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ATTORNEYS FOR THE CITY OF POCATELLO

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUNDWATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA	)	DOCKET NO. 37-03-11-1 **CITY OF POCATELLO'S PRE-TRIAL BRIEF**

INTRODUCTION AND PROCEDURAL POSTURE

The City of Pocatello submits its Trial Brief in conformity with the modified schedule set by the parties and the Hearing Officer by email on November 18. The Director's January 29, 2008 Order found that A&B's water right no. 36-2080 is not being injured by junior ground water pumping. As the evidence in this matter will show, as well as applicable legal argument, the Director's determination must be affirmed.

A&B filed its delivery call in 1994. As summarized in the January 29, 2008 Order ("Order" or "January 29 Order"), Findings of Fact ("FOF") ¶1-9, the matter was stayed in November 1994 and the Idaho Department of Water Resources ("IDWR" or "the Department") retained jurisdiction over the matter with the proviso that any party could file a motion to proceed to request that the stay on the delivery call be lifted. A&B filed a Motion to Proceed in March of 2007. The Department issued its January 29 Order at the direction of Judge Butler in Case No. CV 2007-665, which required the Director "to make a determination of injury [to A&B's water right], if any, in accordance with Rule 42 of the Conjunctive Management Rules." *Memorandum Decision Re: Respondent's Motion to Dismiss* at 15. A&B timely filed its *Petition Requesting a Hearing on the Director's Order*, and Pocatello and IGWA (among others) filed notices of appearance in support of the January 29 Order.

In the interest of efficiency, this brief is focused primarily on certain applicable legal arguments and the testimony Pocatello expects to provide and elicit during the course of this proceeding. For issues not covered in this brief that are part of the testimony or legal argument to be presented by the junior ground water users in this matter, Pocatello adopts the trial brief of the Idaho Ground Water Appropriators ("IGWA").

I. A&B'S CLAIMS UNDER THE MOTION TO PROCEED, GENERAL SUMMARY OF THE JANUARY 29 ORDER, AND GENERAL SUMMARY OF ISSUES THAT ARE THE LAW OF THE CASE (AND THOSE THAT ARE NOT).

A. A&B's Claims in its Motion to Proceed.

A&B's *Motion to Proceed*, March 26, 2007 ("*Motion to Proceed*") provides a global view of the claims made by A&B in this matter:

- Quantities of water. A&B suggests that it requires the decreed amounts under its water right (i.e., "Diversions authorized under Water Right No. 36-02080 are

necessary for the irrigation of lands receiving water under that water right.") (¶ 11.c., d.)

- Lowering of the ground water table. A&B suggests in its *Motion to Proceed* that it is entitled to historic water levels. (¶ 11.b, d, g, and i.)
    - Costs. This claim is derivative of A&B's claim related to lowering of the ground water table. A&B suggests that it has spent unreasonable amounts of money to maintain its system and that the additional "effort and expense to divert the quantity of water to which it is entitled is not economical and would be an unreasonable requirement [to impose on A&B]". (¶ 11.a and e.)
- A&B also requested that the Director determine "reasonable pumping levels" pursuant to his authority under the Ground Water Act, and to curtail juniors across the ESPA to satisfy A&B's water rights. (¶ 11.f and i.)

The Director addressed each of these claims in the January 29 Order and concluded that A&B had adequate water supplies and was not suffering injury to its water rights. Order at Conclusions of Law ("COL") ¶37. He reached this conclusion by analyzing the irrigation diversion requirements for all 62,604 acres associated with A&B's 1948 water right no. 36-2080. The Director compared the irrigation diversion requirements to the historical amounts pumped and found that A&B was not short of irrigation water. Order at FOF ¶35-64. The rationale for applying the irrigation diversion requirements analysis across the entire district rather than on a well system-by-well system basis was the language of A&B's license and partial decree confirming the license, which affirmatively assigns *all* of A&B's water right no. 36-2080 to *all* 62,604 acres to maximize flexibility. Order at FOF ¶32-34, 63-64. The Director also declined to

address A&B's claims under the Ground Water Act (i.e., that it was faced with "unreasonable" expenses to maintain its well system because of declining ground water levels) because its water right was not suffering material injury. Order at COL ¶38.

B. General summary of issues that are the law of the case.

The framework of the Director's Order raises certain legal issues, some of which were resolved through pretrial motions practice and some of which were not.

1. Legal issues arising under the Director's Order that were resolved pre-trial.

- The Director properly interpreted the A&B partial decree by assuming the water diverted by any well was appurtenant to all lands within the place of use.
    - After briefing and argument on IGWA and Pocatello's Joint Motion for Partial Summary Judgment on Appurtenance, the Hearing Officer made an oral ruling on November 5, 2008 that the Director acted within his discretion to interpret the partial decree in this way.
- The Director had the discretion to rely on certain pre-decree information, including the 1985 Bureau of Reclamation Report ("1985 USBR Report") [Exhibit 113].
    - The Hearing Officer considered briefing and argument on A&B's Motion for Summary Judgment that the Director improperly relied on pre-decree information in reaching the conclusions contained in the January 29 Order. The Hearing Officer ruled orally on November 5 that he would not exclude the 1985 USBR Report and that, based on the initial showings made, the Director's reliance on such information was not improper.

- The Director properly declined to consider A&B's claims for historic water levels.
    - The Hearing Officer's Order on *A&B's Motion for Declaratory Ruling*, March 21, 2008 found that the Ground Water Act, including § 42-226, applied to A&B's water right no. 36-2080. *Order Regarding Motion for Declaratory Ruling*, May 26, 2008. As such, A&B's claims for historic water levels (and costs associated with well deepening or interconnection that arise under this theory) fail as a matter of law.

2. Remaining legal issues to be decided in the framework of resolving this dispute.

Although there are undoubtedly many additional legal rulings to be made throughout the course of this hearing, an important legal question that the parties have not briefed related to the January 29 Order is whether the Director properly declined to establish a reasonable pumping level because A&B's water right was not suffering material injury. As detailed in the next section of this brief, the Director's legal reasoning should be affirmed as it is consistent with Idaho law.

II. THE DIRECTOR PROPERLY ARTICULATED THE LEGAL FRAMEWORK FOR A GROUND WATER-TO-GROUND WATER DELIVERY CALL.

As the Director noted in the January 29 Order, a ground water delivery call is, "just as complex as a delivery call by the holder of a senior-priority surface water right against the holders of junior-priority ground water rights, if not more so." Order at COL ¶12. The factual complexity of the A&B delivery call is reflected in part in A&B's multiple theories of injury: shortage of irrigation water supplies, impacts from declining ground water levels, and costs to pump water from declining ground water levels. While the Director examined each of these

claims, he properly declined to base any findings of injury on claims to water levels or costs because he found that A&B had adequate water supplies to satisfy their crops, to wit:

> 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 COL ¶ 38. This paragraph summarizes the Director's legal framework for the January 29 Order and presents an issue for the Hearing Officer insofar as the legal framework controls consideration of the evidence. Although the legal reasoning behind the Director's conclusion of law is not fully developed in the January 29 Order, as described below, it is consistent with the reasoning of Idaho Supreme decisions and should be affirmed.

A. Idaho law does not support A&B's claim of injury from reduced ground water levels in the absence of a showing of water shortage.

As the Hearing Officer noted during the November 5, 2008 oral arguments on summary judgment in this matter, the law of prior appropriation in the West generally, and Idaho particularly, has largely developed around disputes over distribution and administration of surface water rights. The nature of prior appropriative ground water rights, however, is refined by the Ground Water Act, I.C. § 42-226 *et seq.* Indeed, section 226 of the Ground Water Act has seemingly codified the constitutional concept of optimum development as it relates to ground water rights. *See Baker v. Ore-Ida*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (holding the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest). However, the Idaho Supreme Court has been presented with few opportunities to interpret the substantive provisions or reach of the Ground Water Act beyond its decision in *Baker* and *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

Despite the novelty of this dispute, existing case law provides guidance in developing the legal framework to apply to A&B's claims. As a starting point, a delivery call is for the quantity of water necessary to satisfy beneficial uses and not for a particular water level. *American Falls Reservoir District No. 2 v. Idaho Dept. Water Resources*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007), *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 120 (1912). Further, as the Hearing Officer already found in this case, A&B's 1948 water right no. 36-2080 is subject to the Ground Water Act and thus qualified by the "reasonable pumping level" provisions of I.C. § 42-226. *Order Regarding Motion for Declaratory Ruling*, May 26, 2008; *Baker supra*.

While A&B's senior water right is qualified by a "reasonable pumping level" under the Ground Water Act, this qualification does not create a basis for A&B to obtain administration of its senior water right on the strength of a complaint about water levels. The Director has no authority to administer water rights on the basis of water levels—he must administer rights on the basis of the amount required for beneficial use. *AFRD#2*, 143 Idaho at 880. "Reasonable pumping levels" are not an independent entitlement—instead, they are a form of remedy to shortage, and thus only a finding of material injury can lead to the Director evaluating water levels to determine if they are "reasonable".

Under Idaho law, the issue of water levels (whether historic or reasonable) has always been related to the remedy for material injury. At common law, the elements of A&B's water right did not include a right to ground water levels. This is clear from the result in *Nampa-Meridian Irr. Dist. v. Petrie*, 37 Idaho 45, 223 P. 531, 532 (1923) which rejected defendant irrigation district-member Blucher's claim of injury from changes in ground water levels. 223 P. at 532-33. If, prior to the adoption of the Ground Water Act, ground water rights had included the entitlement to specific water levels as an element, the *Nampa-Meridian* Court would not have

rejected out of hand the Blucher's complaints regarding changes in his ground water levels as a result of irrigation district activities. *Id.*

Under the common law, a finding of injury combined with a finding of declines in water levels were a means to shift the burden to juniors for shortages caused by junior pumping. For example, in *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112, 1113 (1933), the effect of junior pumping was that there was "no water" in the senior's well, i.e., the senior was unable to make beneficial use of his ground water and, because of the shortage, the junior had to pay to deepen the well. Thus, at common law, a finding of injury was the trigger to shift the burden to the junior to rectify the situation. Although the Court in *Noh* affirmed that shift, it was not an easy burden to meet as demonstrated in the decision of *Bower v. Moormen*, 27 Idaho 162, 147 P. 496, 503 (1915) (reversing the district court's finding that the junior was required to take steps to replace the senior's water supply).

Similarly, "reasonable pumping levels" under the Ground Water Act provide a means for the Department to shift the burden to juniors to rectify the senior's shortage. I.C. §42-226. But because the Ground Water Act modified the common law, holding a senior ground water right is no longer enough. The Department must take into account full economic development of the resource by examining whether pumping levels are reasonable; if they are, there may be times when a senior may be short of water but may be made to deepen his well because his pumping levels are not unreasonable.

As in *Noh*, the trigger for administrative action should be a finding of shortage to the senior. However, under the Ground Water Act the administrative action is to determine whether the senior is pumping from a "reasonable pumping level" rather than immediately shifting the burden to the junior as a condition of continued pumping. The senior ground water user is, after

all, still only entitled to an amount of water (as opposed to a water level). It is the finding of a shortage sufficient to constitute injury that—requiring administration of junior ground water rights—that triggers the further administrative evaluation, which then leads to determinations regarding reasonable pumping levels. Simply put, without a finding of injury to a senior ground water right there is no remedy required, and the Department has no basis to exercise its discretion to examine "reasonable pumping levels" across the aquifer.

B. The Rules for Conjunctive Management of Surface and Ground Water Resources do not authorize determinations of injury solely on the basis of water level.

Although IDAPA Rule 37.03.11.42.01.a ("Rule 42") authorizes the Director to consider "the effort or expense" of a senior to deliver water, the scope of that consideration must be consistent with Idaho law. *AFRD#2*, 143 Idaho at 879-80 (the CMR must be interpreted by reference to Idaho law and can be read to incorporate Idaho law to the extent it is not on the face of the rules). All water users incur some effort or expense to deliver water, so this cannot be a wholesale requirement to evaluate costs in every delivery call. Further, if Idaho law forecloses evaluation of a reasonable pumping level unless and until a shortage to the senior is demonstrated, then there is little reason to consider the senior's "effort or expense" to deliver water until it is determined whether pumping levels are reasonable.

In addition, the Director is also required to consider Rule 42.01.h. which suggests, by contrast, that the Director might find that the senior is required to expend some "effort or expense" to obtain his water right from an alternate source or alternate well. As a threshold matter, the Director is must also consider Rule 40.03 which requires a determination of whether the petitioner making the delivery call:

> is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground water as described in Rule 42.

Given that all of these provisions are included in the Rules for Conjunctive Management of Surface and Ground Water Resources ("CMR"), Rule 42.01.a. should be narrowly construed.[1] *State v. Hensley,* 145 Idaho 852, 187 P.3d 1227, 1230 (2008)("It is a fundamental law of statutory construction that statutes that are in *pari materia* are to be construed together, to the end that the legislative intent will be given effect.") (citations omitted); *Posey v. State Dept. of Health and Welfare,* 114 Idaho 449, 450, 757 P.2d 712, 713 (Idaho App.,1988) (noting that principles of statutory construction apply to rules and regulations promulgated by administrative agencies).

C. There are practical reasons for affirming the Director's restraint in determining reasonable pumping levels without a showing of physical shortage.

On a practical level, any change in water levels results in increased pumping costs. If a delivery call can be sustained merely on the basis of decreased ground water levels, there will be the proverbial race to the courthouse. There are 15,000 thousand wells on the ESPA that are senior to 1980 (for example). Any of them could experience changes in water levels which required the user to rectify a pump or deepen a well. If A&B's claim is recognized it could lead to the conclusion that only the most senior ground water user is entitled to pump as all pumping by subsequent users has some negative effect on ground water levels available to A&B. Therefore, requiring a factual trigger (beyond the mere allegation of a senior ground water user that it has suffered injury from changes in ground water levels) to authorize administrative action to determine reasonable pumping levels is a practical prerequisite to IDWR action, and is also consistent with the constitutional policy of maximum utilization of water resources.

[1] Although Rule 42.01.h. seems to speak only to senior surface water rights, there is no constitutional or legal basis to so limit the rule. If a senior surface water right can be charged with expending effort to obtain water supplies from an alternate source or through supplemental wells, there is no basis to suggest that senior ground water users should not also be charged with such an obligation. In any event, the Director lists Rule 42.01.h. as a basis for his decision-making and thus must understand it to be within his discretion to apply. Order at COL ¶ 19.

The Director properly declined, in the absence of actual physical shortage of water, to provide relief to A&B's claims of injury from unreasonable ground water levels and other issues arising under the Ground Water Act including costs associated with well deepening, interconnection, and well pumping because these issues are not proper for consideration in this proceeding.

III. AS A FACTUAL MATTER, THE JANUARY 29, 2008 ORDER DETERMINED THAT A&B HAD ADEQUATE WATER SUPPLIES.

A. The Director found that A&B had adequate water supplies based on a variety of measures. This conclusion is supported by the evidence submitted by Pocatello and IGWA. Order ¶¶35-64, 76-80.

The Department analyzed A&B's diversions in light of crop irrigation requirements ("CIR"). *See* Order at FOF ¶¶35-64 and 76-80. The Director concluded that A&B required 2.89 acre-feet per acre on an average annual basis and, by comparison with historical average diversions, had an adequate water supply. Order at FOF ¶52. The Department then went on to make the following comparisons:

- The Department's average diversion requirement of 2.89 acre-feet per acre was compared with the Bureau of Reclamation's ("BOR") diversion requirement of 2.59 acre-feet per acre determined in the 1985 USBR Report [Exhibit 113.]. Order at FOF ¶45.
- These diversion requirements determined by the Department and in the 1985 USBR Report were compared to various "duties" of water—in other words, the amounts diverted compared to the acres served within A&B (Order at FOF ¶53) and in ground water districts outside of A&B (Order at FOF ¶ 55, 56).

- These diversion requirement analyses were further compared to historic patterns of diversion, including A&B's irrigation of expansion acres beginning in the 1970's and 1980's. (Order at FOF ¶57-59).
- The Department also examined satellite imagery analysis of crop evapotranspiration (a.k.a. METRIC) within A&B and in the surrounding areas as a backstop to the more traditional irrigation requirements analysis. (Order at FOF ¶76-80)
- The Department also examined the expectations of the B unit at the time the project was built and concluded that 0.75 miner's inches per acre was a farm delivery capacity for the unit. (Order at FOF ¶ 63-64).

1. Pocatello's experts will provide analyses that support the Director's findings.

In Exhibit 301, Pocatello's expert, Mr. Sullivan, provides a refined analysis for peak farm delivery requirements in the B Unit during a very dry year under two scenarios: "original conditions" (requirements when the farms used gravity or furrow irrigation) and "current conditions" (requirements today when more than 96% of the farms have sprinklers). Exhibit 301 (appendix A). Under "original conditions," 0.84 miner's inches per acre was required at the farm headgate to meet the dry-year peak demand for irrigation. Under the "current conditions" scenario with more efficient sprinkler irrigation, 0.65 miner's inches per acre is required to meet peak dry year irrigation water demand.

By comparison, A&B's experts calculate a 0.89 miner's inches/acre for current conditions (including 96% sprinklers). A&B Irrigation District Expert Report, July 16, 2008 [Exhibits 201F, 201G, 201T thru 201Z, and text at pages 4-7 and 4-8]. This is in excess of the

design capacity of the B unit's delivery system, Bureau and A&B documents demonstrate is approximately 0.75 miners inches. [*See, e.g.*, Exhibits 113, 334 (Appendix A)]

In addition, A&B's experts performed their irrigation requirements analysis on a well system-by-well system basis, but applied a district-wide crop distribution. As the graphs in A&B's Appendix M demonstrate, this well-by-well assumption lead to significant departures between the calculated irrigation requirements and actual diversions which are evidence of the unreliability of the analysis. Testimony from A&B's farmers will show that the "shortages" calculated by A&B's experts in many cases reflected the illogical assumptions of applying the district-wide crop distribution to a well system-by-well system analysis, so A&B experts' irrigation requirements analysis predicted a need for crop irrigation water at times when the grain crop, for example, was in the middle of harvest. Because A&B's irrigation demand analysis is flawed in these ways it does not provide a basis to refute the Director's analysis of the A&B irrigation water supply which found no injury to A&B, and should A&B's analysis should be rejected.

2. The irrigation requirements analysis conducted by Pocatello's experts included soil moisture as a source of water supply; A&B's experts' irrigation analysis is unreliable because it disregards this important source of irrigation water.

As in the Surface Water Coalition ("SWC") delivery call case, the irrigation analysis of Pocatello's consultants differs from that of A&B's consultants. However, unlike in the SWC case, there is only one primary difference between the two analyses: Pocatello's consultants incorporated soil moisture as a water supply source for A&B's crops and A&B's consultants did not. Exhibits 334-F through –J. As a technical matter, removing soil moisture from its irrigation demand analysis makes A&B's methods inconsistent with those found in engineering literature regarding CIR analyses. Exhibit 334. On a more practical level, testimony of the A&B

farmers will establish that they make irrigation decisions based on their weekly (or more frequent) analysis of soil moisture in the field. In concert, these problems make A&B's irrigation analysis unreliable and do not provide a basis for the Hearing Officer to reject the Director's irrigation analysis.

3. The Department's irrigation analysis was confirmed by an examination of well capacities against actual diversions. As Pocatello's evidence will show, the Department properly concluded that well capacities were in excess of actual diversions and that any shortage of water is related to diversion patterns rather than actual supply.

The Department's Order made findings regarding well capacity ("total low flow"[2]) and concluded, based on comparison of total low flow values reported in the 1994 and 2006 annual reports, that the District could deliver 14 cfs more water in 2006 than it had delivered in 1994. (¶61-62). Its irrigation requirements analysis was confirmed by an examination of well capacities against actual diversions. Pocatello's experts also examined well capacity in comparison to diversions and found that capacities often exceeded actual diversions. Exhibits 331-332 (Tables 7-8 Opening Report); Exhibits 334-C and -D (Figures 3-4, Rebuttal Report).

B. The Director properly rejected A&B's claims of injury from water level declines based on the legal analysis, the peculiar hydrogeology associated with the District, and A&B's failure to take steps to adequately interconnect their system. Order paragraphs 81-95 (Hydrogeology). Order paragraphs 109-122 (water level declines and ESPAM).

Pocatello's evidence confirms the Director's findings regarding the nature of the hydrogeology beneath A&B's lands, and the patterns of well drilling and deepening associated with the A&B project. The water level evidence also demonstrates that, although A&B has experienced water level declines, it has also experienced occasional periods of water level recovery. Exhibit 301, section 5.2.2. Finally, Pocatello's evidence confirms the Director's

[2] *See,* Glossary.

Order insofar as he has determined the relative contributions of drought, changes in surface water use practices, and junior ground water pumping on water levels. Exhibit 301, section 6.0.

C. The Director properly rejected A&B's claims for costs.

As discussed in part II *infra,* claims of costs are just another way to make a claim for water levels. If a water user deepens a well to chase water, or pumps from a greater depth increasing incrementally the power charges, claims for compensation for these efforts are simply another way to claim an entitlement to water levels. However, if reasonable water levels are not a proper claim in this matter, then neither are A&B's claims for costs. In any event, the issue of costs is not joined unless and until the Department makes a determination that A&B's pumping levels are *not* reasonable. At this point, A&B's entitlement to compensation for costs incurred from pumping, rectification, and interconnection are entirely speculative.

To the extent the Hearing Officer takes evidence on this issue, caution is warranted in translating any of it into findings. The Director's authority over costs is qualitative at best, and A&B has not identified any statutory authority for the Director to order costs to compensate senior ground water users. To the extent the Hearing Officer finds that costs related to A&B's pumping or other well improvements are *unreasonable*, this could unwittingly provide a cause of action for A&B to sue in district court. Pocatello suggests that costs should play no part in this matter; however, in the event the Hearing Officer declines to adopt the legal analysis outlined in Part II above and orders an examination of reasonable pumping levels without regard to A&B's showing of injury, A&B's costs can be taken up after it is determined the water levels are unreasonable.

As a factual matter, the cost information submitted by A&B is insufficient to make any findings. [Exhibit 307] Some of the numbers relate to the closing of drain wells, which was an action ordered by state and federal water quality officials and is unrelated to water level declines.

Some of the numbers relate to well "rectification," although neither the Manager nor A&B's consultants are able to say which costs are "routine" and which are "extraordinary," so it is impossible to say whether the cost claims are even colorably related to the alleged injury. Further, to the extent these annual costs do not exceed those expected under the Minidoka Project, North Side Pumping Division Definite Plan Report ("DPR"), [Exhibit 111] (and evidence will show they are consistent with the DPR) these are in the normal course of A&B's operations and should not be charged to juniors. Finally, as a point of comparison, as testimony from Pocatello's water superintendent and water operations supervisor will show, A&B's costs are less than Pocatello's and so are not *per se* unreasonable. Exhibit 340.

Based on the evidence to be presented in this case, as well as the applicable law, the Director's January 29 Order finding no injury to A&B's water right no. 36-2080 should be affirmed.

Respectfully submitted this 25th day of November, 2008.

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CERTIFICATE OF SERVICE VIA E-MAILING / MAILING

I hereby certify that on this 25th day of November, 2008, a copy of **City of Pocatello's Pre-Trial Brief** in the **Petition for Delivery Call of A&B Irrigation District** was served by email and/or by placing a copy in the U.S. Mail, postage prepaid and addressed to the following:

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