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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** **A&B IRRIGATION DISTRICT'S REPLY IN SUPPORT OF 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 *Reply in Support of Motion for Summary Judgment* in the above-entitled matter. This *Reply* responds to the *Joint Response* ("*IGWA Br.*") filed by IGWA and the City of Pocatello (hereinafter

collectively referred to as "IGWA") and is supported by the *Second Affidavit of Travis L. Thompson* ("*Second Thompson Aff.*), filed together herewith.

INTRODUCTION

In opposition to A&B's motion for summary judgment, IGWA wrongly claims that A&B "seeks to extend existing case law further than was intended by the Supreme Court". *IGWA Br.* at 2. To the contrary, it is IGWA that attempts to interpret the law in a manner inconsistent with the findings and conclusions of the Idaho Court. IGWA would have the Hearing Officer believe that no delivery of water under a decree is required in the absence of a hearing on the need for the water and that the Director may, in his discretion, determine that the presumption of the decreed right does not exist. This is not the prior appropriation doctrine established by the Idaho Constitution or legal precedent established by Idaho courts. Moreover, to the extent IGWA relies upon a misinterpretation or misapplication of the Department's Conjunctive Management Rules to support its claims, it is clear that administrative rules cannot alter or conflict with established law, including Idaho's prior appropriation doctrine.

IGWA's *Response* attempts to justify the Director's use of "pre-decree" information. Yet, IGWA refuses to acknowledge the SRBA Court's partial decree for A&B's water right #36-2080 and the quantity that the court determined A&B's landowners were entitled to beneficially use on their lands. IGWA further disregards the proper presumption and the standards set for by the Idaho Supreme Court in *AFRD #2 v. IDWR*, 143 Idaho 862 (2007). In an effort to turn the Hearing Office away from A&B's decree, IGWA supports the use of the same "pre-decree" information relied upon by the Director. As set forth in *A&B's Memorandum in Support of Motion for Summary Judgment* (hereinafter "*A&B Memo*"), the Director had no authority to use a variety of "pre-decree" information to artificially limit A&B's delivery capacities and deny

A&B's call. The misinterpretation of this information led to erroneous conclusions which departed from A&B's decreed water right and unlawfully shifted the burden to A&B to re-prove a right to receive water previously acquired from the SRBA Court.

In sum, the Director's failure to apply the proper legal standards and presumptions in the context of responding to A&B's water delivery call constituted an error of law and should be set aside.

I. Idaho Law Does Not Require a Senior Water Right Holder to Prove "Injury", and the Director Cannot Shift the Burden or Refuse to Apply the Proper Presumption.

IGWA, in an attempt to justify the Director's *Order*, ignores the legal protections provided senior water right holders in Idaho. In *AFRD #2* the Idaho Supreme Court plainly re-affirmed well-established precedent and held:

> . . . the Rules do not permit or direct the shifting of the burden of proof.
>
> * * *
>
> The presumption under Idaho law is that the senior is entitled to his decreed water right . . .

AFRD #2, 143 Idaho at 874, 878.

Contrary to IGWA's claims, Idaho law does not require a senior, in this case A&B, to prove that a junior is injuring its senior water right. Just the opposite, Idaho law protects senior appropriators with the proper presumption and burden of proof.[1] As reaffirmed by the *AFRD #2* Court, the requirements "pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules". 143 Idaho at 874.

In Idaho, juniors carry the burden to prove that their diversions do not injure senior water rights. *See Moe v. Harger*, 10 Idaho 302, 303-04 (1904); *Josslyn v. Daly*, 15 Idaho 137, 149 (1908); *Jackson v. Cowan*, 33 Idaho 525, 528 (1921); *Silkey v. Tiegs*, 54 Idaho 126, 129 (1934);

[1] Nothing in the Ground Water Act changed the presumption and protection that Idaho law provides a senior ground water right holder.

Cantlin v. Carter, 88 Idaho 179, 186 (1964).

The above standards and presumptions were reaffirmed in the *Spring Users* and *SWC* cases. *See A&B Memo* at 26-27. Moreover, in the Hearing Officer's recommended order in the SWC case, it was clear that Idaho's prior appropriation doctrine affords senior water right holders with protections as against juniors:

> 1. There is a presumption that a senior water user is entitled to the amount of water set forth in a license or decree.
>
> * * *
>
> 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.***

SWC Opinion at 25-26 (emphasis added).

The above presumptions must be applied in the context of A&B's request for water right administration. In this case, the Director was obligated to apply the proper presumptions and standards that are "to be read into the CM Rules." Instead, the Director refused to apply the presumption that A&B was injured since it was not receiving its decreed water right. The Director ignored A&B's "threshold showing" and instead turned to a variety of "pre-decree" information to justify denying A&B's water delivery call.

Not surprisingly, IGWA supports this approach and ignores the presumption of injury to a senior who is denied the right to divert a decreed quantity of water by reason of the diversions of junior water right holders. Remarkably, IGWA urges that if juniors are diverting from a common source and the water supply is inadequate, it is the senior who carries the burden to proceed with a hearing and prove injury to a water right before administration is necessary.[2]

[2] IGWA also claims that the "optimum development of water resources" and the Ground Water Act (I.C. § 42-226) justifies denial of delivery to a senior water right holder. Idaho courts have thoroughly addressed this issue (as referenced in A&B's *Memorandum* and *Reply in Support of Motion for Declaratory Ruling* filed previously in this

This argument misstates the law.

By ignoring the established legal presumption, the Director erred as a matter of law and wrongly shifted the burden of proof to A&B. Since the Director had the benefit of the *AFRD #2* decision when he responded to A&B's call in January 2008, he had no excuse to not apply the correct legal standards. Idaho law does not, as the Director has here, force seniors to "re-prove" the right to an amount of water that has already been established by the SRBA District Court. Therefore, the Director's misapplication of the proper standards and burdens should be set aside as a matter of law.

II. Idaho Law (Including the Conjunctive Management Rules) Does Not Authorize the Director to Use "Pre-Decree" Information to Limit or Reduce A&B's Decreed Water Right.

IGWA seeks to sidestep the *AFRD #2* Court's standard and instead claims the Department's Conjunctive Management Rules permit the Director to evaluate "pre-decree" information for purposes of water right administration. *IGWA Br.* at 6. IGWA admittedly has no support for this argument in the law but instead claims the Rules "do not foreclose reliance on 'pre-decree' information". *Id.* at 7.

Contrary to IGWA's argument, nothing in the Rules, including the Rule 42 factors, authorizes the Director use "pre-decree" information for purposes of water right administration. IGWA relies upon Rule 42 factors (a), (d), (e) and (h), but nothing in those factors authorizes the Director to use "pre-decree" information to limit what a senior water right holder is entitled to use under its decreed water right vis-à-vis junior water rights. *See IGWA Br.* at 7. Notably, factor (a) discusses the amount of water available in the source, factor (d) concerns irrigation

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case). Full economic development of the water resources of the state can be obtained, even without the application of the Ground Water Act or Department's conjunctive management rules. It is a matter of whether juniors are willing to pay for the development of the resource and the point at which further development cannot be obtained. It does not warrant a refusal of the Director to administer water rights.

rates and efficiencies, factor (e) concerns the amount of water being diverted compared to the ***water right***; and finally, factor (h) applies to a "senior-priority ***surface water right***". *See* IDAPA 37.03.11.42 (emphasis added). As to factor (h), the Rule's plain terms make it clear that it does not apply to A&B's senior ground water right. The Director cannot read "ground water right" into the factor. Accordingly, IGWA's misinterpretation of the Rules does not cure the errors in the Director's analysis.

IGWA continues to demand that the Department, and now the Hearing Officer, ignore the binding nature of a partial decree from the SRBA Court. Contrary to this argument, the Supreme Court has made it clear that the Department and watermasters must administer water rights according to the decrees – they have no authority to "second-guess" a court's findings and "re-adjudicate" a water right's decreed elements. *See State v. Nelson*, 131 Idaho 12, 16 (1998). Moreover, notwithstanding IGWA's effort to write-off the SRBA Court's determination, a decree is conclusive proof of a water user's "beneficial use." *Crow v. Carlson*, 107 Idaho 461, 465 (1984) (recognizing that the "decree is conclusive proof of diversion of the water, and of application of the water to beneficial use, *i.e.*, the decree is *res judicata* as to the water rights at issue herein"). Indeed, a decree issued in the SRBA is "conclusive as to the nature and extent" of the water right. I.C. § 42-1419(1); *see also Stethem v. Skinner*, 11 Idaho 374, 379 (1905).

The well-established precedent was recently affirmed by *AFRD#2* Court. There, the Supreme Court recognized that "a partial decree is not conclusive as to any ***post-adjudication*** circumstances or unauthorized changes in its elements." *Id.* at 876 (emphasis added). However, nothing in *AFRD#2*, the case law, statutes or regulations provide the Director with any authority to consider "pre-decree" information to deny a senior appropriator water under his decreed right, particularly when such an investigation would "second-guess" what the SRBA Court has already

determined. *See, e.g.*, I.C. § 42-1419(1) (a decree issued in the SRBA is "conclusive as to the nature and extent" of the water right).

Although the law and the Rules required the Director to analyze and honor A&B's decree water right, it is clear that the Director instead used and misinterpreted "pre-decree" information for the conclusion that A&B was physically limited to only delivering 0.75 miner's inch per acre. This is factually wrong. *See A&B Summary Judgment Memo* at 12-18. Even IGWA's expert witness admits that A&B has the ability to deliver more than 0.75 depending upon the well system:

> Q. (BY MR. THOMPSON): And would you agree that A&B can physically deliver more than .75 miner's inch per acre at these various well systems where that criteria is above that?
>
> A. (BY MR. PETRICH): I think in some of those, it can, yes. And, in fact, does.
>
> Q. So do you agree for those well systems where they deliver more than that, that the .75 miner's inch is not a maximum rate of delivery on those systems?
>
> A. Yes.

Petrich Depo. Tr. P. 66, lns. 8-18; *Second Thompson Aff.*, Ex. A.

IGWA now asserts that the 0.75 miner's inch was the Director's "duty of water" calculation for A&B lands.[3] *IGWA Br.* at 8. However, nothing in the Director's *Order* concludes that 0.75 miner's inch per acre was the "amount of water required by A&B to produce a crop". *Id.* Instead, the Director wrongly concluded that "0.75 miner's inch represents the maximum rate of delivery" and that since a water supply of 970 cfs represented an average of "0.74 miner's inch per acre" A&B was therefore delivering 98% of its "stated farm capacity".

[3] The Unit B daily pumping data also show that Mr. Sullivan's recommended irrigation requirement of 0.65 miner's inch per acre is not reflective of what A&B's landowners demand and beneficially use. It is undisputed that the Unit B well systems with sufficient capacity can and do pump more than 0.65 miner's inch per acre, particularly during the peak demand periods in the irrigation season. *See A&B Rebuttal to Sullivan Report* at 20-21.

Order at 15, ¶ 64. The foundation for this erroneous finding is "pre-decree" information, not the quantity decreed to A&B by the SRBA Court. *See A&B Memo* at 12-18.

In support of its argument for "pre-decree" information, IGWA continues to demonstrate a fundamental misunderstanding of A&B's separate well systems. *IGWA Br.* at 6-10. First, IGWA wrongly claims that the "supply of ground water for A&B is so far not an issue in this case." *IGWA Br.* at 8. This is factually incorrect. There should be no dispute that the supply of ground water for the Unit B project has been impacted by declining ground water levels and in specific areas, such as the southwest part of Unit B, further deepening will not bring increased yields. *See* A&B Expert Report, at 3-6, 3-12 and 3-21. The report prepared for IDWR by Dr. Dale Ralston entitled, "Hydrogeologic Analysis of the A&B Irrigation District Area" (IDWR Partial Agency Record 1072) agrees with this conclusion and states on page 1089, "*The potential for successful well deepening is high in the northern portion of the project and relatively low in the southern portion of the project area*". The facts plainly show that in some areas of the ESPA within A&B there is insufficient water available for diversion and use. Notably, A&B has been forced to temporarily convert approximately 1,400 acres to a surface water supply due to insufficient ground water supplies. *See* Temple Depo. Tr. Vol. II, p. 269, lns. 23-25, p. 270, lns. 1-16; p. 278, lns. 1-8. *See Second Thompson Aff.*, Ex. B.

Next, contrary to IGWA's assertion, the A&B well systems are not interconnected and cannot simply divert water to any point on the project merely because one well no longer produces sufficient water to supply the lands within that particular well system. It is not a matter of merely connecting a few pipes to allow for the delivery of water from one independent system to another across the entire project. From a technical standpoint A&B cannot redesign and reconstruct its irrigation system to be interconnected. *See* A&B Rebuttal to Petrich Report at 2.

Moreover, the claim that A&B is not injured because it is not pumping its separate well systems at "full capacity" is factually incorrect. A&B pumps water from its individual well systems to meet the daily irrigation demand of its landowners. *See* Temple Depo. Tr. Vol. I, p. 43, lns. 1-25; *See Second Thompson Aff.*, Ex. B. IGWA wrongly relies upon Mr. Sullivan's "monthly average" pumping data analysis to conclude that Unit B well systems "are not pumped at full capacity during the peak season." *See A&B Rebuttal to Sullivan Report* at 20-21. Peak demand may be occurring outside of a calendar month schedule and may be occurring on a daily or weekly basis. *See id.*

Finally, IGWA claims that "pre-decree" information is relevant because A&B's wells were constructed prior to 2003. This reasoning again ignores the *AFRD #2* Court's standard and attempts to step back in time in order to evaluate the "intention of the project" irrespective of the water right decreed by the Court. The process of undertaking such an evaluation overtly disregards what has already been judicially determined. For example, if at the time of construction in 1958 an irrigation project intended to deliver each entryman 100 miner's inches, but fifty years later in 2008, after completion and operation of the same, the project received a decree from the SRBA Court for 120 miner's inches, does that mean the Director can refuse to deliver 120 miner's inches based upon his interpretation of events and conditions pre-dating the decree? Not according to Idaho law and the *AFRD #2* Court's analysis of the question.

Finally, if the date of construction of a diversion facility dictated when a Director was free to ignore a partial decree issued by the SRBA Court, then no water right is safe since all rights are established prior to their date of decree. Moreover, this would mean that regardless of a recommendation from the Director and then issuance of a decree from the Court, water right holders would have no certainty of the validity of their rights as against juniors given the post-

hoc evaluation of their diversion systems. In other words, since a senior's diversion facility in place at the time of the decree would be subject to attack anytime thereafter, based not upon any "post-adjudication" factors, but instead upon the Director's interpretation of information pre-dating the decree, the purpose of the SRBA would be defeated and water right holders would be left to guess as to whether or not their right was enforceable in administration.

IGWA ignores the SRBA Court's decision on this issue and instead claims that the ambiguous questions about the Director's "futile call" order in the Rangen case confirmed the Director's ability to look behind decrees. *IGWA Br.* at 11. IGWA misreads the decision.[4] While the Court acknowledged prior conditions might be relevant in explaining why a "call is futile", it clearly held that ***the Director could not "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.***" *SRBA Order* at 8 (emphasis added); Ex. F to *Thompson Aff.*. The Court explained 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 . . .***" *Id.* (emphasis added).

Here, the Director erroneously re-examined the basis for A&B's water right by relying upon information prior to the decree. The Director relied upon "pre-decree" information to justify his conclusions that: (1) A&B was physically limited to delivering only 0.75 miner's inch per acre to all acres across the project; (2) A&B's "water duty" was less than the amounts

[4] IGWA's reliance upon the SRBA Court's *Order* in the Nez Perce Tribe's subcase is also misplaced. The decision concerned the Tribe's motion to disqualify and set aside Judge Wood's decisions in the matter, and whether or not every water right claim in the SRBA, in this case Judge Wood's, was in automatic conflict with all other claims (including the Tribe's off-reservation instream flow claims). Judge Wood explained that "no conflict between rights can be stated to exist without consideration of whether the sources are connected and the significance of that connection as in conjunctive management and the futile call rule exist". *Order* at unnumbered page 14. Here, there is no question that the ESPA is a common source from which both A&B and IGWA's member divert. *See* IDAPA 37.03.11.50. There is an obvious conflict since ESPA water levels have been lowered by reason of junior ground water diversions and A&B is unable to receive sufficient water to satisfy its senior right.

determined in its decree; and (3) the original siting, construction, and depth of A&B's wells was inadequate. As described above, the Director had no authority to consider this information in re-examining A&B's decreed water right, even in the context of a material injury analysis through application of the CM Rules.

III. A&B's Landowners Have the Decreed Right and Can Beneficially Use the Stated Diversion Rate for Water Right #36-2080.

With respect to the amount of water A&B's landowners can beneficially use, the SRBA Court issued a partial decree for 1,100 cfs and 250,417.2 acre-feet per year. For the irrigation of 62,604.3 acres this converts to a rate of 0.88 miner's inches per acre. The Director's *Order* ignored the diversion rate provided by the SRBA Court's decree and set an artificial maximum rate of delivery at 0.75 miner's inch per acre based upon his erroneous findings as to A&B's physical delivery capacities across the various well systems. IGWA now claims this was the Director's "duty of water" analysis and that A&B "required no more" than this amount. *IGWA Br.* at 8. Curiously, if A&B's landowners did not "require" more than 0.75 miner's inch per acre, what would be the incentive to spend millions of dollars on well rectification and pumping costs to divert and deliver more than that amount?

Contrary to IGWA's claims, the SRBA Court already decreed that the amounts stated on water right #36-2080 are "necessary for the beneficial use" for irrigation on the project. IGWA's members and Pocatello, parties to the SRBA, are bound by that judicial determination and cannot "collaterally attack" A&B's decree in this administrative forum.

Aside from the binding effect of the decree, it is clear that based upon the analysis of the expert witnesses in this case A&B's landowners can beneficially use the amounts of water stated on A&B's decree. The only expert witnesses to analyze A&B's landowners' irrigation diversion requirements have confirmed that they can beneficially use at least 0.88 miner's inch per acre.

See A&B Expert Report at 4-6 to 4-8. Pocatello's expert, Greg Sullivan, testified that A&B could beneficially use 0.88 miner's inch per acre during the peak irrigation demand. *See* Sullivan Depo. Tr. at p. 66, lns. 7-14; p. 68, lns. 1-10. Mr. Sullivan confirmed his earlier testimony in his recently submitted affidavit. *See Sullivan Affidavit* at 2, ¶ 7. IGWA's expert has offered no opinion on this issue since he did not perform an irrigation diversion requirements analysis:

> Q. (BY MR. THOMPSON): So nothing based on your own review or technical analysis of an irrigation requirement?
>
> A. (BY MR. PETRICH): I have not done an irrigation requirement analysis personally for the A&B project.

Petrich Depo. Tr., p. 64, lns. 11-15; *See Second Thompson Aff.*, Ex. A.

Apart from the technical analysis completed in this case, IGWA fails to recognize that the amount of water "actually needed" is not established by the irrigation district, but by the landowners within the district, within the confines of the decreed right held by A&B for the benefit of its landowners. The rate of diversion in a decreed water right is an inherent element of that right and the water right holder is entitled to enforce that rate as against junior appropriators if the water can be put to beneficial use. Stated another way, if the landowners can beneficially use the amounts stated on the decree, the Director has no authority to refuse delivery of water in that amount.

The SRBA Court has confirmed A&B's landowners can beneficially use the amount of water stated on the decree for water right #36-2080 and the Director has failed to identify any "post-adjudication" factors that would demonstrate otherwise. Accordingly, since A&B has the decreed right to pump the amounts stated on its decree, and its landowners can beneficially use the water, the Director has no basis to refuse delivery of that amount as against juniors that

interfere with A&B's diversion.

IV. IGWA's Assumption About the Director's "Reasonable Pumping Level" Finding Does Not Cure the Error That No Factual Basis Exists to Support it.

Similar to the lack of information disclosed by IDWR personnel that worked on the *Order*, IGWA has no basis to support the statement concerning "reasonable ground water pumping levels" in finding 18. Instead, IGWA assumes the "Director was unaware of any evidence" and that "it is reasonable to conclude that the Director had [ ] in mind" some unsupported citation to evidence in the Spring Users Case. *IGWA Br.* at 12-13.

IGWA's argument, like the Director's finding, has no factual or legal support. The facts demonstrate that A&B cannot obtain sufficient water from the ESPA within its project. In certain areas A&B has been forced to temporarily convert acres to a surface water supply. It is clear that the Director cannot conclude that the existing ground water levels in the ESPA do not exceed "reasonably ground water pumping levels" when no such pumping level has been established. The finding is unsupported in the record and leaves the parties to "guess" as to what the Director "had in mind". In addition, the unsupported finding denies ground water right holders, like A&B of the ability to challenge this "phantom" ground water level when it has not been disclosed or established by the agency. Since the Director has failed to set a "reasonable ground water pumping level" under I.C. § 42-226 the finding should be set aside.

CONCLUSION

IGWA's response does not justify the Director's failure to properly respond to A&B's request for water right administration as a matter of law. IGWA claims the Director properly evaluated information pre-dating A&B's decree yet it provides no legal basis to support that argument. As evidenced by the standard in the Idaho Supreme Court's *AFRD #2* decision, only "post-adjudication" factors can be considered for purposes of administration.

As set forth in A&B's motion and supporting documents, it is obvious the Director failed to apply the proper legal standards provided by well-established Idaho law, including the *AFRD #2* decision. Instead, the Director wrongly turned to "pre-decree" information in order to justify A&B not receiving the water its landowners are entitled to beneficially use as determined by the SRBA Court. The use of "pre-decree" information, the failure to apply the proper standards, and the failure to provide any support for a "reasonable ground water pumping level" finding, are errors of law that should be set aside. For these reasons, the Hearing Officer should grant summary judgment for A&B.

DATED this 29th day of October, 2008.

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