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ATTORNEYS FOR THE CITY OF POCATELLO

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

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

BACKGROUND

1. The Minidoka County District Court's May 4, 2010, Memorandum Decision and Order on Petition for Judicial Review ("Order") included a ruling regarding remand:

The Director erred in failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A&B's [Water Right No.] 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. The case is remanded for the limited purpose of the Director [sic] to apply the appropriate evidentiary standard to the existing record. No further evidence is required.

Order, Conclusions and Instructions on Remand, ¶VI.2.

2. On January 31, 2011, A&B filed a Motion to Enforce Orders. On February 14, 2011, the Court granted A&B's relief in part, and ordered that the Department issue this order on remand pursuant to ¶VI.2 of the Order.

PROCEDURAL HISTORY

3. A&B filed its Petition for Delivery Call on July 26, 1994.
4. A&B's Petition alleged that pumping by junior ground water users within the Eastern Snake Plain Aquifer ("ESPA") had caused A&B ground water users to "suffer[] material injury as a result of the lowering of the ground water pumping level within the E[SPA]..." and that the "reduction in diversion rate as a result of the reduction in ground water tables has reduced the diversion 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 lands served by the said wells." *See generally*, IDWR's Order of January 29, 2008 ("IDWR Order") at ¶ 1 and citations to documents in the record thereto.
5. On May 1, 1995, A&B, the IDWR and other participants entered into an agreement which, among other things, stated that "IDWR retains jurisdiction of the petition for the purpose of the continued review of information concerning water supply" and that "action on the Petition is hereby stayed until further notice to the parties. Any party may file a Motion to Proceed at any time to request the stay be lifted." IDWR Order at ¶2.
6. On March 16, 2007, A&B filed a Motion to Proceed with the Department. On November 16, 2007, the Director issued an *Order Requesting Information*, from A&B to support, *inter alia*, its allegations of material injury.
7. On January 29, 2008, the Department issued its Order, finding that A&B's senior water right had suffered material injury from junior ground water pumping.
8. A&B requested a hearing on the Department's January 29, 2008 Order.
9. The hearing was conducted by Justice Gerald Schroeder, retired, sitting as Hearing Officer, and was held from December 3-18, 2008.
10. Justice Schroeder's Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation ("Recommendation") was issued on March 27, 2009.
11. The Department issued a Final Order in this matter on June 30, 2009.
12. The Final Order was the subject of judicial review in the Minidoka County District Court. Judge Wildman ruled on the appeals in the Order, issued May 4, 2010. The Order included remand to the Director to apply the clear and convincing evidence test to the record below.
13. Following petitions for rehearing, and a reiteration of portions of the May 4, 2010 Order, the parties appealed to the Idaho Supreme Court.

14. The January of 2011, A&B filed its Motion to Enforce Order on Judicial Review.
15. The Court ruled on February 14, 2011, that despite the pending appeals in the Idaho Supreme Court the Department was obligated to comply with its May 4 Order and issue an order on remand, applying the clear and convincing evidence standard to the record below.

FINDINGS OF FACT

Background factual information: the delivery of Water Right No. 36-2080 under the B Unit.

16. A general description of A&B's irrigation water deliveries can be found in the testimony of Dan Temple, Manager of the A&B Irrigation District, Volumes III and IV of the testimony transcripts. Key points regarding A&B's operations that are important for purposes of evaluating claims of injury:
 - a. Water Right No. 36-2080, with a 1948 priority date, was appropriated for 1100 cfs to serve 62,604 acres.
 - b. The B Unit wells were sited to allow for irrigation of these acres by gravity. Temple, Vol. III, 465:13-19; 468:4-12. The B Unit currently relies on 177 wells. However, it is entitled to 188 wells. Water Right No. 36-2080 was licensed and decreed to allow any of the wells under the B Unit to be used on any of the 62,604 acres. Temple, Vol. III, 629:9-15.
 - c. Further, because of the terms of its license and decree, A&B may site wells in any location in the B Unit without prior approval by IDWR. Temple, Vol. III, 629:19-24; see also, 628:7-629:18.
 - d. These unique attributes of the decree associated with Water Right No. 36-2080 have allowed for great flexibility in A&B's operations.
 - e. Beginning in approximately 1960, a total of 2018 additional "beneficial use" acres were put under cultivation; a total of 2022 acres of enlargement rights were also put under cultivation in the 1980's. Both types of acres are referred to by A&B as "water spread acres". Temple, Vol. III, 503:19-504:3, 525:11-526:24.
 - f. A&B's manager, Dan Temple, described the "water spread acres" as "high spots that were out in the middle of these farm units that were originally classified as nonirrigable" because they could not be served by gravity irrigation. *Id.*, 525:11-526-24. Development of the "water spread acres" was facilitated by the advent of improvements in and availability of sprinkler technology.
 - g. Over the years, the B Unit has converted most of its lands (including those originally served by gravity irrigation) to sprinkler irrigation. Currently 96-97% of the acres in the B Unit are served by sprinklers. *Id.*, 597:5-8. This conversion to sprinklers has also increased efficiency of operations—in other words, less

water is required for beneficial use because there are fewer losses between the well head and the field. Luke Vol. VI, 1200:24-1202:25.

- h. Most well systems serve two or three farms. Temple, Vol. III, 474:4-25. Twenty-four hours before a water user wants to irrigate, he “orders” water specifying the rate of water that he wants to receive. Eames, Vol. IV, 812:22-814:2. During times of peak demand, the orders for water are tabulated and the rate of delivery associated with a particular well system is determined (by reference to the data collected for the Annual Report). If demand cannot be satisfied for all the users on the system, the available water supply is delivered pro rata by reference to the 36-2080 acres. This is known as “going on allotment”. Temple, Vol. III, 518:14-24.
- i. All acres under cultivation, whether 36-2080 acres or “water spread” acres, are entitled to 3 acre-feet of water per year upon payment of an assessment. Temple, Vol. III, 526:5-23.
- j. However, only the 36-2080 acres are guaranteed deliveries during times of peak demand. The “allotment” deliveries are determined by reference only to the acres associated with Water Right No. 36-2080. The amount to be delivered on “allotment” is reflected in the “criteria” column in A&B’s annual reports. Temple, Vol. III, 518:7-520:22 (discussing the “criteria” column in the 2006 A&B Annual Report, Exhibit 2765); 520:22-521:23 (discussing the timing and duration of the “allotment” season).
- k. A&B has no way to avoid delivering water to the “water spread” acres when the system is “on allotment”—once the water is delivered to the farm headgate it is up to the individual farmer to decide whether or not to spread the 36-2080 water to the “water spread” acres. Temple, Vol. III, 605:18-24 (“Q: So when you go on allocation during the peak period for a particular year, is water delivered or not delivered to the expansion acres or water spreading acres? A. Water is delivered to the water user that requested it and where he puts that within his farm unit I have no control over.”)
- l. Essentially, if a well system isn’t meeting a farmer’s demand, and the farmer uses the 36-2080 water being delivered under allotment to both the 36-2080 acres and the “water spread” acres, he is creating his own shortage. Temple, Vol. III, 742:8-743:6.

The physical supply available to A&B is adequate.

- 17. The ESPA contains a vast quantity of water. Average annual ESPA recharge is 8.3 MAF/year compared to average pumping of 2.3 MAF/year. Exhibit 301 at page 34.
 - a. No evidence was presented that the aquifer is being mined.
 - b. A&B’s Water Right No. 36-2080 was decreed for a rate of 1100 cfs, with a 250,417.2 acre-foot volumetric limitation, for a place of use of 62,604.3 acres.

- c. There is ample physical water supply to satisfy A&B's ground water right.

The facts below demonstrate that A&B has never pumped 1100 cfs during the peak of the irrigation season.

18. Witnesses from IDWR, Pocatello and A&B all agreed that the most important dispute regarded the amount of water to be delivered during the "peak" of the irrigation season. Luke, Vol. VI, 1257:6-9, Brockway, Vol. XI, 1239:8-12; Koreny, Vol. XI, 2239:8-2239:12. There was no dispute that the "peak irrigation" season was from June 15-July 15.¹ See, e.g., Luke, Vol. VI, 1111:10-16, Exhibits 155, 155A.
19. The Director agrees with the experts on this point. In order to satisfy the District Court's order on remand, to determine whether A&B's decreed amount "exceeds the quantity being put to beneficial use" for purposes of determining material injury, evaluation must be made of A&B's water supply during the peak season.
20. Water Right No. 36-2080 was decreed for a rate of 1100 cfs, to be used anywhere on the 62,604.3 acre place of use. Regardless of the amount associated with a decreed water right, a water user cannot assert injury to a paper water right. As such, a threshold factual question is when, if ever, A&B pumped 1100 cfs during the peak irrigation season for a sustained period of time.
21. The technical witnesses in the hearing (as well as the Director, in the January 2008 Order) relied on the District's "low flow discharge" measurements to develop an understanding of the A&B District's ability to satisfy water demands during the peak irrigation season.
- a. The A&B Annual Reports (Exhibit 2765, e.g. or Exhibit 133A) report, *inter alia*, measurements "low flow discharge" and "high flow discharge" volumes from A&B's wells.
- i. The "high flow discharge" values are those measured at the beginning of the season when water levels are at their seasonal highest. Koreny, Vol. XI, 2214:13-2215:15. These are not measurements associated with well capacity during the peak irrigation season.
- ii. The "low flow discharge" values are those measured during the peak irrigation season, when water demands are highest. *Id.*, Luke, 1284:23-1287:25. Witnesses agreed that the "low flow discharge" data reflects the capacity of the wells to meet peak season demand. Koreny, Vol. XI, 2299:8-15.
- b. The "low flow discharge" and "high flow discharge" measurements are collected on various days at the beginning of the season and during the peak of the season. Luke, Vol. VI, 1287:7-12. Nonetheless, the Director in the January 2008 Order and the technical witnesses (including A&B's, Pocatello's and the IDWR

¹ Note that because of an artifact in A&B data collection, a "month" runs from mid-month to mid-month.

witnesses) each aggregated the “low flow discharge” measurements for each well and used the resulting sum as the total capacity of the B Units wells. This was inherently conservative (i.e., it *underestimated* well capacities), because the measurements are not all collected on the same day. Luke, Vol. VI, 1287:7-12.

- c. The witnesses uniformly agreed that this was a useful measure of the capacity of the B Unit’s wells to meet irrigation demand. *See, e.g.*, Koreny, 2214:13-2215:5.
22. In the January 2008 Order at FOF 61, the Director’s evaluation of the information provided by A&B, including the “low flow discharge” value from the Annual Reports, found that A&B’s water supply in 2006 was 970 cfs or 0.77 miner’s inches/acre; in 1963, A&B’s water supply was 1007 cfs. Luke, 1266:14-1267:8; *see also*, 1284:23-1287:23 (Mr. Luke reviewed the factual basis for the Director’s FOF 61 at trial and testified that the Director relied on the “low flow discharge” values in adopting the findings of fact therein).
 23. Mr. Luke’s testimony confirmed the Director’s finding in the January 2008 Order, that A&B did not establish the factual predicate to its claim of injury—namely that prior to water level declines its wells could pump 1100 cfs.
 24. During the peak of the irrigation season, testimony and analysis showed that A&B has never pumped 1100 cfs:
 - a. Mr. Temple was also unable to confirm that A&B had ever pumped 1100 cfs during the peak of the irrigation season. Temple, Vol. III, 633:21-634:23.
 - b. Mr. Sullivan testified about Exhibit 319, which showed historical pump capacities on the same plot with historical diversions, and demonstrated that A&B’s pumping records, which extend back to 1963, show that there was no time when 0.88 miner’s inches/acre (1100 cfs)² was being pumped by A&B’s wells.
 - c. Mr. Koreny testified that his Figure 3-13, which showed that A&B’s wells produced 1100 cfs was based on “high flow discharge” data, measured at the start of the season when ground water levels are highest. He agreed, during cross-examination, that the “high flow discharge” data reflected well capacities “when the ground water levels are seasonally high”, and not during the peak of the irrigation season. Koreny, Vol., 2214:13-2215:1.
 - d. Based on the testimony and evidence submitted by the parties, there is no basis to conclude that the A&B wells could ever collectively produce 1100 cfs during the peak demand period, so A&B’s claim that its capacity has fallen from an average of 0.88 miner’s inches/acre since the late 1960’s cannot be sustained.

² Given the uncertainty regarding the proper context of injury analysis (well-by-well or total cfs across the entire place of use), the technical evidence in this case involved analyses that were rendered in both cfs and miner’s inches/acre. For the sake of comparison, 0.88 miner’s inches/acre is equivalent to 1100 cfs; .77 miner’s inches/acre is equivalent to 970 cfs.

25. Crop yields have increased over time, even though the decreed flow rate of 1100 cfs has never been delivered during the peak of the irrigation season.
- a. This was confirmed by all the farmers who testified, and is illustrated in Exhibit 357 which is based on crop yield data reported by the National Agricultural Statistics Service (“NASS”) and shows increasing average crop yields through time in Minidoka County. The A&B farmer-lay witnesses provided limited information on crop yield data. Exhibits 355A and 358 were developed using data provided by Mr. Eames and Mr. Mohlman. These exhibits show their crop yields are typically greater than the Minidoka County average yields.
 - b. The evidence showed that farmers take steps, initially through crop rotation decisions or by becoming specialists in particular crops (such as potatoes, in the case of Mr. Kostka) and renting or leasing ground that is sufficient for that purpose, to deal with the adequacy of supply from particular wells. The farmers also testified about the practice of moving water from one crop to another, depending on the nature of the demand by the crop. Mohlman, Vol. V, 1031:5-1031:18, 1035:1-1035:8; Kostka, Vol. V, 974:10-975:12; Eames, Vol. IV, 837:18-838:2.

While the record shows that the B Unit’s historic diversions have never reached 1100 cfs, it also establishes that historic diversions have allowed B Unit farmers to meet crop demands.

26. Mr. Luke examined A&B’s diversion data for the peak month and concluded that during only three years had A&B diverted more than 0.75 miner’s inches/acre during the peak monthly demand period—1963 (0.76 miner’s inches/acre), 1964 (0.75 miner’s inches/acre) and 1967 (0.76 miner’s inches/acre). Luke, Vol. VI, 1200:11-19; Exhibit 155A. These historical amounts are well below 1100 cfs, which converts to 0.88 miner’s inches/acre.
27. Mr. Koreny made a comparison of monthly diversions for each well system beginning in the 1970s. The highest combined system-wide monthly average well pumping was 55,000 af in the early 1970s. During cross-examination, Mr. Koreny converted this monthly volume to miner’s inches/acre to develop Exhibit 366, reproduced below:

Historical Peak Monthly Average Water Use (1970)

	Figure 3-12 (1970) at the well	At the field (less 3% conveyance loss)
62,604 acres (Water Right No. 36-2080 acres)	55,000 af=0.71 miner’s inches/acre	0.69 miner’s inches/acre
66,686 acres (36-2080 acres + water spread)	55,000 af=0.68 miner’s inches/acre	0.65 miner’s inches/acre

28. Thus, based on Mr. Koreny's testimony regarding historical diversion data, maximum monthly diversions (and the maximum occurred more than 40 years ago) were less than 0.75 miner's inches/acre.
29. Furthermore, testimony of the A&B farmers, as well as farmers irrigating lands outside of the B Unit established that the decreed amount was in "excess of the quantity being put to beneficial use".
 - a. The farmer testimony uniformly indicated only that it was *easier* to irrigate at higher rates of flow³; there was no testimony that crop yields had suffered from historic diversions:
 - i. No farmer-lay witness produced evidence of crop loss or yield reductions. *See, e.g.*, Adams, Vol. V, 905:23-907:5, 919:24-920:11; Eames, Vol. IV, 827:3-23, 835:14-25, 854:3-12; Kostka, Vol. V, 993:6-25.
 - ii. Further, three of the four A&B farmer-lay witnesses were also plaintiffs in a lawsuit filed in federal court claiming crop damage and yield reductions due to application of an herbicide called "Oust" for a period of time (approximately 2001-2005). Thus, the weight of these witnesses' claims that alleged crop loss or yield reductions are the result of water supply limitations must be judged against their claims made in the Oust litigation.
30. While it is understandable that farmers would prefer higher rates of flow to enhance flexibility in operations, personal preference on the part of the irrigator is not provide clear and convincing evidence that the 1100 cfs decreed rate of Water Right No. 36-2080 is required.
31. By the same token, the record contains evidence that farmers can grow their crops (and do grow their crops) with rates of production between 0.65 and 0.75 miner's inches/acre. Mr. Kostka testified that if he had "the physical ability to get 75 hundredths of an inch to every piece of that 4000 acres, I can farm it." Kostka, Vol. V, 990:6-8.
32. While it is understandable that farmers would desire more water to make irrigation scheduling easier, this alone is not a basis for ordering curtailment of juniors nor can it be a basis for finding by clear and convincing evidence that the decreed rate of 1100 cfs is not in excess of the amount required for beneficial uses.

Further, the record below demonstrates that A&B's capacity to deliver water was in excess of the amount of water demanded by the Unit B farmers. Thus even assuming A&B had a shortage, its well system had capacity to deliver additional water.

³ Deeg, Vol. V, 1081:19-1082:11 (Mr. Deeg testified that he was able to "take days off" from irrigating his farm that had a well delivering 0.9 miner's inches/acre); Mohlman, Vol. V, 1018:8-21 (Mr. Mohlman testified that reduced water deliveries have caused him a "lot of extra work");

33. The Director determined that A&B's total water supply in 2006 was 970 cfs (or 0.77 miner's inches/acre) based on examination of the "low flow discharge" values in the A&B Annual Report.
34. In Exhibit 331, Mr. Sullivan made a similar analysis, comparing total system capacity with weighted average diversions.
 - a. His evaluation showed that average well system capacity based on a weighted average (weighing each well system low discharge by the acres associated with the well system) during the period from 2000 - 2007 was 0.79 miner's inches/acre.
 - b. Average peak delivery on a monthly basis during the 2000 - 2007 period was 0.66 miner's inches acre.
 - c. Despite having a peak pumping capacity of 0.79 miner's inches/acre, A&B farmers only pumped 0.66 miner's inch/acre during the peak month. This demonstrates that A&B does not operate their wells during the peak demand period at full capacity.
 - d. This is consistent with the analysis in the Pocatello Rebuttal Report, Figure 4 (page 17) Exhibit 334, which showed many well systems are not operated continuously up to their capacity.
35. During cross-examination, Dr. Brockway was asked to convert his analysis showing a 970 cfs pumping capacity to a potential monthly volume, which he computed to be 59,539 af. Brockway, Vol. XI, 2260:22-2262:4.
 - a. He compared the potential monthly pumping volume of 59,539 af with the historical peak monthly pumping in 2006, shown on Figure 3-12, which was approximately 50,000 af.
 - b. The monthly shortage calculated by A&B's experts for 2006 from Table 4-7 was approximately 10,000 af.
 - c. Assuming that A&B's experts were correct, and A&B required an additional 10,000 af of water to avoid shortage in 2006, A&B could have made up the difference from the available water supply (59,539 af-50,000af=9539 af additional available water supply).
36. In sum, these evaluations show that the District is not pumping up to the available well capacity. There is no reason for this, unless the farmers do not need the water.
37. The Unit B data and analysis of A&B experts demonstrates that the wells under Unit B have unused capacity during the peak demand period. In effect, the wells in Unit B can deliver additional water supplies, beyond those demanded by the farmers.

A&B's deliveries to its water spread acres when the system is "on allotment" further reduces the amount available to the 36-2080 acres.

38. The effect of A&B's inability to foreclose delivery of 36-2080 water rights to the water spread acres was described in FOF ¶¶16.h. and i. above and has resulted in the A&B farmers causing their own reductions in water deliveries per acre.
39. Mr. Luke testified at the hearing that Unit B has experienced a 7% decline in diversions during the peak month of operations, attributable in part to the irrigation of the 4100 acres of "water spread" lands. Luke Vol. VI, 1200:24-1202:25.

40. As the District Court put it:

Prior to seeking regulation of pumpers junior to September 9, 1948, it would be incumbent on A&B to first apply the water servicing its enlargement acres on its original lands or alternatively to factor that quantity of water in conjunction with the enlargement acres into the Director's material injury analysis in determining water shortages, if any, to the 36-2080 right.

CONCLUSIONS OF LAW

41. The Director hereby incorporates by reference the Conclusions of Law from the June 30, 2009 Final Order in this matter.
42. The Findings of Fact are incorporated herein as conclusions of law.
43. The District Court ordered that the Department apply the "clear and convincing" evidence standard to the record below. Under Idaho law, the "clear and convincing" is a heightened standard of proof, and can be characterized by evidence that demonstrates a proposition to be "more likely than not". See, §10.13, Idaho Trial Handbook 2d Edition, D. Craig Lewis (2005), and cases cited therein.
44. The Director finds that the record supports a finding that A&B is not injured, and that the evidence to support this finding is "clear and convincing".
45. All legal requirements to satisfy the clear and convincing evidence standard have been met.
46. Under *AFRD#2*:

The amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is [therefore] possible for a senior to receive less than the decree or licensed amount, but not suffer injury.

AFRD#2 v. IDWR, 143 Idaho at 868, 154 P.3d at 439 (quoting former Director Dreher).

