

Roger D. Ling, ISB #1018  
Attorney at Law  
P. O. Box 623  
Rupert, Idaho 83350  
Telephone: (208) 434-2717  
Facsimile: (208) 436-6804

John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
Paul L. Arrington, ISB #7198  
BARKER ROSHOLT & SIMPSON LLP  
113 Main Avenue West, Suite 303  
P.O. Box 485  
Twin Falls, Idaho 83303-0485  
Telephone: (208) 733-0700  
Facsimile: (208) 735-2444

*Attorneys for A&B Irrigation District*

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

|                                   |   |                                      |
|-----------------------------------|---|--------------------------------------|
| IN THE MATTER OF THE PETITION FOR | ) | <b>DOCKET NO. 37-03-11-1</b>         |
| DELIVERY CALL OF A&B IRRIGATION   | ) |                                      |
| DISTRICT FOR THE DELIVERY OF      | ) | <b>A&amp;B IRRIGATION DISTRICT'S</b> |
| GROUND WATER AND FOR THE          | ) | <b>PRE-HEARING MEMORANDUM</b>        |
| CREATION OF A GROUND WATER        | ) |                                      |
| MANAGEMENT AREA                   | ) |                                      |
| _____                             | ) |                                      |

COMES NOW, A&B IRRIGATION DISTRICT ("A&B"), by and through its attorneys of record, and hereby submits this *Pre-Hearing Memorandum* in the above-entitled proceeding, pursuant to the schedule approved by the Hearing Officer.

**INTRODUCTION**

The Department's failure to administer junior priority ground water rights has forced A&B to continue to suffer material injury without recourse. Although A&B filed its delivery in

1994, ground levels have steadily declined since that time. Seeking relief and proper administration, A&B had no choice but to file its *Motion to Proceed* with the delivery call proceeding in March 2007. Only after a writ of mandate was issued by the Minidoka County District Court did the Director finally take action, which was to deny A&B's call in the January 29, 2008 *Order*.

A&B filed a petition requesting a hearing on the *Order* on February 13, 2008. For purposes of this memorandum, A&B incorporates that petition, as well as its March 21, 2008 *Motion for Declaratory Ruling*, its October 3, 2008 *Motion for Summary Judgment*, its October 22, 2008 *Response to IGWA's Motion for Partial Summary Judgment*, and the associated memorandums and affidavits.

## **PETITION FOR CLARIFICATION / RECONSIDERATION**

### **I. Clarification of Ruling on A&B's Summary Judgment Motion**

A&B petitions the Hearing Officer to clarify the decision on A&B's motion to preclude the use of "pre-decree" information to limit A&B's decreed water right #36-2080. A&B submits the Director erred as a matter of law by relying upon "pre-decree" information, or prior existing conditions, to justify his refusal to distribute water to A&B pursuant to its decreed water right. The Director did not apply the presumption under Idaho law that A&B was entitled to divert and beneficially use water at its decreed rate of diversion for the irrigation of lands included in the District. Rather, the Director embarked on an unauthorized analysis that relied on information that pre-dated A&B's decree.

The Department is bound to honor the SRBA Court's decrees and cannot "look behind" those decrees to re-determine the elements of a water right for purposes of administration. Indeed, the Director recommended A&B's water right to the SRBA Court in 2002, eight years

after A&B filed its water delivery call with the Department. If the elements of the water right, including the locations of the existing wells and the stated diversion rate were sufficient for purposes of obtaining a decree from the SRBA Court, there is no question those elements should be honored for purposes of administration.

In addition, as parties to the SRBA (including some participating as objectors to A&B's water right claims before the SRBA Court) IGWA's members and Pocatello are bound by the SRBA Court's decision and cannot re-litigate the elements of A&B's water right, including the diversion rate by which A&B is entitled to divert and beneficially use ground water in the context of this delivery call proceeding.

Although the Department and the parties may have the ability to consider "post-adjudication" factors as a defense to A&B's call, including the facts relating to the operation, maintenance, and construction of new wells and pumps, any such information that pre-dates A&B's date of decree cannot be used to limit the right that has already been determined by the SRBA Court. A&B requests clarification of the ruling on its summary judgment motion identified at the November 5, 2008 oral argument and asks the Hearing Officer to exclude "pre-decree information" that is used for the purpose of limiting A&B's decreed water right.

## **II. Reconsideration of Decision on A&B's Motion for Declaratory Ruling**

A&B also requests reconsideration of the Hearing Officer's preliminary declaratory ruling that water right #36-2080, with a priority of September 1, 1948, could be altered or amended by the Idaho Ground Water Act where (1) upon enactment, the Act provided that it would not effect pre-existing ground water rights, and (2) the law does not allow any retrospective application to pre-existing water rights. Notwithstanding these legal failings, the Act does not apply in A&B's case because (1) the Director has failed and refused to establish a

reasonable ground water pumping level, and (2) the Act is not applicable when a well has reached the bottom of the aquifer and cannot provide sufficient water to meet the diversion rates authorized by the decree. When this occurs, unless mitigated, the Director must curtail junior diversions from the connected ground water source.

### **EXPECTED WITNESS ORDER / TESTIMONY**

#### **Virgil Temple: Former Well Driller, Reclamation Employee, and Manager**

Mr. Temple will provide testimony about well drilling on the A&B project at the time of construction of the project. Mr. Temple will describe the cable tool drilling method and how and why it was used to drill wells from which water could be pumped and diverted on the project. Mr. Temple will also provide testimony in regard to the operations of the project from its inception and during the time he served as manager of the District. He will explain why the wells and pumps of the project were located in order to provide water to the lands within the District. He will discuss the necessity of being able to divert water at the rate allowed under water right #36-2080 to provide an adequate water supply to the landowners within the district. He will further explain why rectification of the wells and pumps of the district's irrigation system that provided water to the landowners was necessary from time to time to insure that the district has the ability to divert the water under its decree.

#### **Dan Temple: Current Manager**

Mr. Temple will provide an overview of the project's infrastructure, water rights, and water delivery operations. Mr. Temple will describe the individual wells, pumps and motors. He will discuss the wells and distribution systems, acres served by those systems, and the water availability at those points of diversion. Mr. Temple will provide testimony on operations of the District's wells, pumps and conveyance systems, including how water is measured and delivered.

Mr. Temple will describe his experience with the project and area well drillers on decisions made to drill additional wells or deepen existing ones, and the resulting changes to the pumps and motors to provide an adequate and necessary water supply as provided by A&B's decreed water right.

Mr. Temple will describe the District's water level measurements, and the continuing decline in static pumping water levels across the project. Mr. Temple will also describe the District's well rectification program, including the District's efforts to deepen wells, increase horsepower, modify and upgrade pump equipment in order to address declining ground water levels. Mr. Temple will describe the costs incurred and the increased costs paid by the District landowners for this program.

Mr. Temple will also provide testimony about wells that will not produce the supply of water as originally designed because of declining ground water tables in the Eastern Snake Plain Aquifer (ESPA), despite the continued deepening of such wells, why certain wells have been abandoned, and how certain acres have been temporarily provided water from a surface water source. Mr. Temple will provide information about landowners' demands for water, and how requests for water delivery by landowners are made to the District, their complaints of inadequate water supplies, and the continued need to supply additional water, particularly during the peak of the irrigation season.

**Harold Mohlman:    Landowner / Board Member A&B**

Mr. Mohlman will provide testimony about his experience on the A&B project and his farming operations. Mr. Mohlman will describe how reduced water delivery has forced him to redesign and change sprinkler packages on his pivots, change irrigation practices and leave wheel lines off during the peak of the irrigation season, and change cropping decisions on his

farms. Mr. Mohlman will provide testimony about the need to provide additional water to his crops during the peak of the irrigation season and how additional water could be put to beneficial use. Finally, Mr. Mohlman will provide testimony about the increased expenses to the District to improve and drill additional wells to address declining ground water levels, and the increased assessments levied against the landowners.

**Tim Eames: Landowner**

Mr. Eames will provide testimony about his experience on the A&B project and his farming operations. Mr. Eames will describe his irrigation practices and the increased water demand during the peak of the irrigation season, and how he could beneficially use the additional water to which he is entitled under the District's water right, if provided. Mr. Eames will provide testimony about changing irrigation practices during the peak of the irrigation season as a result of the inability of the District to provide to him his full entitlement to water, including being forced to rotate and leave certain sprinkler lines off. Mr. Eames will describe his experience and observations in growing potatoes and the quality and yield impacts that can occur due to reduced water delivery. Mr. Eames will also describe his irrigation operations on lands served by private water rights, including actions taken to address declining ground water levels at those wells.

**Timm Adams: Landowner**

Mr. Adams will provide testimony about his experience on the A&B project and his farming operations. Mr. Adams will describe the water requirements of the crops he grows, particularly during the peak of the irrigation season, and how additional water would be beneficially used if provided. Mr. Adams will describe how reduced water delivery has forced him to shut water off early in the season, change irrigation practices and not water certain crops

in order to provide water to others. He has been forced to redesign pivot sprinkler packages, shut off a pivot endgun and leave corner acres out of production, resulting in impacts to his farming operations.

**Ken Kostka: Landowner**

Mr. Kostka will provide testimony about his experience on the A&B project and his farming operations. Mr. Kostka will describe his crops need for water, particularly during the peak of the irrigation season, and how additional water would be beneficially used if provided. Mr. Kostka will describe how limited water diversions from various A&B wells has affected his cropping decisions and forced him to shut off sprinkler lines and pivots during the irrigation season. Mr. Kostka will also describe problems associated with over-watering early in the year, and how that affects fertilizer inputs. Mr. Kostka will describe his irrigation practices and how his pivot systems and crops require all the water he can apply during the peak of the irrigation season.

**Elmer McDaniels: Former Manager**

Mr. McDaniels will provide testimony as to his knowledge of the A&B project, his understanding as to the purpose of the 0.75 miner's inch per acre criteria identified in the May 9, 1984 letter to the U.S. Bureau of Reclamation, the purpose of the letter, and the requirements of and the actual physical capacity for water delivery on the project. Mr. McDaniels will provide testimony that the 0.75 quantity identified in the letter represented an absolute "minimum" diversion rate that indicated the need to immediately increase the delivery capability from that well system before the following irrigation season.

## PRIMARY ISSUES PRESENTED FOR HEARING

The following general issues are presented for hearing. As identified below, and as will be demonstrated at hearing, the Director failed to recognize and honor the decreed elements of the A&B's senior ground water right #36-2080 for purposes of administration. Hydraulically connected junior ground water rights materially injure A&B's senior ground water right when they divert water out-of-priority and reduce the amount of water available for diversion and application to a beneficial use by A&B at each of its diversion points described in the partial decree for water right #36-2080. The Director's *Order* fails to recognize this basic premise of Idaho's prior appropriation doctrine, and the legal presumptions and protections afforded to A&B's decree. Finally, the failure to properly distribute water to A&B pursuant to its decreed water right has deprived A&B and its landowners of a valuable property right. Accordingly, the *Order* must be modified.

**Issue #1:      The Director Failed to Properly Analyze A&B's Water Diversions From its 177 Separate Wells (Points of Diversion) to Determine Injury to A&B's Water Right.**

A&B pumps water from 177 individual wells that comprise 135 separate systems. A "well system" constitutes one or more wells, each with a pump and motor, that provide water to a distribution system serving a certain number of acres. The Department was aware of this fact at least as early as December 2007. *See Order* at 9, ¶ 35. Moreover, since the Department licensed A&B's ground water right and later examined and recommended the water right as part of the SRBA, it was further aware of the locations of A&B's separate points of diversion.

A&B's ground water project is not a single distribution system as implied by the *Order*. Accordingly, the Director's analysis regarding total "average" annual water use across the project does not accurately portray actual diversions and how A&B is not able to divert its



decreed senior water right from its individual points of diversion. *See Order*, FF 35-64; CL 23-26. By assuming the “total water supply” can be equally delivered to all acres on the project, the Director erroneously concluded that A&B could divert “0.77 miner’s inch per acre” at all wells and therefore deliver “0.74 miner’s inch per acre” to every single acre on the project. *Id.*, FF 64. This assumption was incorrect factually and as a matter of law in analyzing A&B’s water diversion and use under its decreed senior water right.

Testimony from Dan Temple, A&B’s Manager, will explain how water is diverted and measured at individual wells across the project. Mr. Temple will also explain how water is distributed and delivered to the various farm units across the project. Mr. Temple will further explain how certain wells are not capable of producing the “average” rate implied by the Director’s *Order* and the costs and efforts incurred by A&B to improve those wells to provide water to the landowners. Mr. Temple will provide testimony about the amount of water A&B seeks to deliver when rectifying wells based upon the demand from the landowners. Mr. Temple will describe the wells that have been deepened, wells that have been abandoned, and the limitations experienced due to falling ground water levels across the project.

Finally, Mr. Temple will describe how water cannot be physically diverted from one well system and delivered to any acre across the project.

Testimony from A&B’s landowners, Tim Eames, Timm Adams, Ken Kostka, and Harold Mohlman will further explain how water is used from the individual wells and well systems. These landowners will explain that the amount of water provided varies by depending on the well serving their particular farms. The landowners will confirm that A&B does not deliver an “average” amount of water per acre across the project and that the system is operated “on-demand”. The landowners will provide testimony about their water use needs, how they are

restricted to specific diversion rates during “allotment” or the peak of the irrigation season.

Finally, the landowners will provide testimony about the impacts to their farming operations due to reduced water deliveries from individual wells during the peak of the irrigation season and how they can beneficially use the amount of water provided for by A&B’s decree, (0.88 miner’s inch per acre).

Analysis from A&B’s expert witnesses, Dr. Charles Brockway, John Koreny, and Dave (included in A&B’s Expert Report) also describes the diversions from individual wells across the A&B project, and the impacts on those wells due to declining ground water levels. *See A&B Report* at Chapter 3. Diversions by junior ground water rights are interfering with A&B’s ability to divert water at the decreed points of diversion and provide it to its landowners for the irrigation of their lands. This Report further provides an irrigation diversion requirement analysis for each well system, and confirms the peak irrigation diversion requirement needed by A&B’s landowners on the project. *Id.* at Chapter 4.

**Issue #2:     The Director Erroneously Found That A&B is Physically Limited to Delivering Only 0.75 Miner’s Inch Per Acre to Justify the Conclusion that A&B Has Sufficient Water Across the Entire Project.**

The Director erroneously found that “0.75 miner’s inch represents the maximum rate of delivery” to A&B’s landowners across the entire project. *Order* at 15, ¶ 63 (emphasis added). The Director used this finding to conclude that since a diversion of 970 cfs (average delivery of 0.74 miner’s inch per acre) was “near the maximum authorized rate of diversion, there is a sufficient quantity of water to irrigate its 62,604.3-acre place of use”. *Order* at 43-44, ¶ 23. This flawed analysis fails.

The Director did not analyze A&B’s individual well systems nor the actual water delivered on a per acre basis on those systems and compare it to A&B’s decreed water right.

This information plainly demonstrates A&B is not physically limited to only delivering 0.75 miner's inch per acre across the entire project. While A&B can divert and deliver more than 0.75 miner's inch per acre depending upon the well system, it is incapable of diverting and delivering that amount from all wells to supply to all acres on the project, as suggested by the Director's findings. The use of an erroneous "capacity limitation" consequently flawed the Director's entire analysis.

Testimony from Dan Temple will describe the various wells and well systems and the amount of water that can be delivered to the individual farm units. Mr. Temple will explain that A&B is not physically limited to only delivering 0.75 miner's inch per acre to all acres on the project since it depends on the individual well system to determine what can be delivered. Mr. Temple will provide testimony about well systems that fall below A&B's rectification standard of 0.75 miner's inch per acre and the actions taken to improve those wells.

Testimony from A&B's landowners will confirm they have received more than 0.75 miner's inch per acre depending upon the well system. These landowners will also provide testimony about their farming operations and the water needed during the peak of the irrigation season. These landowners will confirm they can beneficially use the amount of water provided by A&B's decreed water right and the impacts to their operations caused by reduced water deliveries.

**Issue #3:      The Director Failed to Properly Analyze the Injury to A&B's Water Right at the Water Short Well Systems (Referred to as the Item G Lands).**

The Director erroneously reviewed "average annual water use" across the project, and wrongly relied upon a non-existent physical delivery capacity to decide A&B had sufficient water for all of its project acres. The Director further refused to analyze A&B's "water-short" wells (points of diversion) and well systems, or those lands to which A&B could not even deliver

0.75 miner's inch per acre during the peak of the irrigation season due to lowered ground water levels.

The only justification offered for not conducting a separate review for each well system was an alleged discrepancy in acres, and "concerns and observations" regarding A&B's "acreage per system". *See Order* at 15, ¶¶ 65-68. It will be shown that there is no factual basis for these findings. The Director further claimed that some of the lands served by these 39 wells are also irrigated by private ground water rights, and that it appeared some irrigation on federal lands existed as well. *Id.* at 16-18. Again, there is no factual basis for this finding and in some respects, such a finding would indicate an unlawful use of water from a private well which the Director would have a duty to curtail.

The Department admittedly failed to verify the number of irrigated acres served by the identified well systems, despite reviewing its own information and information provided by A&B. The failure to investigate unanswered questions does not justify the refusal to complete a comprehensive analysis of the water use under A&B's individual wells.

Dan Temple will provide testimony explaining the "acreage per system" served by the referenced wells and how the water produced by these wells was insufficient to provide the average rate provided by A&B's water right (0.88 miner's inch per acre) as well as 0.75 miner's inch per acre, the criteria A&B uses to determine if a well is placed in A&B's well rectification program. Mr. Temple will further describe his discussions with IDWR staff about their questions on the lands served by the referenced 39 wells, and the information provided by A&B.

As to the Department's questions and concerns about the irrigated acreage served by the 39 wells, analysis by A&B's expert witnesses confirms the approximate number of acres submitted by A&B last year. *See A&B Expert Report* at 4-23 to 4-25, 4-30 to 4-31. A&B's

experts have further analyzed private water rights in the A&B project which demonstrates that only 3% of A&B's project lands have a supplemental private ground water right. *Id.* at 4-26 to 4-27. The fact that IDWR issued a private water right to cover land already served by A&B does not justify denying A&B's call, and it does not relieve A&B from the obligation to provide water to that landowner under A&B's water right.

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. The SRBA Court has decreed that the amounts stated on water right #36-2080 are "necessary for the beneficial use" for irrigation on the project. Testimony provided by A&B's landowners, Mr. Eames, Mr. Adams, Mr. Kostka, and Mr. Mohlman will confirm they need the amount of water provided by A&B's decree, and describe the impacts to their farming operations on those lands served by well systems that cannot produce a minimum of 0.75 miner's inch per acre.

The irrigation diversion requirements analysis contained in A&B's Expert Report also supports the fact that the landowners can beneficially use the amount of water stated on A&B's decree and the need for a delivery rate of 0.88 miner's inch per acre during the peak of the irrigation season. *See* A&B Expert Report at 4-6 to 4-8.

**Issue #4:     The Director Wrongly Concluded that Original Well Siting and Construction, and A&B's present Well Construction Methods Justified Denying A&B's Water Delivery Call.**

The Director's *Order* contains various finding on the hydrogeology, well design, drilling and construction on the A&B project. *See Order* at pp. 31. From these findings, the Director concludes that the "failure to take geology into account is a primary contributor to A&B's reduced pumping yields" and that 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”. *Order* at 45, ¶ 30.

The Director’s findings on these issues are not supported by the record and do not serve as a sufficient basis to deny A&B’s call. A&B’s Expert Report provides detailed information to rebut the Director’s claims on the following issues:

|  |                             |
|--|-----------------------------|
| <b>Adequacy of Unit B Well Design and Construction</b>               | <b>Rep. at 3-16 to 3-20</b> |
| <b>Hydrogeologic Analysis During Well Construction and Deepening</b> | <b>Rep. at 3-20 to 3-22</b> |
| <b>Size of Well Diameters</b>  | <b>Rep. at 3-22 to 3-23</b> |
| <b>Use of Cable Tool Drilling Method</b>                             | <b>Rep. at 3-23</b>         |
| <b>Costs Incurred by A&amp;B Compared to Projected Costs</b>         | <b>Rep. at 3-24 to 3-25</b> |

Notably, the Director’s *Order* erroneously uses the project location, its original well siting and construction as justification for not delivering water to A&B as provided under its decreed water right #36-2080.

First, the A&B project was designed and constructed by the U.S. Bureau of Reclamation, not A&B. It is clear that the wells were sited across the project in order to convey water by gravity through laterals to the farm units served by their respective wells. Although the wells produced water when they were originally drilled and deepened, as supported by the original pump tests, the Director claims that the wells were constructed at the wrong locations across the project. Stated another way, the Director implies the A&B project must be re-engineered and reconstructed before its senior water right is entitled to protection from injury by junior rights.

The Director cannot use the location of the wells as a reason to justify not delivering water under a decreed water right, particularly when the Department previously licensed, and later recommended that water right to the SRBA Court with those same wells at their respective

locations. The Department analyzed A&B's water right on two separate occasions and confirmed that the locations of the wells, the existing points of diversion, and the stated quantities, including diversion rate, were acceptable and necessary for irrigation purposes. As such, his findings on this issue are erroneous.

In addition, the Director's conclusions about the adequacy of the Unit B well design and construction is not supported by information in the record. A&B's Expert Report examines the history of the project and original design and construction completed by Reclamation. *See* A&B Expert Report at 2-1 to 2-4. The Report also rebuts the Director's conclusions about the adequacy of the project's well design and construction and the subsequent deepening of wells on the project. *See id.* at 3-16 to 3-25. As demonstrated by that analysis, by the late 1960s almost all wells on the project had at least 5-10 feet of water over the top of the pump bowls and the average water depth over the pump bowls was about 25 feet. *See id.* at 3-16. Almost all wells were able to provide more than 0.75 miner's inch per acre at that time, and most provided more than this amount. *See id.* 3-16, 3-17. Moreover, A&B's wells were drilled at a depth and with a saturated well interval comparable to other wells constructed across the ESPA at that time, and there is no indication that the wells did not meet the applicable standards. *See id.* at 3-19. Finally, A&B's Expert Report and testimony from A&B's manager rebuts the Director's conclusion that A&B has not used sufficient "hydrogeologic analysis" during well construction and deepening.

Mr. Virgil Temple will provide testimony about early well drilling on the A&B project, the well construction methods used at that time, and the results achieved. Mr. Temple later served as A&B's manager and will also provide testimony about the project's early operations.

Mr. Dan Temple will provide testimony about A&B's recent well drilling and deepening efforts on the project. Mr. Temple will describe the experience that he and his staff, along with local well drillers, have in this region and their decisions about well drilling, pump design, and well deepening on the project.

**Issue #5:      The Director Wrongly Concluded the ESPAM Model Scenario is Not Intended for Water Right Administration.**

Unlike the Department's response to every other water right delivery call on the Eastern Snake Plain Aquifer (ESPA), in the case of A&B the Director backpedaled and alleged that the model scenarios, "such as the A&B Scenario, are not intended for use in administering the state of Idaho's water".<sup>1</sup> *Order* at 33, ¶ 122. The Director made this finding despite using the ESPAM in response to calls filed by Rangen, Blue Lakes Trout, Inc., Clear Springs Foods, Inc., and the Surface Water Coalition through orders issued from 2004 to 2008.<sup>2</sup>

The finding in the A&B *Order* further contradicts the Director's final orders issued in other cases where he determined the ESPAM "represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically connected reaches of the Snake River and its tributaries" and that there "currently is no other technical basis as reliable as the simulations from the EPSPA ground water model" that can be used to determine those effects. *See SWC Final Order* at 11, ¶ 17. The A&B Scenario, or one of the "simulations", plainly stated that it was "being developed to provide technical information that will be useful in resolution of conflicts among water users and in future water administration." *See* A&B Scenario at 2 (emphasis added).

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<sup>1</sup> The State does not "administer" water, rather watermasters "distribute" water in accordance with existing water rights. *See* Idaho Code § 42-607.

<sup>2</sup> *See generally*, orders in response to the referenced calls found at <http://www.idwr.idaho.gov/about/orders.htm>.



The Director has no basis to back away from the ESPAM for purposes of responding to A&B's water delivery call just because the A&B Scenario found that between 80-84% of the ground water level decline in A&B was caused by pumping of junior priority ground water rights outside of the project. *See* A&B Scenario, A&B Expert Report at 6-2 to 6-3. This scenario, while troubling for junior ground water right holders, should have been used by the Director in responding to A&B's call. Instead, the Director created a false criteria claiming the ESPAM "does not properly account for local hydrogeologic feature" and therefore "should not be used to evaluate impacts of one well on another". *Order* at 33, ¶ 119.

Contrary to the Director's assertion, the model accounts for cell-by-cell variations in aquifer hydrogeologic properties as is appropriate for the regional simulation of ground water pumping by groups of wells on areas of the aquifer. *See* A&B Expert Report at 6-4. In addition, A&B's water delivery call does not simply ask the Director to evaluate the impact of "one" junior priority well on "one" of A&B's 177 wells, or points of diversion. Since the ESPAM can evaluate the effects of pumping of a group of junior priority ground water wells on the ground water levels over a larger area of the ESPA around A&B, it should be used by the Director in the administration of water rights to satisfy A&B's call.

**Issue #6:      The Director Erred in the Analysis of Costs Incurred by A&B to Mitigate for Continuing Ground Water Level Declines.**

In analyzing the costs A&B has incurred due to declining ground water levels in recent years, the Director relied upon the 1955 Definite Plan Report and its estimate that annual "replacement" costs for irrigation wells of \$43,250. *Order* at 35, ¶ 134. The Director then used the Consumer Price Index to state this amount would equal approximately \$246,000 in 1995 and \$326,000 in 2006. *Id.*

The Director wrongly found that the "additional expenditures that A&B attributes to

water level decline is comparable to the original cost estimate for maintaining production wells”.

*Order* at 35, ¶ 135. The Director wrongly compared the Definite Plan Report’s normal annual “replacement costs” for wells to the costs incurred by A&B for well deepening, pump upgrades and increased power needed because of declining ground water levels. The Definite Plan Report describes its estimated annual replacement costs as follows:

Provision has been made in the estimate of annual operating costs to cover the average annual amount that would be required to replace the property items needing replacement during the payout period, table 17. This estimated annual cost is based on straight-line depreciation over the estimated life of the replaceable items. The annual amount estimated at current price levels has been adjusted to a long-range price level comparable with the price level used in the estimates of farm income.

*Definite Plan Report* at 95. *See Exhibit C to 3/21/08 Affidavit of Dan Temple.*

The amount of \$43,250 in Table 17 of the Definite Plan Report is the amount that would be needed to be set aside for a full replacement of items that would wear out. This estimate was already “depreciated over the estimated life of the replacement items”, therefore the Director incorrectly adjusted the amount for inflation as a comparison. More importantly, the cost estimate in the Definite Plan Report does not provide an estimate for well deepening, pump and motor upgrades, and additional power costs needed to pump water at greater depths. *See A&B Expert Report* at 3-24 to 3-25. Consequently, the Director’s conclusion that costs incurred by A&B are “not unreasonable when compared to original cost estimate for maintaining the production wells and the reasonable exercise of its water right” is erroneous and based upon a false comparison. *See Order* at 45, ¶ 36.

A&B completes normal repairs and replacement of equipment on an annual basis which costs are tracked separately from those costs incurred due to declining ground water levels. From 1998 to 2007, A&B has spent an average of \$122,626 per year for well repair and

maintenance. *See 3/21/008 Temple Aff.* at 6. Over and above normal operation and maintenance expenses, A&B has spent almost an additional \$2.5 million, or \$206,000 per year, in well rectification, including increasing horsepower, retrofitting pumps and bowls, and deepening wells between 1995 and 2006. *See id.*

Dan Temple (A&B's Manager) will provide testimony explaining the District's well rectification program and the costs incurred by A&B's landowners to deepen wells, increase horsepower, and modify and upgrade pump equipment in order to compensate for lowered ground water levels across the project. Mr. Temple will describe the amounts spent for the well rectification program and how it has increased in recent years resulting in increased annual assessments for A&B's landowners.

**Issue #7:      The Director Wrongly Denied A&B's Petition to Designate a GWMA.**

The Director denied A&B's request to designate the ESPA as a Ground Water Management solely because "water districts created pursuant to chapter 6, title 42, Idaho Code, are in place across all of the ESPA." *Order* at 47, ¶ 41. The Director's reliance upon the existence of water districts, which only administer water rights, fails to recognize the state of the ESPA and the purpose of Idaho Code § 42-233b which is aimed at protecting the water resource.

Under Idaho law, each "water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators." Idaho Code § 42-604. The watermaster and the Director have a clear legal duty to distribute water "in accordance with the prior appropriation doctrine." Idaho Code §§ 42-602, 607. A water district is not created for the purpose of protecting the water supply, it is created to distribute water pursuant to established water rights. A ground water management area, on the other hand, is designated when a ground

water basin, or part thereof, “may be approaching the conditions of a critical ground water area”. Idaho Code § 42-233b. When a GWMA is created, the Director may approve a “ground water management plan” which shall “provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.” *Id.* Unlike a water district, a GWMA designation is aimed at protecting the water resource and managing the effects of ground water withdrawals.

Pursuant to the Director’s May 1, 1995 *Pre-Hearing Conference Order* in this matter, the Director ordered:

1. IDWR will develop a plan for management of the ESPA which will provide for active enforcement of diversion and use of water pursuant to established water rights. Such plan will be adopted and implemented under the Administrative Procedure Act.

*Pre-Hearing Conference Order* at 8.

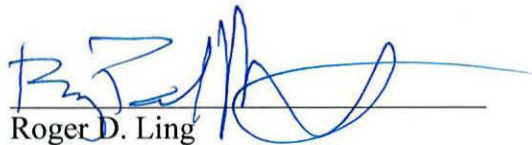
No such plan was ever developed or adopted by the Department. Although water districts have been created to provide for water right administration, the Department has yet to adopt a “management plan” to protect water supply in the ESPA. This is despite the evidence of a continuing decline in ground water levels across the aquifer.

The evidence provided by A&B to the Department clearly demonstrates declining aquifer levels across the ESPA within the A&B project. A&B’s Expert Report also shows a statistically significant trend for declining ground water levels throughout other areas of the ESPA. *See* A&B Expert Report at 5-3 to 5-5, Figures 5-7 and 5-8. Declining ground water levels have not only affected A&B, but they have also forced other water right holders to deepen their wells (about 160 private wells deepened after 1970 in the vicinity of A&B). *See id.* at 3-18. Declining ground water levels have resulted in declining reach gains and tributary spring flows to the Snake River. *See id.* at 5-5 to 5-6. Increased ground water pumping and decreased

incidental recharge have contributed to declining ground water levels and reduced water supplies for existing water right holders like A&B.

At a minimum, the southwestern portion of the ESPA qualifies for designation as a "ground water management area" since the rate of aquifer recharge (from all sources) is not sufficient to meet the rate of aquifer discharge (from all combined discharges). *See* A&B Expert Report at 5-9 to 5-11. The Director, by refusing to consider the existing water supplies and the evidence concerning the state of ground water levels across the ESPA, erred in denying A&B's petition requesting designation of a GWMA.

DATED this 25<sup>th</sup> day of November, 2008.

  
Roger D. Ling

BARKER ROSHOLT & SIMPSON LLP

  
John K. Simpson  
Travis L. Thompson  
Paul L. Arrington

*Attorneys for A & B Irrigation District*