times to turn the water off for a day, because it takes so long to get the water back. It's a 24-hour call up to get the water turned back on. So many times we'll turn our operation off for one day, and just let the water run down the ditch, and turn it back the next day when we need to start up again.

Transcript, page 2135.

2. A&B operates consistent with its agreement with BOR. The practices of A&B are consistent with their agreement with the Bureau of Reclamation and may be utilized to provide notice to other water users within the same system. A&B is required to accommodate multiple users on a well system with different crop needs. On private systems where the irrigator and the water provider are the same person, efficiencies are different than when the distributor of the water and the irrigator are different. Nonetheless, when curtailment or mitigation in lieu of curtailment is sought, delivery efficiencies are a legitimate consideration.

3. The delivery rate of 0.75 is higher than that of nearby surface water users. See SWC Delivery Call, Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation, at 55.

4. Crops may be grown to full maturity on less water than demanded by A&B in this delivery call. Evidence from irrigators outside A&B is informative to the extent that it indicates that full crops can be produced on less water than demanded by A&B in this delivery call proceeding. In fact full maturity crops are grown on Unit B with less than the 0.75 amount. This may result in increased costs in power to the irrigators who may be required to run their pumps longer and increased labor to manage the water, but careful management by A&B and its irrigators has resulted in the production of crops to full maturity with less water than demanded by A&B.

XVII

THE AMOUNT OF WATER NECESSARY TO IRRIGATE DURING PEAK PERIODS

1. The Petition to Proceed alleged a need for a minimum of 0.75 miner's inch per acre to irrigate during peak periods. In these proceedings A&B maintains that any time the deliveries

to a well system are less than 0.88 inches per acre it suffers injury. The 0.88 would be the derivative of the 1,100 cfs licensed and decreed in the partial decree -- one miner's inch is equivalent to 0.02 cfs, and one cfs is equivalent to 50 miner's inches. A&B's Water Right No. 36-2080 for the irrigation of 62,604.3 acres converts to an average diversion rate of 0.88 miner's inch per acre.

2. Going back at least to 1963 it does not appear that there was a time when all well systems could produce 0.88 miner's inches per acre. Some could produce above that amount and some below.

3. The failure to secure the full extent of the authorized water right does not by itself constitute injury. Conclusion of Law No. 9 in the January 29, 2008, Order determined the following:

Because the amount of water necessary for beneficial use can be less than the decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. Thus a senior water right holder cannot demand that junior ground water rights holders diverting from a hydraulically-connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use.

That conclusion is consistent with prior rulings. A&B is entitled to the amount of its water right. However, it is not entitled to curtail junior pumpers to reach that full amount if the full amount is not necessary to develop crops to maturity. Curtailment under those circumstances would contravene State policy as expressed in Idaho Code section 42-226 that, "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of the right shall not block full economic development of underground water resources." The question is whether irrigators' crop needs in Unit B can be met with less than the full amount of the water right.

4. The analysis of experts varies dramatically. Farmers with comparable experience differ on the amount needed to meet minimum requirements. Experts with comparable education have similar disagreements.

a. Gregory Sullivan, an expert on behalf of Pocatello, conducted an original conditions scenario and a current conditions scenario, taking into account farm efficiencies since Unit B was originally developed. He concluded that at the time of the original development a 0.84 miner's inch

per acre was adequate to meet the dry year consumptive irrigation water requirements for Unit B and that with current efficiencies a 0.65 miner's inch delivery is sufficient. Of interest is the fact that the 0.84 miner's inch calculation for original conditions is close to the 0.88 miner's inch amount that calculates from the original license, and the 0.65 figure is comparable to what has been authorized and used by farmers outside Unit B for similar crops. If accepted, the vast majority of the systems in Unit B would meet irrigation needs and there would be no showing of material injury.

b. Doctor Brockway, an expert for A&B testified that 0.89 is necessary to meet crop needs. Using his calculations there would be some 110 Unit B well systems that cannot meet crop needs in the peak period. That would amount to some 76% of the well systems in Unit B and would amount to a major breakdown in the Unit B system as designed and used. Such a significant breakdown would constitute material injury and warrant curtailment or mitigation.

c. The Director used 0.75 which significantly reduced the number of well systems that are inadequate to meet crop needs and which would not be a sufficient breakdown of the system to constitute material injury.

5. The significance of soil moisture in the experts' opinions. An element in the extreme disagreement between the experts is the question of the use of developing soil moisture in the non-peak periods to buffer against the pumping shortages that might develop during the peak period. The Pocatello expert faults the opinion of A&B for not considering soil moisture as a factor. A&B says the use of soil moisture is already built into farming practices and, therefore, is not an additional factor that can make their practices more efficient. The evidence establishes that irrigators in A&B do utilize the practice of developing soil moisture to buffer against the peak irrigation period. There was extensive analysis of the practice of building a supply of water in the soil during the non-peak periods when water is plentiful in order to create a body of water in the soil to ameliorate shortages of available water during the period of peak demand. This is good practice and is routinely used by irrigators in A&B. Consequently, the amount they say they need to grow crops to full maturity cannot be reduced by a factor attributed to building a proper soil moisture profile. That factor already exists. Reducing a claim of need by a soil moisture factor would be duplicating a factor already in place.

The use of soil moisture to reduce peak demand for water is crop specific and does not substitute for an adequate supply of water during the peak period. Crops such as potatoes, beans, wheat, and sugar beets have relatively shallow root systems which will not reach deeply for water. Moisture below that level is unavailable to the crop. Crops such as alfalfa with very deep root zones can make use of water retained much farther down in the soil. Economic farming practices do not permit planting only very deep rooted crops, though that practice would maximize the ability to store water in the ground for the hot dry season. An Eastern Snake River Plain covered with alfalfa would doubtless maximize the use of soil moisture but would assure many farm failures.

Building soil moisture in the fall and spring is not a substitute for an adequate water supply during the peak period of heat during the summer. Shallow rooted crops may utilize the moisture in the soil in a matter of days during hot periods. According to Dr. Brockway, "If you have three, four hot days in a row, which we have quite often, you can burn through your allowable depletion on potatoes in three to four days easily." Transcript, page 2,290. Consequently, it is necessary to place more water on the ground to retain an adequate supply in the soil to allow the crops to draw water from the root zone. Otherwise, the roots suck on dry soil and suffer. Soil moisture that will only supply crop needs for a period of days without replenishment is not a substitute for water that must be pumped during the peak period to retain a usable level of water in the soil. Farmers monitor this factor regularly and calculate their need for water on the basis that they have considered the water already stored in the soil at a depth that is usable by the crop they plant.

6. The Director's determination is supported by substantial evidence. Several factors support the Director's determination. It is consistent with the Motion to Proceed which indicates 0.75 to be a minimum need. A minimum is not a desirable amount, but it is adequate. The 0.75 is consistent with the policy of rectification adopted by A&B. It is unlikely rectification would be prompted at a level below the amount necessary for crop production. More is sought, and more is better, but 0.75 meets crop needs. There is persuasive evidence that 0.75 is above the amount nearby irrigators with similar needs consider adequate.

XVIII

THE CONDITIONS IN THE SOUTHWEST AREA THAT MAKE THE RECOVERY OF WATER FROM THE WELLS DIFFICULT DO NOT JUSTIFY CURTAILMENT OR OTHER MITIGATION.

1. The problem of water production is primarily in the southwest portion of Unit B.

The greatest problem faced by A&B is the inability to produce the amount of water it desires under its water right from the wells in the southwest portion of the project as a consequence of the declining water level and the slow rate of transmissivity resulting from the ancient lake bed silt and sand. Those portions of the project that lie over a subsurface consisting primarily of fractured basalt are generally able to access water, though additional drilling and other rectification may be necessary.

2. The conditions of a difficult area for water production do not justify curtailment or mitigation. The conditions in the southwest area create a situation which in significant ways is analogous to the problem addressed in *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912), which weighed the public interest against the exercise of an established water right. Construction of a dam downstream from Schodde's point of diversion eliminated his means of diversion. Schodde's means of diversion were apparently reasonable when constructed, just as the wells as developed by the Bureau of Reclamation were reasonable under the conditions known at the time. Regardless, Schodde was not permitted to block the construction of the dam or apparently to obtain other mitigation. He retained the water right, but that right could not trump the public welfare in development of the dam. The public good was considered and outweighed the private right despite the fact that Schodde suffered injury. That injury was to his means of diversion, not to his underlying water right. This case creates a similar issue. A&B has a water right with points of diversion in the southwest region. That right can be used if the water is accessible, but the inability to access the amount of water to which A&B is entitled under the right by the current configuration of the system of diversion does not justify curtailing the extended development that has occurred over the ESPA with the blessing of State policy.

3. There is a Constitutional balance. Article XV, Section 5 of the Idaho Constitution acknowledges the priority in time of water rights but passed to the Legislature the authority to

subject that priority to “such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.”

4. State policy has been defined by the Legislature. State policy emerged in several legislative enactments. Idaho Code section 42-106 provides: “As between appropriators, the first in time is first in right.” However, this provision must be read in the context of Idaho Code section 42-101:

Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for delivery of such water.

The issue of ground water management is addressed more specifically in Idaho Code Section 42-226:

GROUND WATERS ARE PUBLIC WATERS. The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of “first in time is first in right” is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided. ... All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. This act shall not affect the rights to the use of ground water in this state acquired before its enactment.

5. Prior to this hearing there was a determination that A&B's water right does not guarantee the historic pumping levels. Reference is made to that ruling. Consequently, A&B must make efforts to reach water to satisfy its right until there is a determination that reasonable pumping levels have been reached and those levels are entitled to protection.

6. Protection of A&B's water right cannot be based on its poorest performing wells. Measuring the protection due A&B's water right by the levels of its poorest producing wells would mean subsequent ground water development would be limited unreasonably. A relatively small percentage of A&B's wells would define reasonable pumping levels and set an unreasonable standard for determining material injury. The fact that junior ground water pumping may cause some level of reduction in the capacity of a minority of A&B's wells situated in an area of poor productivity does not lead to the conclusion that curtailment is appropriate. A finding of material injury leading to curtailment or mitigation cannot rest upon what would amount to a bottleneck in the system, similar to Schodde's means of diversion. The right to water established in the partial decree remains, but that right is dependent upon A&B's ability to reach the water from those wells or to import it from other wells.

7. The aquifer is not being "mined." More water enters the aquifer than is being removed by ground water pumping. The aquifer is not being "mined," and A&B is not entitled to its historic pumping levels. Overall its rectification efforts have been successful, excluding the limitations in the southwest area where conditions make rectification either more difficult or in instances impossible.

8. A&B has not been required to exceed reasonable pumping levels. The condition of water in the aquifer is not such that A&B can say its need to pursue the water further is over. If deepening wells is necessary to produce the amount of water A&B is entitled to under the water right, that burden remains with A&B until it is established that it is unreasonable to drill deeper. Its efforts at rectification have been largely successful, indicating that there is water available if the proper efforts to secure it are pursued. However, A&B and other pumpers need standards to know when further efforts remain their responsibility and when that additional cost and effort passes to junior users.

XIX

THE ESTABLISHMENT OF REASONABLE PUMPING LEVELS

1. A process to establish reasonable pumping levels should be undertaken. The level of knowledge concerning the hydrology of the aquifer, the costs of deepening wells, the costs of pumping from deeper levels, and the likelihood of success in that pursuit has increased dramatically since the beginning of Unit B. Flow patterns and the effects of withdrawals from one area on another are understood at a much higher level. There should be some predictability as to how far down a pumper must go and when the protection of reasonable pumping levels has been reached.

2. The amount of water entering the aquifer significantly exceeds the amount withdrawn by ground water pumping, but the establishment of reasonable pumping levels should not be dependent upon extracting the last drop of that recharge. The expense and difficulty of that effort strikes at unreasonable and poor management of the aquifer. It ultimately would allow the pumper or pumpers over the deepest part of the aquifer to define a reasonable pumping level for the rest of the pumpers, regardless of priority. At some point, established by reasonableness, there should be a level of predictability and certainty to say that when wells have been deepened and are in good working order enough is enough. At that point reasonable pumping levels have been reached and are protected from junior pumping that would require more. This is what is contemplated by the Legislature in Idaho Code section 42-226: "Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided."

XX

A GROUND WATER MANAGEMENT AREA

1. A&B maintains that the Director wrongly denied its petition to designate the ESPA as a Ground Water Management Area. The rationale applied by the Director is that there are water districts in place all across the ESPA which enable the Director to accomplish the same ends as could be achieved with the designation of the ESPA as a ground water management area.

Idaho Code Section 42-233B provides the following:

OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

“Ground water management area” is defined as any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area....

When a ground water management area is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.

Application for permits made within a ground water management area shall be approved by the director only after he has determined on an individual basis that sufficient water is available and that other prior water rights will not be injured.

The director may require all water right holders within a designated water management area to report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.

The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given.

Idaho Code Section 42-233A provides the following definition of a critical ground water area:

“Critical ground water area” is defined as any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

2. Designation of a ground water management area does not add to the authority of the Director. The position of IDWR is that the designation of a ground water management area adds nothing to the management that can be effectuated through the water districts. “I think anything that you do in a ground water management area can also be done in a water district.” Luke testimony, transcript, page 1,325. The designation of a ground water management area requires notice to cease or reduce withdrawal of water be given only before September 1. The Director may enter the same type of order within a water district but is not under the same time constraint. This type of order would be appropriate if the Director made a determination that the protection of

reasonable pumping levels was necessary. That condition has apparently been found in four areas that have been designated critical ground water management areas. Transcript, pages 1326-27. However, those determinations are not applicable to this call.

3. IDWR has not been processing applications for permits since 1992 pursuant to a moratorium, except for domestic and stock water rights which are exempt and municipal appropriations limited to domestic type restrictions. The best evidence is that at this point the depletive effect of ground water pumping is within five percent of being fully realized, not more than ten percent and perhaps lower than the five percent. Any significant reductions in the aquifer level will be a consequence of other factors than the ground water pumping subject to the moratorium, assuming that the moratorium on permits to pump remains in effect. It is likely, however, that declines in the aquifer level will continue as incidental recharge is reduced by more efficient surface water practices and more ground water is withdrawn in uses not limited by the moratorium, unless alternative recharge practices or policies are implemented.

4. No tangible benefit has been demonstrated to result from the designation of the ESPA as ground water management area. The benefit of designating the ESPA as a ground water management area is not apparent. There may be no harm in doing so, but it would appear to add an administrative overlay without identifiable benefits.

XXI

USE OF THE EASTERN SNAKE PLAIN AQUIFER MODEL WOULD BE APPROPRIATE IF INJURY WERE FOUND BUT NOT TO DETERMINE IF INJURY HAS OCCURRED.

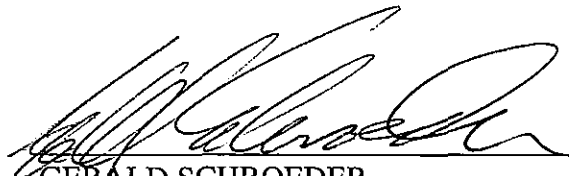
The ESPA ground water model has been analyzed in some detail in the calls made by Snake River Farm and Blue Lakes Trout Farm as well as the Surface Water Coalition call. It was used in the trout farm cases following a determination of injury to evaluate how much water junior to the injured parties would flow to the affected reaches by curtailment and to eliminate cells in the model that had less than ten percent impact from curtailment, the so-called trim line. The model was also used to evaluate replacement water plans. In the Surface Water Coalition call the model was again used following a determination of injury to establish a trim line and to determine the level of injury

and determination of a priority date that would supply the amount of water necessary to meet that level of injury. The model was not used in the trout farm calls or the Surface Water Coalition call to determine injury, and the Director did not utilize the model in A&B's call to determine injury. It is not a tool to establish injury. Were injury to be found it would be proper to consider use of the ESPAM in the same fashion it has been used in the prior cases. This would involve identifying a priority date for potential curtailment to address the sources of injury and to establish a trim line to exclude those areas where influence on the A&B wells is too problematic to justify curtailment. Those methodologies remain open for discussion in the event material injury is found at some point.

CONCLUSION

This opinion constitutes the findings of fact and conclusions of law and recommendations resulting from the hearing on the A&B Irrigation District's call against junior ground water users and the objections that have been made by the parties to the Order entered by the Director January 29, 2008. The format is intended for the ease of tracking the issues discussed. The context of the sections should make clear what determinations are findings of fact and which are conclusions of law.

Dated this 27 day of March, 2009.


GERALD SCHROEDER
HEARING OFFICER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2009, the above and foregoing, was served by the method indicated below, and addressed to the following:

RANDY BUDGE
CANDICE M. MCHUGH
RACINE OLSON
PO BOX 1391
POCATELLO ID 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

JOHN SIMPSON
TRAVIS THOMPSON
BARKER ROSHOLT
PO BOX 485
TWIN FALLS ID 83303.0485
jks@idahowaters.com
tlt@idahowaters.com

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

ROGER D. LING
LING ROBINSON
PO BOX 623
RUPERT ID 83350
rdl@idlawfirm.com

(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

SARAH KLAHN
WHITE JANKOWSKI
511 16TH ST STE 500
DENVER CO 80202
sarahk@white-jankowski.com

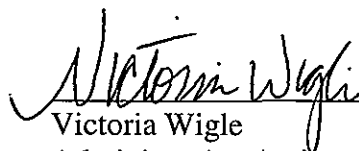
(x) U.S. Mail, Postage Prepaid
() Facsimile
(x) E-mail

DEAN TRANMER
CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205
dtranmer@pocatello.us

() U.S. Mail, Postage Prepaid
() Facsimile
() E-mail

JERRY RIGBY
RIGBY ANDRUS
25 N 2ND EAST
REXBURG ID 83440
jrigby@rigby-thatcher.com

() U.S. Mail, Postage Prepaid
() Facsimile
() E-mail



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

**EXPLANATORY INFORMATION
TO ACCOMPANY A
RECOMMENDED ORDER**

(Required by Rule of Procedure 720.02)

The accompanying order is a "**Recommended Order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

Any petition for reconsideration or other motion to the hearing officer shall be served upon all other parties to the proceeding. All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.