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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	**DOCKET NO. 37-03-11-1** **MEMORANDUM IN SUPPORT OF A&B IRRIGATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, A&B IRRIGATION DISTRICT ("A&B"), by and through its attorneys of record, pursuant to I.R.C.P. 56(c) and the Hearing Officer's September 22, 2008 *Order Approving Stipulation to Move Dispositive Motion Deadline*, and hereby submits this *Memorandum in Support of Motion for Summary Judgment* in the above-entitled matter. For the reasons set forth below, the Hearing Officer should grant A&B's motion as a matter of law.

INTRODUCTION

The Director's decision to deny A&B's call in the January 29, 2008 Order contains fundamental errors of law. Notably, the Director relied upon a mix of "pre-decree" information, or prior existing conditions, to justify a denial of water delivery to A&B's senior right #36-2080. Despite the fact A&B diverts water from the Eastern Snake Plain Aquifer (ESPA[1], the same aquifer depleted by thousands of junior priority ground water rights, the Director refused to recognize A&B's water right as decreed by the Snake River Basin Adjudication (SRBA) District Court.

As set forth in detail below, the Director relied upon a 1985 U.S. Bureau of Reclamation draft planning study for an uncompleted "Extension lands" project to erroneously conclude that: 1) A&B could only physically deliver 0.75 of a miner's inch per acre to all acres across its project; 2) A&B's "water duty" was less than the amounts determined in its decree; and 3) the original siting, construction, and depth of A&B's points of diversion, or wells, was inadequate. The use of such "pre-decree" information violates Idaho law and disregards the elements of A&B's water right as decreed by the SRBA District Court.

In addition, the Director applied an incorrect legal standard in responding to A&B's call. Instead of applying the proper presumption defined by the Idaho Supreme Court in *AFRD #2 v. IDWR*, 143 Idaho 862 (2007), and then affirmed by the Director in the *Spring Users* and *Surface Water Coalition* cases, the Director applied a different standard in order to justify denying A&B's call. Whereas A&B made the "threshold showing" of a decreed senior water right and the sworn statement of "material injury" to that right, the Director refused to accept the showing or apply the proper presumption. Instead, the Director used "pre-decree" information to obviate

[1] An area of "common ground water supply" defined by Rule 50 of the Department's conjunctive management rules. *See* 37.03.11.50.

the presumption of injury to A&B's decreed senior water right in favor of water rights with junior priorities. Although junior water right holders carry the burden to prove a defense to A&B's call, the Director misapplied the proper standards essentially forcing A&B to "re-prove" the right it already has. *See AFRD #2*, 143 Idaho at 878. This is an error of law.

Finally, the Director's finding that A&B has not exceeded a "reasonable ground water pumping level" is unsupported in the record. The Director has failed to set a "reasonable ground water pumping level" in the ESPA and no information or witness was disclosed to provide a factual basis for the finding. Accordingly, the finding should be recommended to be set aside.

STATEMENT OF FACTS

The Idaho Department of Water Resources ("IDWR" or "Department") issued a license for A&B's senior water right #36-2080 on June 10, 1965. *See* **Ex. A** to *Affidavit of Travis L. Thompson* (hereinafter "*Thompson Aff.*"). The license identified 177 wells, or points of diversion, and authorized a diversion rate of 1,100 cfs. *See id.* A&B then filed a claim for water right #36-2080 in the Snake River Basin Adjudication (SRBA). After the initial recommendation was issued and various objections were resolved, A&B, Reclamation, and IDWR filed a *Standard Form 5* with the Court on July 29, 2002, setting out the agreed to elements of water right #36-2080. *See Thompson Aff.*, **Ex. B**. IDWR's recommendation for water right #36-2080 confirmed the earlier license, and identified 177 wells and an authorized diversion rate of 1,100 cfs and 250,417.2 acre-feet per year. The SRBA Court issued a partial decree on May 7, 2003. *See* **A&B 3270**.[2] The decree confirmed A&B's recommended points of diversion (the 177 wells), diversion rate and annual volume.

[2] All citations to "**A&B ___**" refer to excerpts from the Department's partial agency record filed in this matter. Some of the cited excerpts are provided at **Exhibit C** to the *Thompson Aff.* for the Hearing Officer's convenience.

In response to A&B's *Motion to Proceed* filed on March 16, 2007, the Director issued an order on January 29, 2008. The Department later identified the staff that prepared findings for the *Order*. *See March 14, 2008 IDWR Disclosure*. These staff members were then deposed in May and June.

Although the Director's *Order* is the subject of this contested case and hearing, for purposes of this motion, the determinations identified below can be addressed as a matter of law. For example, it is undisputed that the Director relied upon certain "pre-decree" information to deny A&B's delivery call. In addition, it is undisputed that the Director applied certain legal standards to A&B's call that do not comply with Idaho law. As detailed below, various findings in the *Order*, confirmed through explanations by Department staff, make clear that the Director used "pre-decree" information and an incorrect legal standard to arbitrarily limit A&B's decreed water right.

Finally, the Director has provided no factual information to support his finding that A&B has not reached a "reasonable groundwater pumping level". Indeed, the *IDWR Disclosure* and staff testimony show the Director has disclosed no information to support this conclusion. In summary, the legal errors and unsupported findings from the Director's *Order* that are identified below must be corrected and set aside as a matter of law.

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497, 112 P.3d 785, 787 (2005); *Doe v. City of Elk River*, 144 Idaho 337, 160 P.3d 1272, 1273 (2007). When an action is tried before the court without a jury, the judge is not constrained

to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Read*, 112 P.3d at 787. If there are no material facts in dispute a court may enter a judgment in favor of the party entitled to prevail as a matter of law. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 312 (Ct. App. 1982).

ARGUMENT

I. The Purpose of the Snake River Basin Adjudication.

The Idaho legislature explained the purpose of the SRBA succinctly in I.C. § 42-1406A (uncodified), under which the adjudication was commenced in November, 1987:

> Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined.

In an August, 1988 paper entitled "Snake River Basin Water Right Adjudication," David B. Shaw, Adjudication Bureau Chief for IDWR from 1985 to 1996, explained:

> The Adjudication Process
>
> The term 'adjudication' means to settle judicially. A water right adjudication should be termed 'a **fair, comprehensive, technically correct and legally sufficient determination (identification and quantification) of existing water rights'**.
>
> Department staff will compare water rights claimed with known water uses to be certain the water rights claimed are complete and accurate. Investigation of water uses will be conducted using available data, computer and satellite technology as well as field inspections. . . . At the completion of the investigation, the department will compile a report of water rights for the court. **This report will identify the elements of each water right so that the right can be properly identified as a property right as well as quantified for proper delivery of water.**

Effect of the Decree

> **The new decree will provide for the identification and security of ownership of water rights that has not been available since the early 1900's if ever. The decree will be binding on all water users and will identify the water rights as they exist today. This will minimize future challenges against those water rights as long as the rights continue to be used according to law.**

Thompson Aff., **Ex. D** (emphasis added).

The SRBA statutes were amended in 1994. House Concurrent Resolution No. 70, passed that session, directed the Legislative Council Committee on the SRBA to study and report back to the 1995 Idaho Legislature on several matters related to the adjudication, including actions the Legislature should take to facilitate the development of a long-term management plan for the administration of surface and ground water supplies in Idaho.

In its report, the Committee explained that: "The Legislature authorized the adjudication in 1985 to provide finality and certainty with respect to all water rights and to address the federal government's impending claims." *Thompson Aff.*, **Ex. E**, p. 31. After considering testimony by "Chief Justice McDevitt, representing the judiciary, members of the executive branch and, in particular, the detailed comments made by claimants," the Committee developed the following "statement of substantive goals for the SRBA":

> A. *Goals for the Snake River Basin Adjudication*
>
> 1. **All water rights within the Snake River Basin should be defined in accordance with Chapter 14, title 42 so that all users can predict the risks of curtailment in times of shortage. It is vital to all water users that they have as high a degree of certainty as possible with respect to their water rights. Uncertainty discourages development, undermines the ability of agencies to protect stream systems and fosters further litigation.**
>
> 2. All water rights acquired under federal law must be quantified, their relative priority determined, and their legal and hydrologic relationship to state-law based rights must be established.

> 3. **The decree must contain sufficient information for state administration of all federal as well as state water rights**. The McCarran Amendment provides a basis for state administration of federal water rights. The language of the McCarran Amendment, 43 U.S.C. § 666(a)(2), defers to the entire body of water law administration procedures of each state, regardless of the forms in which they may exist. *Federal Youth Center v. District Court of Jefferson County*, 575 P.2d 395, 400 (1978). In order for effective administration of water, the State must fully exercise this authority. **While the quantification of water rights is important, it is of little use if the decree fails to provide an adequate basis for future administration. The State must know how each water right relates to another with sufficient legal and hydrologic certainty to ensure delivery in accordance with priority and in order to know what water supplies remain for future use. Thus, the final decree in the SRBA must contain those provisions necessary to allow the IDWR to administer the federal and state water rights as decreed**.

Id.. pp. 32-33 (emphasis added).

Stated simply, the purpose of the SRBA was to provide IDWR and the various watermasters with an accurate list of water rights to distribute water pursuant to the SRBA Court's decrees. When the SRBA Court issues a partial decree, the Department is bound to accept the court's findings as to the quantity element that a right holder is entitled to divert and beneficially use. I.C. §§ 42-1401A(5); 1420(1); *Crow v. Carlson*, 107 Idaho 461, 465 (1984) ("The [ ] decree is conclusive proof of diversion of the water, and of application of the water to a beneficial use."). The Idaho Supreme Court has further clarified that a water right decree represents the amount of water necessary for beneficial use:

> Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed.

Head v. Merrick, 69 Idaho 106, 108 (1949).

In A&B' case, the SRBA Court confirmed and decreed that the amounts stated on water right #36-2080 are "necessary for the beneficial use" for irrigation on the project. Furthermore,

the decree was based upon a previous license. In addition to the binding effect of an SRBA decree, a license is also binding upon the Department and all other water right holders. I.C. § 42-220. By law, the license cannot reflect "an amount in excess of the amount that has been beneficially applied." I.C. § 42-219. The SRBA Court has explained the effect of a water right license issued by the Department and how a license, like a decree, cannot be "collaterally attacked" in subsequent proceedings:

> Licenses are and have been consistently treated in the SRBA the same as prior decrees for purposes of binding the parties and their privies. In *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcases 36-02708 *et al.* (Dec. 29, 1999), the SRBA Court affirmed a special master's ruling that the SRBA was not the appropriate forum for collaterally attacking licenses previously issued through administrative proceedings.
>
> * * *
>
> The bottom-line is that a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding.

Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law (City of Pocatello – Federal Law Claims) at 12-13, Subcase No. 29-11609 (Oct. 6, 2006).[3]

Accordingly, both the Department and all junior ground water right holders are bound by the license and the SRBA decree for water right #36-2080.

II. The Director Has a Duty to Administer Water Rights According to the Decree.

Idaho law charges the Director with the "direction and control of the distribution of water from all natural water sources within a water district to the * * * facilities diverting therefrom * * * in accordance with the prior appropriation doctrine." I.C. § 42-602. To carry out this function, the water distribution statute provides:

[3] The SRBA Court's decision is available on the SRBA website at http://www.srba.state.id.us/srba7.htm.

> It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom **according to the prior rights of each** respectively, in whole or in part, and to shut and fasten . . . other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; . . . (emphasis added.)

Idaho Code § 42-607 (emphasis added).

This statute requires the watermaster to "to distribute water according to the adjudication or decree." *State v. Nelson*, 131 Idaho 12, 13 (1998). A "decree entered in a general adjudication [is] conclusive as to the nature and extent of all water rights in the adjudicated water system." I.C. § 42-1420(1). As a ministerial officer, a watermaster is required to distribute water in compliance with applicable decrees, and cannot go beyond the plain terms of a decree to determine whether it is supported by the findings in the adjudication. *Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972); *Beecher v Cassia Creek Irr. Co. Inc.*, 66 Idaho 1, 9-10 (1944); *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20 (1935); *Stethem v. Skinner*, 11 Idaho 374, 379 (1905). "The holders of water rights are entitled to presume that the watermaster is delivering water to them in compliance with the governing decree." *Almo*, 95 Idaho at 21. The purpose of this authority granted to watermasters is "to insure that a water right consists of more than the mere right to a lawsuit against an interfering water user." *Id.* Moreover, the Idaho Supreme Court has explained the importance of a decreed water right for future administration:

> Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of the property. . . . A decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for instructions as to the source of the water. If the provisions define a water right it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree.

State v. Nelson, 131 Idaho 12, 16 (1998).

As described below, the Director's January 29, 2008 Order fails to follow the above standards and requirements for lawful administration to distribute water to A&B's decreed senior water right. Instead of analyzing and honoring A&B's decree with respect to its present water use and requirements, the Director relied upon "pre-decree" information as a basis to deny the call.

III. The Director Wrongly Relied upon "Pre-Decree" Information as a Basis to Deny A&B's Water Right Delivery Call in the January 29, 2008 Order.

It is undisputed that the SRBA Court decreed A&B's senior water right on May 7, 2003. *See* **A&B 3270**. It is further undisputed that the Director relied upon information pre-dating May 7, 2003 as a basis to deny A&B's water right delivery call. The Director's failure to recognize A&B's decreed water right and instead use "pre-decree" information, or prior existing conditions, as the basis for denying A&B's delivery call is an error of law that should be set aside.[4]

In *AFRD #2* the Idaho Supreme Court plainly identified the information that could be considered by the Director in response to a water right delivery call. The Court set forth the following standard for the Director to follow:

> The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the 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 place; that is presumed by the filing of a petition containing information about the decreed right.

143 Idaho at 878.

[4] Since the Director is barred from using such material in responding to A&B's call, parties to this contested case, including IGWA and the City of Pocatello are likewise barred using "pre-decree" information as a defense to the call at the hearing in this matter. Any reliance upon "pre-decree" information to attack A&B's water right is an impermissible collateral attack on the SRBA Court's decree issued in 2003.

While the Court recognized some "post-adjudication factors" could be relevant, the standard prohibits the Department from using "pre-decree" information or factors in a manner that would arbitrarily limit or preclude a senior's right to the amount of water stated on the face of the decree.[5] The Department and the various watermasters are required to administer water rights pursuant to the water right decrees, not according to "pre-decree" information. *See also*, *State v. Nelson*, 131 Idaho at 16. To allow the Department to "look behind" decrees for the purpose of administration would constitute an impermissible "collateral attack" on the adjudication court's judgment. The SRBA Court specifically addressed this standard in the context of a "material injury" analysis:

> Collateral attack of the elements of a partial decree cannot be made in an administrative forum. As such, the Director cannot re-examine the basis for the water right as a condition of administration by looking behind the partial decree to the conditions as they existed at the time the right was appropriated. This includes a re-examination of prior existing conditions in the context of applying a "material injury" analysis through application of IDWR's Rules for Conjunctive Management of Surface and Groundwater Resources, IDAPA 37.03.11 *et seq.*

Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration at 8 (Subcase No. 92-00021; In Re: SRBA Case No. 39576, Fifth Jud. Dist., Twin Falls County) (emphasis in original); *see Thompson Aff.*, **Ex. F.**

Contrary to above-defined legal standard, the Director improperly used certain "pre-decree" information to: 1) define a "maximum" rate of delivery to A&B's landowners different than the partial decree and actual water use; 2) imply a "water duty" different than the partial decree; and 3) conclude that original well siting, construction, and depth was inadequate.

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[5] In the *Spring Users Case* the Director affirmed the Hearing Officer's decision limiting discovery to information "following adjudication". *See Order Re Discovery* at 2, 3. In that case, IGWA sought information concerning "spring construction and improvements, collection systems, diversion facilities, measurement devices, including maps, construction plants and designs, drilling records, contractor information, calendars, notes, memoranda, relating to the same" and "all water rights utilized at the facilities together with all files and records pertaining thereto, including . . . field reports, proof of beneficial use, engineering reports. . .". *Id.* IGWA's request for such "pre-decree" information was denied. The Director failed to apply the same standard in his response to A&B's call.

Since the Director did not find A&B was "wasting" water, or that it had "forfeited or abandoned" its right "post-adjudication", he instead turned to "prior existing conditions" as the justification for disregarding the elements of A&B's decreed water right and denying the call.

a. Use of 1985 Reclamation Study to Wrongly Define A&B's "Maximum" Rate of Delivery to its Landowners.

Rather than rely upon A&B's decreed water right, the Director wrongly relied upon a draft Reclamation study from 1985 concerning a proposed extension project to define A&B's present "maximum" rate of delivery to its landowners. The Director concluded that A&B's "maximum" delivery capacity to its landowners was only 0.75 miner's inch per acre (across the entire project):

> 63. Paragraph 11.d. of the Motion to Proceed asserts that 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 peek (sic) periods when irrigation water is most needed." ***However, page 43 of the USBR's 1985 Hydrology Appendix to the North Side Pumping Division Extension report indicates as follows***: "In a letter to the Bureau of Reclamation dated May 24, 1984, the district states that they cannot support a peak net farm delivery 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." ***In other words, 0.75 miner's inch represents the maximum rate of delivery, not the minimum as represented in the Motion to Proceed.***
>
> 64. The indicated current total water supply of 970 cfs equates to 0.77 miner's inch per acre for the 62,604.3 ground water irrigated acres in the delivery call. ***Assuming a conveyance loss of 5%, the net farm delivery for the acreage in the delivery call is 0.74 miner's inch per acre, which is more than 98% of the stated farm delivery capacity of 0.75 miner's inch.***

Order at 15, ¶¶ 63-64 (emphasis added).

> 23. In its Motion to Proceed, A&B asserts that 0.75 of a miner's inch is "the minimum amount necessary to irrigate lands within A&B during the peek (sic) periods when irrigation water is most needed." *Motion to Proceed* at 7. ***However, the USBR, which developed the A&B project, stated in a 1985 report that 0.75 of a miner's inch is the maximum rate of delivery. Based on the USBR's reported maximum rate of delivery,*** and A&B's statement that it is pumping 970 cfs, adjusted for conveyance loss, within the District's 62,604.3 acre

> boundary for water right no. 36-2080, on-farm delivery is 0.74 of a miner's inch per acre. ***On-farm delivery of 0.74 of a miner's inch is more than 98% of the stated maximum rate of delivery by the USBR.*** The difference of less than 2% is within reasonable margins of error for measurement. ***Because 970 cfs is near the maximum authorized rate of diversion, there is a sufficient quantity of water to irrigate its 62,604.3-acre place of use.*** Moreover, A&B's own data shows that its inability to irrigate some portions of that place of use is attributable to an inefficient well and delivery system. IDAPA 37.03.11.042.01.b, g, and h.

Order at 43-44, ¶ 23 (emphasis added).

The Director's findings violate the standard set forth by the *AFRD #2* Court as well as the Department's conjunctive management rules. Specifically, the CM Rule 42 factors for a "material injury" analysis provide for consideration of "the amount of water being diverted and used compared to the water rights", not compared to some "pre-decree" document. Rule 42.01.e (emphasis added). Instead of acknowledging A&B's diversion rate and acre-foot per acre volume that was decreed by the SRBA Court (1,100 cfs; 4 afa) and comparing that to A&B's water use data for its individual well systems, the Director and his staff admittedly relied upon Reclamation's study as the basis to wrongly conclude that A&B's "maximum" rate of delivery was 0.75 of miner's inch per acre across the entire project.

Sean Vincent, the staff member responsible for paragraph 64 and the last sentence in paragraph 63 of the order's "Findings of Fact" set out above, admitted that he did not review A&B's decreed water right and compare it to the amount of water being used:

> Q. (BY MR. THOMPSON): Let's jump to 63. Did you review A&B's partial decree for its water right 36-2080?
>
> A. ***I did not.***

Vincent Depo. Tr. at 77, lns. 3-6 (emphasis added). *Thompson Aff.*, **Ex. G**.[6]

[6] All deposition excerpts are separated by deponent and included at Exhibit G to the *Thompson Aff.*

Q. That's my question. If a water right, if a decree allows more than 0.75 miner's inch and that amount can be diverted and beneficially used, isn't that the, quote "maximum rate of delivery"?

A. Well, water rights are a little bit out of my realm. That is the maximum, but it's not a guaranteed entitlement.

Q. So this last sentence in 63 where you state that .75 represents the maximum rate of delivery, if that's not identified by the water right, that's – that conclusion could change?

A. It appears to be a system constraint, rather than a water right constraint.

Q. So it's not your opinion that A&B's only entitled to 0.75 miner's inch per acre?

A. No.

Id. at 78, lns. 7-22.

Q. But apart from that, you reviewed pumping records provided by A&B?

A. I did review some of the data. It wasn't my main focus.

Id. at p. 80, lns. 4-7.

The Director relied upon the draft 1985 Reclamation study to wrongly find that A&B could only physically deliver 0.75 of a miner's inch at a "maximum" rate of delivery to its landowners. This finding then led to the Director's false conclusion that since A&B was diverting 970 cfs, or 0.74 of a miner's inch on average across 62,604.3 acres (assuming 5% conveyance loss), A&B was actually delivering 98% "of the stated maximum rate of delivery by USBR". *Order* at 43-44, ¶ 23. In reality, A&B's "maximum rate of delivery" varies between wells systems and it is undisputed that A&B can deliver more than 0.75 of a miner's inch on certain well systems. IDWR staff had knowledge of this fact but failed to acknowledge or include this analysis in its findings.

In addition to his admitted failure to review and compare the decreed diversion rate to the water actually diverted and used by A&B, Mr. Vincent also failed to verify or investigate his conclusion that A&B's separate distribution systems were all limited to delivering 0.75 of miner's inch per acre as a maximum "farm delivery capacity":

Q. Let's look at paragraph 64. We'll mark this. (Exhibit 47 marked).

Q. (BY MR. THOMPSON): Do you recognize Exhibit 47, Mr. Vincent?

A. Yes.

Q. Can you identify it?

A. It looks to be a page out of the Hydrology Appendix, the 1985 Hydrology Appendix. That's page 43.

Vincent Depo. Tr. at p. 81, lns. 24-25.

Q. In paragraph 64, what do you mean by that quoted quote "stated farm delivery capacity"?

A. I'm referring to the Bureau of Reclamation reference to the letter.

Q. And is that reflected in this page 43?

A. Yes.

Q. I guess what's the basis besides that you have to conclude that .75 miner's inch per acre is a farm delivery capacity of A&B for those acres under its water right?

A. ***It's really independent of the water right. It appears to be a system constraint based on this paragraph.***

Q. Did you try and verify that statement, do any investigations of the actual delivery system at A&B?

A. ***I did not.***

Id., p. 82, lns. 1-15 (emphasis added).

Mr. Vincent failed to verify the factual basis of his conclusion, despite the actual delivery records provided by A&B, and despite his recognition that A&B's Manager, Dan Temple, had explained that the district had the capability to deliver more than 0.75 miner's inch per acre:

> Q. Did you ever question it? I mean, given your notes, given the water right, given all the information supplied to you that "Hey, maybe they can deliver more than .75 miner's inch. I should look into that further"? Did that ever cross your mind?
>
> A. We did. We asked Dan Temple.
>
> Q. And he said they couldn't deliver more than .75?
>
> A. ***And he said that they could deliver .88.***
>
> Q. So they could deliver?
>
> A. ***That's what he said.***

Vincent Depo. Tr. p. 188, lns. 5-16 (emphasis added).

Mr. Vincent further recognized that A&B diverted water from 177 separate wells, not from a single distribution system:

> Q. Yeah. Is it your understanding that the current total water supply for A&B at its maximum diversion rate of 970 cfs, whether or not that can be delivered equally to all 62,000 acres under its water right?
>
> A. I doubt it.
>
> Q. Are you aware that the irrigation system under that water right was acquired and is represented by 177 separate irrigation systems?
>
> A. Approximately 177 wells, yes.

Id. at p. 80, lns. 15-24, p.81, lns. 7-16.

Therefore, the Director's "false ceiling" for A&B's water deliveries disregards the decreed diversion rate of 1,100 cfs and creates the impression that A&B has "sufficient water" since it is allegedly delivering 98% of 0.75 of a miner's inch per acre on average across the

project. The Department's staff had no factual basis, other than a misinterpretation of incomplete, "pre-decree" information, to conclude that A&B's physical delivery capacity was limited to 0.75 of a miner's inch per acre for all acres in the project. Moreover, despite the knowledge that A&B diverts water from 177 separate wells Mr. Vincent failed to conduct any further analysis or investigation to determine A&B's actual "maximum" delivery capacity from those wells. Instead, Reclamation's draft 1985 study, not A&B's decree for water right #36-2080, served as the basis for Mr. Vincent's, and ultimately the Director's, incorrect findings.

The incorrect finding related to A&B's maximum "farm delivery capacity" in turn served as the basis for the Director's conclusion that since 970 cfs was "near the maximum authorized rate of diversion", A&B was not injured and therefore had a "sufficient quantity of water" to irrigate all 62,604.3 acres under water right #36-2080. *See Order* at 44, ¶ 23. The Director's finding implies that all 62,604.3 acres across the A&B project are served by a single distribution system and can equally receive "0.74 miner's inch per acre". This is factually incorrect as described above. A&B operates 135 separate well systems (177 individual wells) that pump varying amounts of water. The Annual Pump Reports (2003-2007) supplied to the Department plainly informed the Director and his staff of this fact. *See* **A&B 2714-2798.**

For example, the annual water use data from 2007 shows well systems that actually delivered more than 0.75 of miner's inch per acre. *See* **A&B 2782**. In the 2007 column for "Criteria Available Per Acre at Turnout", the first three systems demonstrate a delivery rate exceeding 0.75 (1AB823 = 0.8368; 1C823 = .7716; 1A824 = 0.8198). *Id.* Accordingly, it is undisputed that A&B's "maximum" rate of delivery is not limited to 0.75 miner's inch as claimed by the Director.

Rather than acknowledge the decreed diversion rate (1,100 cfs) or conduct any review of A&B's actual water diversion and use data from its individual wells, the Director wrongly relied upon the 1985 Reclamation study to assert A&B was limited to delivering a "maximum delivery rate" of 0.75 of a miner's inch per acre to all landowners on the project. Accordingly, the Director's reliance upon "pre-decree" information to determine that A&B's water right was not being injured constitutes an error of law that must be set aside.

b. Duty of Water

In addition to using "pre-decree" information to wrongly state that A&B was limited to delivering 0.75 miner's inch per acre across the project, the Director also unlawfully used the same information to identify a duty of water contrary to A&B's decreed water right. While the 1985 study concerned a proposed extension project that was never completed, the Director nonetheless used it to evaluate A&B's "pre-decree" water use for the existing project. The Director further created another "duty of water" example, different than the decreed amount, again relying upon "pre-decree" information to justify the findings.

In assessing A&B's duty of water, the Director made the following findings:

> 45. ***The above-cited 1985 USBR report recommended that the diversion requirements for irrigation of the "Extension lands" served by ground water from Unit B would be 2.59 acre-feet per acre.*** This requirement assumed an average annual consumptive irrigation requirement of 1.73 acre-feet per acre, a 70 percent on-farm application efficiency using sprinkler irrigation systems, and a conveyance loss of 5 percent. The on-farm delivery requirement was 2.46 acre-feet per acre. *Id.* at 59.
>
> * * *
>
> 51. Using a University of Idaho publication regarding evapotranspiration ("ET") and consumptive use irrigation requirements for the state of Idaho, the Department computed a mean weighted consumptive irrigation requirement of 2.17 acre-feet per acre using crop report data provided by A&B for the period 1990 through 2002. . . .

* * *

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

53. ***Annual ground water diversion duties between 1960 and 2007 for the 62,604 Unit B acres are shown below in Figure 5, along with the 2.89 and 2.59 acre-feet per acre ground water requirements computed respectively by the Department and the USBR.***

54. ***The annual Unit B water duties in the previous finding exceed the 2.59 acre-feet per acre water diversion requirement recommended by the USBR in all but three years: 1995, 1998, and 2005.*** Minidoka Project, Idaho-Wyoming, North Side Pumping Division Extension, Hydrology Appendix (USBR 1985). These are the three lowest years on record for diversion of ground water by A&B.

Order at 11-13.

Again, the Director wrongfully relied upon "pre-decree" information to deny A&B's call and imply that A&B water requirements are less than the diversion rate and volume decreed by the SRBA Court in 2003. Instead of reviewing the decree and comparing it to A&B's diversion data to determine whether or not junior priority ground water rights were interfering with the use of A&B's senior right, the Director again based his findings upon Reclamation's 1985 "Extension lands" study to assert that A&B's diversions exceeded "water requirements" in all years but 1995, 1998, and 2005.[7] In doing so, the Director disregarded the decree and created a minimum "water diversion requirements" benchmark based upon "pre-decree" information to

[7] Based upon precipitation and climate data publicly available and also presented in the *SWC Case* the Director was certainly aware that 1995, 1998, and 2005 included months of unusually cool and wet conditions during the irrigation season.

claim A&B does not "need" water beyond the computed diversion requirements of 2.89 or 2.59 acre-feet per acre.[8]

Contrary to the Director's stance now, just 6 years ago the Director recommended to the SRBA Court that A&B could beneficially use 4 acre-feet per acre on 62,604.3 acres (250,417.2 acre-feet total), at a diversion rate of 1,100 cfs. *See Thompson Aff.*, **Ex. B**. This recommended "duty of water" was then decreed by the SRBA Court in May 2003. In an about-face to this prior representation, the Director now asserts that A&B's duty of water is significantly less than what was recommended and ultimately decreed by the court (2.59 afa compared to 4 afa, a 35% reduction). The basis for this finding, Reclamation's 1985 "Extension lands" study, once again represents "pre-decree" information that the Idaho Supreme Court has prohibited the Director from using to limit or preclude delivery to a decreed senior water right. Therefore, the finding should be recommended to be set aside.

Furthermore, it is undisputed that the Director did not find A&B was wasting water, or had forfeited or abandoned its water right after 2003, i.e. post-adjudication. *See generally, Order*. The only expert witnesses in this case to perform an irrigation diversion requirement analysis (A&B's and Pocatello's) have both confirmed that A&B can "beneficially" use the diversion rate (1,100 cfs or 0.88 miner's inch per acre) that is provided for by the water right decree. *See A&B Expert Report* at 4-6 to 4-8. IGWA's experts did not perform an irrigation diversion requirements analysis in the reports or testimony filed in this case. Indeed, the SRBA Court's decree confirms that A&B has a right to divert and "beneficially use" the amount stated on its decree.

[8] Not surprisingly, A&B did not divert as much water in 1995, 1998, and 2005 given unusually cool and wet conditions during those irrigation seasons. The Director's incomplete finding makes no reference to precipitation and climate conditions in those years, leading the reader to wrongly believe that A&B had sufficient water in all years of record except those three.

Pocatello's expert Greg Sullivan acknowledged the same:

> Q: (BY MR. SIMPSON): Okay. If a well on the A & B project delivered .88 inches per acre to a parcel of land on A & B within the A & B project during the peak demand period, could that water be put to beneficial use?
>
> A. Sure. I mean, either by meeting crop demand or going into soil moisture to be used later.
>
> * * *
>
> Q. Would you read the last sentence for me, please.
>
> A. "A & B's water right No. 36-2080 converts to an average diversion rate of .88 -- .88 miner's inch per acre."
>
> Q. Okay. And that number is consistent with your earlier testimony that during the peak irrigation demand that A & B could beneficially use that amount; correct?
>
> A. Yes.

Sullivan Depo. Tr. at p. 66, lns. 7-14; p. 68, lns. 1-10.

Since A&B can beneficially use the amounts stated on its decree, as confirmed by both IDWR and the SRBA Court, the Director's use of "pre-decree" information to justify a reduced "water duty" to deny A&B's call is erroneous as a matter of law. Since the Department licensed and then recommended a water right for A&B based upon an amount of 1,100 cfs and 4 acre-feet per acre, the Director was barred from using "pre-decree" information to reduce A&B's water right in order to deny the call.

c. Original Well Siting, Construction, and Depth.

Finally, the Director relied upon "pre-decree" information to deny A&B's call by claiming that Reclamation and A&B failed to properly site the wells, use proper technology in drilling the wells, and drill to sufficient depth in the aquifer. In relying directly upon statements pulled from the 1985 Reclamation study, the Director concluded the following:

101. ***According to the*** Minidoka Project, Idaho-Wyoming, North Side Pumping Division Extension – Planning Report/Draft EIS, ***Hydrology Appendix (USBR 1985, p. 28)***,

> Since construction of the pumping diversion in the 1950's, *well construction methods have changed*, especially construction specifications written by Reclamation planners. The original 177 project production wells were drilled by drilling contractors using cable drills, and were completed using the usual completion methods at that time. Drilling was continued below the water table until the drill cuttings were "lost," which was apparently an indication of good yield. Construction completion usually consisted of installing surface casing with the balance of the well left "open hole". When caving conditions were encountered during the drilling, a casing liner was installed, generally just through the caving interval. The liner would be perforated when the caving interval was located within the "good" aquifer section of the well. After the well was completed, a pump test was run to determine the yield. If the yield was insufficient, the well would be deepened in hopes of encountering additional water.

Emphasis added.

102. ***The*** Minidoka Project, Idaho-Wyoming, North Side Pumping Division – Planning Report/Draft EIS, ***Hydrology Appendix (USBR 1985, p. 28) further states***:

> These methods were workable, but generally *did not allow for much lowering of the pump if the water level declined.* The project was begun about the water level peak period and was completed during a water level decline period. More than one-half of the wells had less than 100 feet of saturated well bore; therefore, as the water levels declined, drawdown increased, the thickness of the saturated well bore thinned, and yield decreased. *Deepening of many of the wells was undertaken before the project was completed.* About one-half of the wells have been deepened to date (1984) and about one-half of the wells still have less than 100 feet of exposed aquifer.

Emphasis added.

103. ***Using data provided by A&B, the average initial saturated interval (total depth minus the initial depth to water) for the original production wells (90.3 feet) is considerably lower than for the seventeen planned wells (182.5 feet) that were characterized in 1985 as "up to current Reclamation standards."*** Minidoka Project, Idaho-Wyoming, North Side Pumping Division Extension-Planning Report/Draft EIS, Hydrology Appendix (USBR 1985, p.31). ***The initial saturated interval for the original wells that had to be deepened (67.0 feet) is considerably less than the initial saturated interval for the sixty-nine original wells that have not had to be deepened (127.5 feet).***

Order at 28-29 (emphasis added).

From the above findings which clearly relied upon "pre-decree" information, the Director then made the following "Conclusions of Law" to justify denying A&B's call:

> 29. While cable tool continues to be used for deepening many of the existing wells and drilling new wells, this technology is not well suited for use in the geological environment in the southwestern portion of the District because it requires that the borehole diameter be successively reduced every time a new string of casing is emplaced to hold back the caving sediments. Eventually, the diameter is not sufficient to emplace a large diameter pump, which is required to have the combination of high pump lift and high pumping rate. Failure to use the appropriate technology artificially limits access to available water supplies and is not consistent with the requirement for the appropriator to use reasonable access. IDAPA 37.03.11.020.03, .040.03; *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 119 (1912).
>
> 30. As indicated in the Findings of Fact, failure to take geology into account is a primary contributor to A&B's reduced pumping yields, not depletions by junior-priority ground water users. Hydrogeology is critical to the siting of wells. ***If A&B employed appropriate well drilling techniques for the geological environment in which it is located and sited its wells based upon a comprehensive hydrogeologic study of its service area, water would be available to supply its well production and on-farm deliveries.*** *Id.*
>
> * * *
>
> 33. ***Using data provided by A&B, the average depth of penetration beneath the water table for the original production wells drilled in the 1950s was inadequate.*** Deepening of many of the wells was undertaken before the project was completed, and about one-half of the wells were deepened by 1984.

Order at 45 (emphasis added).

Again, relying upon portions of Reclamation's 1985 "Extension lands" planning study, the Director asserted that the well locations, "inappropriate" well drilling techniques, and the failure to drill deep enough in the 1950s thus justifies denying A&B's call today. Clearly, this decision ignores the stated elements of A&B's decreed water right and instead looks back to "prior conditions" existing before the decree to assert that Reclamation should have drilled and sited the wells differently. Moreover, the finding ignores A&B's right to its points of diversion

as originally perfected under the license. Stated simply, the Director's findings and conclusions in this area appear to fault the existence of A&B's project in the first place.

Although the Department licensed A&B's water right based upon existing conditions in 1965, which included the original well drilling techniques and location of the wells, and those same licensed elements were then recommended by the Department to the SRBA Court in 2002, the Director now attempts to "turns back the clock" in an effort to refuse delivery of water to A&B's decreed right. Stated another way, although the project, as originally constructed, was sufficient to demonstrate beneficial use for obtaining a water right license and later a partial decree from the SRBA Court, the Director has now changed his mind for purposes of administration of junior priority rights. Furthermore, junior priority ground water rights cannot interfere with A&B's points of diversion. Idaho law precludes the use of "pre-decree" information, or "prior existing conditions" as a basis to deny A&B's call. The Director's standard is unsupported in the law and would essentially force A&B to wholesale reengineer and reconstruct its project as a condition to receiving water under its senior water right and preventing interference by junior water users.

Pursuant to the standard set forth by the Idaho Supreme Court, the Director is barred from relying upon "pre-decree" information to deny a senior water right holder's call. The Director's use of Reclamation's 1985 planning study as a basis to find A&B's original well siting, construction, and depths are insufficient for administration, is therefore an error of law and should be set aside.

IV. The Director Applied the Wrong Legal Standard in Responding to and Denying A&B's Water Right Delivery Call in the January 29, 2008 Order.

In responding to A&B's request for water right administration to satisfy its senior water right #36-2080, the Director applied the following legal standard:

21. Contrary to the assertion of A&B, and as previously stated, depletion does not equal material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with CM Rule 42; ***therefore, the establishment of injury is a threshold determination that must be established by prima facie evidence.***

* * *

37. ***Based on*** the information submitted by A&B, the Department's review of that information, and ***independent investigations by Department staff of a wide variety of materials and reports herein identified***, it is the Director's conclusion that junior ground water right holders are not causing material injury to water right no. 36-2080.

38. ***Because the threshold determination of material injury has not been found under the CM Rules***, it is not necessary to consider other legal issues, which include, but are not limited to application of the Ground Water Act, codified at Idaho Code §§ 42-226 through 42-237g.

Order at 43, ¶ 21 (emphasis added).

As set forth above, it is clear the Director placed a higher burden upon A&B to "establish" injury to its senior water right by some other "prima facie evidence" than what is required by Idaho law. As described below, this new standard contradicts the Court's decision in *AFRD #2 v. IDWR*, as well as prior precedent from the Department. In *AFRD #2* Court plainly identified the legal standard of review as well as the respective presumptions and evidentiary burdens of proof to apply in a water delivery call proceeding before the Department:

> 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. . . . 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 the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way 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.

143 Idaho at 877-878.

The Director affirmed the above legal standard in the final orders issued in the *Spring Users* and *SWC* cases as recommended by the Hearing Officer.[9] In the *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* issued April 29, 2008 in the *SWC* case, the Hearing Officer summarized the above Idaho Supreme Court standards and burdens to apply in water right administration under the Department's conjunctive management rules:

> 1. There is a presumption that a senior water user is entitled to the amount of water set forth in a decree or license. . . .
>
> 2. The senior water right holder must allege material injury under oath setting forth the basis of that belief. . . .
>
> 3. The licensed or decreed amount of a water right is a maximum amount to which the right holder is entitled. The right holder is presumed entitled to that amount, and the burden is upon a junior right holder to show a defense to a call for the amount of water licensed or decreed. . . .
>
> 4. "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." *AFRD #2, at 879.*

April 29, 2008 SWC Order at 25-26.

In the *Spring Users'* case, the Hearing Officer further explained the presumption of injury, how a threshold showing is made, and the relative burdens the Director must apply:

> They made calls for water by demands in letters. Nonetheless, the Director treated those letters as sufficient calls for water and initiated the investigation that led to the curtailments in this case. There is now considerable sworn testimony as to the basis for the claims of material injury. ***The threshold showings necessary by the Spring Users have been made***. They demonstrated their decreed rights and they have now alleged under oath material injury, i.e., they cannot utilize their fish propagation facilities fully from lack of their adjudicated rights.
>
> * * *

[9] *See* July 11, 2008 *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* (Blue Lakes and Clear Springs Consolidated Case) and September 5, 2008 *Final Order Regarding Surface Water Coalition Delivery Call* (Surface Water Coalition Case).

> 4. The decreed amount of a water right is a maximum amount to which the right holder is entitled. ***The right holder is presumed entitled to that amount, and the burden is upon a junior right holder to show a defense to a call for the amount of water in the partial decree.***

January 11, 2008 Opinion at 9-10 (emphasis added).

In this case, A&B made its initial showing in the *Motion to Proceed* filed on March 16, 2007: 1) a description of water right #36-2080 decreed by the SRBA Court; and 2) a statement of material injury under oath. *See* **A&B 13-20**. The Minidoka County District Court agreed. In granting A&B's request for a preemptive writ of mandate Judge John K. Butler specifically found that A&B had met the "threshold showing" required under Idaho law: "The presumption exists that A & B is suffering material injury, and there is no evidence to the contrary." *See Memorandum Decision Re: Respondent's Motion to Dismiss* at 13 (Fifth Jud. Dist., Case No. CV-2007-665). IDWR and the Director did not appeal this decision.

Once the initial showing was made by A&B, the burden then shifted to junior priority ground water right holders to prove that the "call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *AFRD #2*, 143 Idaho at 879. Contrary to the established legal standard, the Director failed to apply the established burdens, refused to accept A&B's initial showing, and instead denied A&B's call on the basis of "pre-decree" information. Whereas the junior ground water right holders carried the burden under the law to overcome the presumption of injury, the Director ignored A&B's threshold showing and its decreed water right.

Instead, as described above, the Director justified delivery of less than the amount of A&B's decreed water right on the basis that a 1985 Reclamation study established the "maximum" rate of delivery to A&B's landowners, not on the basis of any "post-adjudication" factors. By refusing to accept the SRBA Court's decree, the Director ignored the presumption

afforded A&B. Second, the Director further justified denial of A&B's call on the basis of conditions existing prior to the date water right #36-2080 was decreed in 2003, which included the original construction and siting of A&B's 177 points of diversion and the technology used to drill and deepen wells.

In summary, the Director failed to apply the correct legal standard in reviewing and responding to A&B's call. Once the threshold showing was made by A&B, the burden shifted to junior ground water right holders to prove a defense to the call. The standard was set by the Idaho Supreme Court almost a year before the Director issued his January 29, 2008 Order. The failure to apply the correct standard is an error of law.

V. No Factual Basis Exists for the Director's Finding that A&B Has Not Exceeded a "Reasonable Pumping Level".

With respect to a "reasonable groundwater pumping level", the Director made the following "finding of fact" in the January 29, 2008 Order:

> 18. Although ground water levels throughout the ESPA have declined from their highest levels reached in the 1950s, ground water levels generally remain above pre-irrigation development levels. There is no indication that ground water levels in the ESPA exceed reasonable ground water pumping levels required to be protected under the provisions of Idaho Code s 42-226. A&B asserts in its Petition that ground water levels within the ESPA have lowered "by an average of twenty (20) feet since 1959, with some areas of the Aquifer lowered in excess of forty (40) feet since 1959 . . . ." *Petition* at 2, ¶ 6.

Order at 5, ¶ 18.

In order to discover the basis for findings in the *Order*, A&B formally requested IDWR to identify "employees and any persons" who participated in its preparation. *See A&B Irrigation District's Request for IDWR to Identify Persons Involved in Preparing the Director's January 29, 2008 Order* filed February 19, 2008. The Department disclosed Sean Vincent as the sole employee who participated in preparing findings for paragraph 18. *See IDWR Disclosure* at 2.

Although the Department identified Mr. Vincent as the author contributing to the paragraph, he explained that he did not author the sentence regarding the "reasonable ground water pumping levels":

> Q. (BY MR. THOMPSON): Let's turn back to the order. If you could turn to paragraph 18. That's the first paragraph identified that you worked on. . . .

Vincent Depo. Tr. p. 49, lns. 9-11.

> Q. In this paragraph your statement – I guess what – did you draft this paragraph?
>
> A. The last sentence. And I drafted – I drafted a version of this paragraph. And I recognize the last sentence and I believe part of the first sentence. But as I indicated earlier, this paragraph was changed.
>
> Q. What did it say before it changed?
>
> A. I don't recall specifically. I think it said much the same. In fact, I recognize the third sentence. The second sentence I did not author.
>
> Q. Do you know who did?
>
> A. I don't.

Id. at p. 50, lns. 22-25, p. 51, lns. 1-9.

Based upon IDWR's counsel's response later during Mr. Vincent's deposition it was implied that the Director authored the finding, yet no supporting factual information was ever disclosed or provided to support the finding:

> Q. Who drafted the reasonable pumping level sentence in paragraph 18?
>
> A. I don't know, but it wasn't me.
>
> MR. THOMPSON: Okay. We'd like to know who did. So you guys can look into that. Are there parts of the findings of fact that somebody besides those people on that list drafted that you're aware of?

MR. BROMLEY: I think we've disclosed, Travis, who drafted what, what their participation was with certain paragraph numbers, attachments. But I think ultimately, Travis, one thing to consider is that the order was signed by the director.

MR. THOMPSON: So we can assume that finding – that sentence, paragraph 18, is drafted by the director?

MR. BROMLEY: I don't know if you can assume or not.

MR. THOMPSON: Do you know?

MR. BROMLEY: I can't tell you. I don't know.

Vincent Depo. Tr. p. 190, lns. 12-25, p. 191, lns. 1-8.

When Rick Raymondi, the final Department staff member to be deposed, was questioned about the "reasonable groundwater pumping level" sentence at his deposition he too denied having any factual information to support it:

Q. (BY MR. SIMPSON): Okay. If you could turn to finding of fact 18 on page. 5.
Did you have any participation in the drafting of this paragraph.

A. No.

Q. Did you review this paragraph?

A. Yes.

Q. Do you know who authored this paragraph?

A. I believe Sean Vincent wrote part of it, but I don't know beyond that.

Raymondi Depo. Tr. p. 44, lns. 11-20.

Based upon the information disclosed by the Department, and the knowledge of Department staff who participated in preparing the *Order*, there is no factual basis to support the finding in paragraph 18 concerning the "reasonable ground water pumping level". To the best of

A&B's knowledge, the Director has failed to set a "reasonable ground water pumping level" pursuant to Idaho Code § 42-226 anywhere in the ESPA. Accordingly, since there is no factual basis to support the finding, it should be recommended to be set aside.

CONCLUSION

The facts for A&B's motion are clear and undisputed. The Director relied upon "pre-decree" information and applied the wrong legal standard to justify denying A&B' call. The failure to accept the proper presumptions and honor the SRBA Court's decree for A&B's senior water right constitutes an error of law. Since the Director had the benefit of the proper standards to apply, as announced nearly a year earlier by the Idaho Supreme Court in its *AFRD #2* decision, he had no excuse to employ anything to the contrary. Whereas no "post-adjudication" factors were found to justify denying A&B's call, the Director was forced to go behind A&B's decree to avoid administration of junior priority ground water rights. Idaho law prohibits such action in water right administration. For the reasons set forth above, the Hearing Officer should grant summary judgment for A&B.

DATED this 3rd day of October, 2008.

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