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 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 POST-HEARING MEMORANDUM AND PROPOSED FINDINGS**

COMES NOW, A&B IRRIGATION DISTRICT ("A&B"), by and through its attorneys of record, and hereby submits this *Post-Hearing Memorandum and Proposed Findings* in the above-entitled proceeding. In support of the proposed findings, A&B incorporates its *Pre-Hearing Memorandum* filed on November 25, 2008, including the request for clarification and

reconsideration contained therein, as well as the other pleadings, expert reports, and testimony submitted and presented in this case.

INTRODUCTION

The evidence and testimony presented in this case demonstrates that the Director erred in his January 29, 2008 *Order* and that A&B's senior water right is being materially injured by junior priority ground water diversions in the ESPA. As set forth below, the Hearing Officer should recommend that the Director's findings be set aside or modified accordingly.

I. The Director Failed to Apply the Proper Legal Presumptions and Honor A&B's Decreed Water Right in the January 29, 2008 Order.

The Hearing Officer's April 29, 2008 *Opinion Constituting Findings of Fact, Conclusions of Law, and Recommendation* ("*SWC Order*") affirmed the legal standards, presumptions, and burdens the Director must apply in responding to a water right delivery call.[1] Here, the Director failed to apply those standards in the January 29, 2008 Order ("*Order*").

First, the Idaho Supreme Court set forth the following standard for the Director to follow in water right administration:

> The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has. . . . While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right.

AFRD #2 v. IDWR, 143 Idaho 862, 877-78 (2007).

[1] On September 5, 2008, the Director issued a final order in the SWC case, and except for two issues, affirmed and adopted the Hearing Officer's April 29, 2008 recommended order.

There is a presumption that A&B is entitled to the amount of water set forth in its decree. *SWC Order* at 25. The SRBA Court decreed A&B's senior water right on May 7, 2003. *See* **Ex. 139**. The SRBA Court decreed A&B the right to use 1,100 cfs and 250,417.2 acre-feet annually. Pursuant to the decree, A&B is entitled to a diversion rate of 0.88 miner's inch per acre for the 62,604.3 decreed irrigated acres. Under Idaho law, the Director could not apply the CM Rules in a way to force A&B "to demonstrate an entitlement to the water in the first place". 143 Idaho at 878.

Next, the senior water right holder must allege material injury under oath setting forth the basis of that belief. *AFRD #2*, 143 Idaho at 878; *SWC Order* at 25. A&B filed a *Motion to Proceed* with its delivery call on March 16, 2007. *See* **Ex. 102**. The motion was verified under oath by A&B's manager, Dan Temple. The *Motion* identified the falling ground water levels on the A&B project, the efforts expended by A&B to pump water from those levels, and the fact that A&B was unable to divert a minimum of 0.75 miner's inch per acre for all of the lands served by its senior water right.

The decreed amount of water 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 the junior right holder to show a defense to a call for the decreed amount. *AFRD #2*, 143 at 878-79; *SWC Order* at 26. Contrary to this legal presumption, the Director disregarded A&B's decreed amounts and applied no presumption to the SRBA decree. Instead, the Director created a "new" standard not authorized by law:

> 9. Injury to senior priority water rights by diversion and use of junior priority ground water rights occurs when diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior water right for the authorized beneficial use. Because the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is

possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. . . .

* * *

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

* * *

23. . . . Because 970 cfs is near the maximum authorized rate of diversion, there is a sufficient quantity of water to irrigate its 62,604.3-acre place of use. . . .

Order at 38, ¶ 9.

Instead of applying the legal presumption in favor of A&B's decreed water right, the Director turned the presumption on its head and found it was A&B's duty to "establish" material injury by "prima facie evidence". Moreover, the Director further determined that since 970 cfs was "near the maximum authorized rate of diversion", A&B was not injured even though it could not divert its decreed diversion rate of 1,100 cfs (or 0.88 miner's inch per acre). This framework assumed A&B was not entitled to the amounts identified on its water right decree. Instead, the Director determined that A&B had not "established", or proven to him, that the decreed amounts were necessary for beneficial use. The law does not allow such action. Indeed, the Director's action amounted to a "re-adjudication" of A&B's water right #36-2080 that was prohibited by the Idaho Supreme Court. *See AFRD #2*, 143 Idaho at 878-79; *SWC Order* at 26.

In addition, the Director turned the established burden of proof on its head. Idaho law requires junior appropriators to prove that their diversion and use of water does not injure a senior. *See Jossyln v. Daly*, 15 Idaho 137, 149 (1908); *Moe v. Harger*, 10 Idaho 302, 303-04; *AFRD #2*, 143 Idaho at 873 ("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."). Although Idaho law

required junior ground water right holders to "show a defense to a call for the amount of water licensed or decreed", the Director required no such showing. Instead, the Director determined A&B was not "entitled" to its decreed amounts and justified the reduced diversion rates based upon erroneous factual information (i.e. 0.75 miner's inch per acre maximum physical rate of delivery by A&B).

This misapplication of the proper legal standards and burdens flawed the Director's *Order* and his no-injury determination. Rather than apply the presumption afforded A&B's senior water right, the Director disregarded the law and forced A&B to "re-prove" its right to the amounts already decreed by the SRBA Court.

In this case A&B made its initial showing in the *Motion to Proceed* filed on March 16, 2007: 1) a description of water right #36-2080 decreed by the SRBA Court; and 2) a statement of material injury under oath. *See* **A&B 13-20**. In addition, A&B's Manager testified at hearing that A&B is unable to divert the decreed diversion rate for all of the project lands. *Dan Temple Testimony*, **Tr. Vol. III**, p. 558, lns. 15-25; p. 559, lns. 1-8; p. 635 ln. 1 – p. 637, ln. 11. Moreover, A&B's landowners have provided additional testimony under oath identifying the injury to their water right and the consequent effects on their farming operations. *See Eames Testimony*; **Tr. Vol. III**, p. 814-15, 817-21; *Adams Testimony*; **Tr. Vol. IV**, p. 889-894; *Kostka Testimony*; **Tr. Vol. IV**, p. 956-966; *Mohlman Testimony*; **Tr. Vol. IV**, p. 1017-1020.

Once the initial showing was made by A&B, the burden then shifted to junior priority ground water right holders to prove that the "call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *AFRD #2*, 143 Idaho at 879. Yet, the Director failed to apply the established burdens, refused to accept A&B's initial showing, and denied A&B's call. Whereas the junior ground water right holders carried the burden under the

law to overcome the presumption of injury, the Director did not accept A&B's threshold showing and its decreed water right. Therefore, the Director's error should be corrected in the Hearing Officer's recommended order. The Hearing Officer should recommend that the Director misapplied the proper legal standards and burdens in responding to A&B's call and that a revised analysis is necessary.

II. 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 over 130 separate systems. *Dan Temple Testimony*; **Vol. III**, p. 467, lns. 3-7; p. 473, ln. 14 – p. 474, ln. 7. 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 to one or more landowners. *Id.*; p. 474-75.

A&B's ground water project is not a single distribution system as implied by the Director's *Order*. *Dan Temple Testimony*, **Vol. III**, p. 475, lns. 2-9. At hearing, IDWR staff Tim Luke recognized that water cannot be pumped from any well and delivered to any acre on the project. *Tim Luke Testimony*, **Vol. VI**, p. 1209, ln. 20 – p. 1210, ln. 4. Since the Director's analysis regarding total "average" annual water use across the project does not take this fact into account, it does not accurately portray actual diversions or A&B's inability 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 each acre on the project. *Id.*, FF 64. This assumption was wrong.

A&B's Manager, Dan Temple, testified that not all wells produce the same amount of water on a per acre basis, particularly during the peak of the irrigation season when the District is

on "allotment". *Dan Temple Testimony*, **Tr. Vol. III**, p. 517-21. Mr. Luke confirmed that the Director's "average" diversion rate was not applicable to all wells on the project. *Tim Luke Testimony*, **Tr. Vol. VI**, p. 1246, lns. 3-7, p. 1247, lns. 14-23. Therefore, not all wells on the A&B project can produce or deliver the "average" rates implied by the Director's *Order*. The *Order's* flawed analysis does not accurately reflect actual conditions on the project, which are specific for each well, or point of diversion, under A&B's water right.

By failing to analyze water diversions, compared to A&B's decreed water right, and each point of diversion (177 wells) and well system, the Director erred in his analysis to determine material injury. *See e.g.* CM Rule 42.01.e ("The amount of water being diverted and used compared to the water rights."). The Director and his staff conducted no analysis comparing A&B's diversion and water use to the amounts stated on the decreed water right #36-2080, either project-wide or on a well specific basis. *See Tim Luke Testimony*, **Tr. Vol. VI**, p. 1265, lns. 14-20 ("Q. And isn't true that you did not compare the water supply referenced in this paragraph to the diversion rate provided by the water right. A. That's correct. It's not in this particular finding. It doesn't make that comparison."); *Sean Vincent Testimony*, **Tr. Vol. IX**, p. 1844, lns. 12-19 ("Q. But the comparison is not to the diversion rate provided by the water right; is that correct? A. That's correct.").

The Department failed to conduct a well-by-well analysis and in the process disregarded the individual decreed points of diversion on A&B's water right #36-2080. *Luke Testimony*, **Tr. Vol. VI**, p. 1847, lns. 18-23; *Vincent Testimony*, **Tr. Vol. IX**, p. 1841, lns. 16-21. Although A&B provided information to the Department regarding the number of acres served by each well system, the delivery rate, and the monthly volume pumped, the Department failed to perform a well specific analysis. *Luke Testimony*, p. 1252, lns. 2-17. Mr. Luke admitted such an analysis

would be more representative of actual water use on the project. *Id.*, p. 1252, lns. 13-17. With respect to the Item G lands, or land that was served with less than 0.75 miner's inch per acre in 2006, A&B's staff and experts confirmed the number of acres actually irrigated corresponded with the acres submitted to IDWR:

> Appendix Q shows that the total Item G lands under the original 1948 water right to be 18,664.9 acres as taken from the hard sheets, which confirms the estimate of 18,525 acres in the original "Acreage Per System" spreadsheet was appropriate. . . . A&B staff performed an analysis to estimate the irrigated area within the Item G Farm Units by digitizing 2006 aerial photography and comparing to Farm Unit boundaries. This analysis shows the total irrigated area within the Item G Farm Units to be 19,672 acres compared to the water rights for Item G Farm Units from Appendix Q of 19,620 acres."

See A&B Expert Report at 4-31

Despite having the information from A&B, and the ability to determine the number of irrigated acres within each well system and farm unit, IDWR performed no such analysis. Moreover, IDWR conducted no analysis to refute the fact that A&B was irrigating all of the acres (62,403.2) authorized by its decreed water right #36-2080, including the acres referenced above in the Item G lands. *See Luke Testimony*, **Tr. Vol. VI**, p. 1172, lns. 4-9 ("I just used the water right acreage, the 62,604.").

A&B's landowners testified about the separate well systems on the project and how water delivery varies between those systems serving particular farms. *See* **Exs. 229A, 230A, 231A** (water delivery criteria lists for landowners; *see also*, *Eames Testimony*, **Tr. Vol.**, p. 815, lns. 2-24; p. 817, lns. 13-15; *Adamms Testimony*, **Tr. Vol. V**, p. 894, lns. 2-7; *Kostka Testimony*, **Tr. Vol. V**, p. 947, lns. 17 – p. 948, lns. 11. The landowners confirmed that A&B does not deliver an "average" amount of water per acre across the entire project. Therefore the Director's basis for his "no-injury" determination, that A&B's average "on farm delivery of 0.74 of miner's inch" based upon a pumping rate of 970 cfs was sufficient because it was "near the maximum

authorized rate of diversion" was erroneous and does not accurately reflect the actual water diversion and use from the 177 points of diversion across the project.

The Director's failure to analyze the individual well systems on A&B's project flawed his injury analysis. Therefore, the Hearing Officer should recommend that the Director modify his injury analysis to evaluate the individual decreed points of diversion and the lands served by the separate well systems on the A&B project. Since A&B does not deliver water through a single delivery system across the Unit B ground water portion of the project, the Director cannot ignore the independent water diversion and delivery systems that were in place at the time the SRBA Court decreed A&B's senior water right #36-2080, in May 2003.

III. Diversions Under Junior Priority Ground Water Rights Have Injured A&B's Senior Ground Water Right #36-2080.

A&B diverts water from the Eastern Snake Plain Aquifer (ESPA), a common ground water supply. *See* CM Rule 50; *A&B Expert Report* at 5-1. Ground water levels have declined significantly in the western portion of the ESPA, including the area around A&B, and have continued to decline into 2008. *Id.* at 3-47, at 5-6; *Dan Temple Testimony*, **Tr. Vol. III**, p. 529, ln. 15 – p. 530, ln. 25; *Ralston Testimony*, **Tr. Vol. I**, p. 127, lns. 14-20. Ground water pumping under junior priority water rights has caused declines in ground water levels across the ESPA, including at A&B. *See A&B Expert Report* at 5-3 to 5-4. Consequently, lowered ground water levels have resulted in reduced pumping rates in A&B's wells. *See A&B Expert Report* at 3-9.

Mr. Temple provided testimony about the water supply problems at A&B that have been caused by declining ground water levels:

> Q. (BY MR. THOMPSON) Can you describe the water supply problems A&B has faced in recent years.
>
> A. For the unit B the water supply problems are the declining pump discharges caused by the decline in the aquifer levels. That is creating our

reduced production capabilities and causing the problems with the shortages to the water users.

Tr. Vol. III, p. 531, lns. 12-20.

Mr. Temple further testified that lowered ground water levels during the irrigation season have also caused A&B to completely lose well production leaving landowners without water delivery at times. *Id.* **Tr. Vol. III**, p. 536, ln. 20 – p. 537, ln. 19. Moreover, lowered ground water levels have forced A&B to abandon wells, increase horsepower, drill existing wells deeper, drill additional wells, replace pump bowls, and add pumping column in order to continue diverting under its senior ground water right. *Id.*, **Tr. Vol. III**, p. 537, ln. 20 – p. 538, ln. 25, p. 539, lns. 1-25, p. 555, ln. 19 – p. 556, ln. 19. With respect to the acres that have been temporarily converted to a surface water supply, Mr. Temple testified about the lack of water in the wells that had to be abandoned:

Q. [BY MR. THOMPSON] I want to switch gears and talk about those wells that were abandoned and lands that have been supplied surface water. Why did A&B temporarily abandon certain wells in that southwest area?

A. Well, that problem started in the early '80s with a couple of those wells. The decline, we lost, I guess I'll call it the interflow zones. The drawdowns increase substantially because it basically sucks the water out of the well at the manually – valve them back to produce only what the well would yield. We did some drilling.

Q. How deep did A&B drill?

A. The first one that I'm referring to, 20A922 I think was our first one, we fought that 3 or 4 years pumping water a mile and half with a diesel pump and laying out portable main lines. I believe we drilled that well or tried to drill that well, it went, I can't remember, 7 or 800 foot deep I'm thinking. I would have to look at the record there. It didn't improve our situation. And then in that area those problems just started to build and compound into the early '90s.

Tr. Vol. III, p. 565, ln. 11 – p. 566, ln. 10; *see also* **Ex. 217**.

Mr. Temple explained that water produced by various wells on A&B has been insufficient to provide the rate of delivery under A&B's decreed water right (0.88 miner's inch per acre) as well as even 0.75 miner's inch per acre, the criteria A&B uses to determine if a well is placed on A&B's well rectification list.[2] *Dan Temple Testimony*, **Tr. Vol. III**, p. 538-541. Based upon the evidence and testimony described above, pumping under junior priority ground water rights has injured A&B's senior ground water right #36-2080.

In addition, A&B's landowners testified about the impacts to their farming operations due to reduced water deliveries from individual wells during the peak of the irrigation season. *See Eames Testimony*; **Tr. Vol. III**, p. 814-15, 817-21; *Adams Testimony*; **Tr. Vol. IV**, p. 889-894; *Kostka Testimony*; **Tr. Vol. IV**, p. 956-966; *Mohlman Testimony*; **Tr. Vol. IV**, p. 1017-1020. Each landowner stressed the importance of the rate of delivery provided by A&B during the peak of the irrigation season and the fact they beneficially use the per acre diversion rate provided for by A&B's decreed water right (0.88 miner's inch per acre). Mr. Eames testified that the delivery rate is critical for his irrigation operations and water-sensitive crops:

> Q. [BY MR. THOMPSON] For those well systems that produce more than .75 miner's inches per acre, that first, there is a few throughout those two lists in that year 2007-2008. If there is a well system that provides more than the .75 delivery rate, are you able to use that higher delivery rate during the irrigation season?
>
> A. We are.
>
> Q. What is the importance of the rate of delivery provided by A&B?
>
> A. The importance of that would be to run the complete system so we have a proper rotation on our crops for watering and we're not staggering our watering schedule.

[2] A&B's former managers confirmed the 0.75 miner's inch standard was not A&B's water delivery requirement, or "project design" for water deliveries, but that it represented a "rectification criteria" or "minimum" use. *See Virgil Temple Testimony*, **Tr. Vol. II**, p. 362, lns. 9-21, p. 365, lns. 3-22; *Elmer McDaniels Testimony*, **Depo. Tr.** p. 23, ln. 2 – p. 24, ln. 11. *See also*, **Ex. 226** ("Having been under study for several months, the Board reached a conclusion on the matter of irrigation well rectification criteria . . .").

Q. Is that particularly important during the peak of the irrigation season?

A. It is, especially for water-sensitive crops.

Tr. Vol. IV, p. 815, ln. 11 – p. 816, ln. 3.

Tim Adamms also testified that he needs the rate of delivery, even more, than what is decreed under A&B's water right #36-2080:

Q. [BY MR. THOMPSON] For those well systems that produce more than .75 miner's inches, are you able to use that water during the irrigation season; do you have a need for that?

A. Yes, I have a need for that. I would be able to use when the crops are at the right stage probably a criteria of 1 inch of water.

Tr. Vol. V, p. 888, ln. 20 – p. 889, ln. 1.

Q. So on those example, that list, those criteria list, if A&B could increase the rate of water delivery from those well systems, would you be able to use that during your irrigation season?

A. Yes, I could use a larger delivery during the peak time, I think. There's no question in my mind that we could use that.

Like I mentioned earlier, our systems that are in place are all designed to be able to utilize a higher amount of water than what A&B is able to deliver us at this time.

Tr. Vol. V, p. 893, lns. 2-13.

Mr. Kostka confirmed he could use the decreed rate of delivery per acre, and testified that reduced deliveries have affected his irrigation operations and even forced him to change cropping patterns:

Q. [BY MR. THOMPSON] What does it mean to you when A&B goes on allotment, when they, I guess, reduce the delivery rate depending on the well system?

A. Well, this particular farm has been, for the most part pretty good. I farm this, like I said, this next year I think is my tenth year on a 10-year lease, and I think I farmed it 3 or 4 years prior to that. It's been really a pretty good farm as

far as delivery.

This year our criteria dropped way off and it got to a point where I could not even turn on my pivot. . . .

* * *

Q. Can you explain, I guess, the rate of delivery would not run your pivot at that time; is that correct?

A. That's right. On that particular farm I was down to 73 inches of water basically, which is not sufficient to run the pivot.

Tr. Vol. V, p. 957, lns. 5-13, p. 956, lns. 9-14

Q. Those times when A&B has been able to deliver more than .75 miner's inch per acre, have you been able to use that rate for the irrigation season?

A. I don't – I don't know exactly where the .75 was derived. I don't have – if all I have is .75, I'm not going to plant potatoes there. So I made the decision already.

I guess I get somewhat – it's always the .75 and I don't – I use the criteria numbers mostly because of my history on these farms. If it's a farm that I don't have a history with, I have to find out from the landowner whether we have enough water and whether the landowner is willing to give me enough water at the suffering of his crops potentially so that my crops don't suffer.

So the .75 to me is, I suppose, a baseline. . . .

Q. So would you say the water supply provided in any certain well system has affected your cropping decisions?

A. Of course, no doubt. . . .

Tr. Vol. V, p. 960, lns. 13-25, p. 961, lns. 1-6, 13-16.

In support of the landowners' testimony regarding their water needs, Mr. Temple confirmed that when A&B rectifies a well system, the District seeks to provide between .85 and .90 miner's inch per acre:

Q. [BY MR. THOMPSON] When you are looking at rectifying a pump today, working on a well, how much water does A&B design that pump to deliver when it drills a new well?

A. The standard is .85 to .90, but as testified to yesterday, we also look at the existing horsepower on that unit that we are redesigning and if we've got ample existing horsepower without having to buy additional horsepower or

rewind, we might go to .95.

Q. And why do you design to that amount?

A. Because that is my understanding, dealing with the water users, that is what they need to meet their crop requirements.

Tr. Vol. III, p. 552, ln. 20 – p. 553, ln. 9.

In addition to the landowners' testimony, A&B's expert witnesses analyzed the diversions from individual wells across the A&B project over time, and the impacts on those wells due to declining ground water levels. *See A&B Expert Report* at 3-3 to 3-12. The A&B's expert witnesses' irrigation diversion requirements analysis supports the landowners' testimony and the fact they can beneficially use the amount of water stated on A&B's decree, including 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.

The evidence and testimony shows that 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 at the decreed rate for the irrigation of their lands. Since A&B's landowners have a need for the delivery rate provided by A&B's decreed water right (0.88 miner's inch per acre), and since individual well capacities have been reduced by lowered ground water levels, the Director must recognize the injury to A&B's water right caused by junior priority diversions. The Hearing Officer should recommend a finding of injury to A&B's water right on this basis.

IV. 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. In other words, the Director concluded A&B's senior ground water right was not injured based upon this information. Since the Director's conclusion was based upon flawed factual information, as admitted by his own staff at hearing, it should be recommended to be set aside and a new injury analysis should be performed.

As discussed above, 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 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.

A&B's manager Dan Temple, referring to **Ex. 133** (the A&B 2006 Annual Pump Report), testified about the capacities from the individual wells and well systems and how the amount of water that can be delivered to the individual farm units varies across the project:

> Q. [BY MR. THOMPSON] So that is what they would be limited to on a delivery rate basis during allotment?
>
> A. On allotment at anytime when user demand exceeded our pumping capabilities of that well system.
>
> Q. Does that vary depending upon the well system?
>
> A. Yea. You can look down through there, they're all independent. It varies substantially what those capabilities are from that well system.

Tr. Vol. III, p. 519, lns. 13-23.

Contrary to the finding and conclusion in the Director's *Order* (FF 63, CL 23 "0.75 of miner's inch is the maximum rate of delivery"), Mr. Temple testified 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:

> Q. [BY MR. THOMPSON] Are all wells across the project limited to only delivering .75 per acre?
>
> A. No. The best place, again, to go back to that annual pump report for any given year, it will show every year what that criteria was and it will show that there is no limit to .75. It gives you the criteria what was from the early '60s what the pumping capabilities were. There is no limit to that, no.
>
> Q. So A&B doesn't have a physical restriction of only delivering .75 to a landowner?
>
> A. No, no. We try to deliver to our water right of .88 and the water users' needs.

Tr. Vol. III, p. 540, lns. 16-25, p. 541, lns. 1-4.

IDWR staff confirmed Mr. Temple's testimony and the factual error in the Director's *Order* that stated A&B was limited to 0.75 miner's inch "maximum rate of delivery" across the project. First, Sean Vincent admitted that his analysis was flawed and that A&B's systems have a capacity greater than 0.75 miner's inch:

> Q. [BY MR. THOMPSON] And is it correct that at the time you were working on findings for the order, that you interpreted the .75 miner's inch maximum rate of delivery as a system constraint, that A&B could not provide more than that amount?
>
> A. I did, and I said that in my deposition.
>
> Q. Okay. And you did not try and go back and investigate into whether or not A&B had the capability of providing more water than that at their well systems?
>
> A. Yeah, it was a design number. And I have no doubt that they have greater capacity than that, and that stands to reason.

Tr. Vol. IX, p. 1843, lns. 12-25 (emphasis added).

At hearing Tim Luke also testified that A&B is not limited to only delivering 0.75 miner's inch as a "maximum rate of delivery" across the project:

> Q. [BY MR. THOMPSON] And you mentioned that you had the annual reports you looked at over time. Did you recognize that A&B could deliver more than .75 miner's inch per acre depending upon the well system?
>
> A. Yeah, I recognize that certain well systems could or were providing more than three-quarters.
>
> Q. So you recognize that. But this finding [*Order* FF 63] implies that it represents the maximum rate of delivery. I mean, you would agree that A&B can provide more than .75 miner's inch per acre depending upon the well system, physical capability of providing that water?
>
> A. Yeah, again, I don't disagree with that individual wells can provide more than three-quarters. This – yeah. I'll just leave it at that.

Tr. Vol. VI, p. 1264, lns. 14-25, p. 1265, lns. 1-7.

Accordingly, based upon the above testimony provided at hearing, it is undisputed that A&B is not physically limited to a "maximum rate of delivery" of only 0.75 miner's inch per acre. The Director's "false ceiling" for A&B's water deliveries in the *Order* disregards the decreed diversion rate of 1,100 cfs and served as the basis for the erroneous finding that A&B has "sufficient water" since it is allegedly delivering 98% of 0.75 of a miner's inch per acre on average across the project. The Department's staff had no factual basis to support the Director's conclusion that A&B's physical delivery capacity was limited to 0.75 of a miner's inch per acre for all acres in the project.

The Director's "no-injury" finding is based upon an erroneous assumption about the physical limitations of A&B's delivery systems across the project and should be recommended to be set aside. In addition, the Hearing Officer should recommend that the Director perform a new injury analysis using the proper legal standards identified above and the correct factual

information regarding A&B's pumping capacities and water delivery from its separate well systems across the project.

V. 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).

A. The Director Failed to Recognize the Irrigated Acres Within A&B's Item G Land Shapefiles (Polygons) Based Upon Alleged "Discrepancy" With the Total Gross Area.

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. *Order*, at 9-15. The Director further refused to analyze A&B's "water-short" wells (points of diversion) and the water use under well systems that could not deliver 0.75 miner's inch per acre during the peak of the irrigation season due to lowered ground water levels. *Order*, at 15-18. 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.

IDWR admitted that its perceived discrepancy for the "acreage per system" for the lands served by the 39 "water short" wells, was its misunderstanding and misuse of the "total area" rather than the lands irrigated with A&B's water right #36-2080 within the GIS shapefiles (polygons) provided by A&B for those lands. At hearing, Tim Luke admitted IDWR's error:

> Q. [BY MR. THOMPSON] And you identify in that finding of fact 67 that you found a total acreage of 22,663 acres for those Item G lands; is that correct?
>
> A. Right.
> Q. And you understand that to be the total gross area of the those polygons?
>
> A. Yes, that is the total area.

Tr. Vol. VI, p. 1268, lns. 12-19.

Q. So the map at [Exhibit] 216, that's the polygon we're referencing there?

A. Yes.

Q. That would be – the 22,663 would be that total area identified in all of those Item G lands; correct?

A. Yes.

Q. And Mr. Temple explained that that was not the irrigable acres within each of those tracts?

A. Yes.

Q. That was a different number?

A. I understand that.

Q. Did you understand that at the time?

A. I think I – I think I understood it by January 4. I don't think I understood it before then.

Q. So you recognize that the gross area within those polygons was not the irrigate area within those polygons?

A. Yes. That's – if I didn't understand it then, I certainly do now.

Tr. Vol. VI, p. 1269, ln. 18 – p. 1270, ln. 14.

Accordingly, even though it was explained to IDWR by at least January 4, 2008 that the "total gross area" within the Item G shapefiles provided by A&B was not the actual area irrigated, IDWR refused to accept and analyze the irrigated acres that were served by the "water short" wells. Instead, IDWR claims that an alleged "discrepancy" between the total gross area and the actual irrigated acres prevented further analysis. Yet IDWR had the available information, including the acreage per system on the Annual Pump Reports and aerial imagery,

and still refused to perform the analysis.[3] *See Luke Testimony*, **Tr. Vol. VI**, p. 1273, ln. 21 – p. 1274, ln. 21.

A&B's Manager, Dan Temple, further testified at hearing that he had explained the "acreage per system" served by the referenced wells and how the gross area differed from the actual irrigated acres to IDWR prior to the issuance of the *Order*:

> Q. [BY MR. THOMPSON] ... Is that part of the information you submitted?
>
> A. Yes, Exhibit 216 is a GIS, I guess you want to call it, a map identifying well systems in various colors that the District – in the information that the District submitted was what we called item G land that was under the 75 hundredths criteria.
>
> Q. And did you explain to IDWR employees about the gross area within those compared to the actual irrigated areas?
>
> A. Yeah, we talked about our land and our acres. And as near as I can recall, I did try to describe to them that our farm units, that there was a difference between gross acres and irrigable acres.

Tr. Vol. III, p. 575, lns. 1-15.

Clearly, IDWR and the Director had the necessary information and understanding about the irrigated acres as compared to the total gross area within the Item G shapefiles provided by A&B. In addition to the testimony referenced above, A&B's experts have further confirmed that the acres irrigated under the Item G lands with A&B's senior water right #36-2080 correspond to the "acreage per system" and the information that was provided to IDWR. *See A&B Expert Report* at 4-30 to 4-31. Therefore, there was no basis for IDWR staff to fabricate an issue as to any alleged "discrepancy" between those two numbers for purposes of refusing to further analyze the water deliveries under the 39 "water short" well systems. *See Order*, FF 68.

[3] A&B's expert witnesses confirmed the approximate number of acres that were being irrigated under the Item G lands. *See* A&B Expert Report at 4-23 to 4-25, 4-30 to 4-31.

In summary, the Director failed to properly analyze the water diversion and use under A&B's Item G well systems. The basis for the Director's conclusion not to further analyze the water use under these individual well systems, a claimed discrepancy in acreage, is not justified and should be recommended to be set aside for a new analysis.

B. The Director Erroneously Relied Upon Misinformation about A&B's Place of Use and Irrigated Acres Served by Water Right #36-2080.

In addition to the error in failing to analyze the irrigated acres under A&B's Item G lands, the Director also relied upon misinformation about A&B's actual place of use for acres served by water right #36-2080. In relying upon the shapefile "Pou-a-b-id," the Director claimed that "areas identified by A&B as being water-short are not entirely irrigated by A&B and receive water from other sources". *See Order* at 17, ¶ 72. This finding is factually wrong since the information relied upon by the Director (depicted by black lines of Figure 7) does not define A&B's place of use or the acres being irrigated by A&B's water right #36-2080.

At hearing, Dan Temple testified to the erroneous information and how he had explained that to IDWR staff in response to their questions in January 2008:

> Q. [BY MR. THOMPSON] After January 4 you said there were other meetings, January 9, January 24?
>
> A. Yes, after the January 4 meeting – well, in the January 4 meeting they had several questions on a place of use shape file that my consultant HDR had submitted in one of those information requests to the Department, and they had some examples of that place of use shape file where it showed up overlying some of the District tracts. And the way I recall it, it overlaid that on some aerial imagery and you could clearly see that land was being farmed outside of this place of use shape file in the example that they showed us there.
>
> And what they was told was that place of use shape file, that was generated by IDWR and somewhere it was supplied to the District and that inadvertently got submitted to HDR which came back to the Department in that information request.
>
> But that place of use shape file generated by IDWR, and I believe Ms. Danielle Favreau, was never used by the District in identifying our lands and SRBA claims for our acres. It was wrong.

Tr. Vol. III, p. 576, ln. 6 – p. 577, ln. 5

Q. Is that place of use shape file, an example of that depicted on that Figure 7?

A. It is. It's the small black lines that are showing up inside the white and yellow farm unit tract lines.

Q. And did you represent to the Department that that defined the area to which A&B delivered water?

A. No, I did not. It was explained to them that is not our place of use, that was all wrong. It was erroneously developed – what do I want to say? It was wrong. And it was made a very clear point to them.

And then you asked about subsequent meetings, and that disturbed me so much that then I, on January 9th I made contact with the Department, Tony Morris and Allen Wylie through a teleconference. I e-mailed those, I think that very example there to them, showing them the District's tracts overlaid on an aerial which showed the lands we was watering, our hard sheet that showed our acres and shows how that compared, where the land was being watered in the farm unit, what our right was, and that it didn't match this.

So they understood that and said then at that point that they understood it, that that wouldn't be used and we went from there. I thought they fully understood it.

Q. Your understanding was that place of use shape file was not correct and that they were not going to use that?

A. That was my understanding.

Tr. Vol. III, p. 577, ln. 11 – p. 578, ln. 18.

At hearing Tim Luke confirmed Mr. Temple's testimony about IDWR's understanding as to the "place of use" shape file and that it did not accurately define the area to which A&B delivered water:

Q. [BY MR. THOMPSON] Looking at figure 7, reference that place-of-use .shp file. You conducted some of this, I take it?

A. What page is that on?

Q. 18.

A. Well, I did. I didn't write any findings relative to it. I looked at it early on like before we met with Dan. That was one of those things – that was one of the questions we had for Dan. We didn't know what it was.

I think after the meeting on January 4, it seemed to be of no value to me. So I didn't do anything further with it at that point.

Q. Do you recognize that A&B was not identifying that – those black areas, that place-of-use .shp file, as the area that it delivered water to?

A. As of January 4, yeah.

Tr. Vol. VI, p. 1275, ln. 24 – p. 1276, ln. 18.

Despite the explanation from Mr. Temple that the place of use shapefile referenced in Figure 7 was not correct, IDWR went ahead and used the information in the *Order* anyway. Accordingly, the Director's use of the erroneous information is misleading and does not support the finding that A&B's Item G lands "receive water from other sources". As such, the Hearing Office should recommend that the use of the information identified in FF 71-72 was in error and should be set aside.

C. The Director Wrongly Implied A&B's Water Right Serving Some Item G Lands Was Not Injured Due to the Use of Private Supplemental Ground Water Rights on Those Lands.

Finally, the Director included findings in the *Order* relative to an unidentified number of acres for A&B's Item G lands to suggest that those acres are not short of water because they may also be irrigated by private ground water rights. *Order* at 16, ¶¶ 69, 70. The Director also included a vague finding (FF 73) that indicated 135 private wells irrigate 27,235 acres within the A&B boundary. These findings are misleading and do not show that A&B's water right is not being injured due to the ability of a few landowners to use private wells. Based upon testimony provided at hearing, it is clear IDWR did not perform a thorough evaluation of the private ground water rights within A&B's boundary, nor determine a specific number of acres that are actually served by both A&B's water right #36-2080 and a private water right.

With respect to this issue, Mr. Luke admitted:

Q. [BY MR. THOMPSON] Did you complete a comprehensive review of those ground water rights within the boundaries of the A&B project?

A. No, not very comprehensive. My involvement in that was that – I don't remember who, but somebody felt that it was worth mentioning or pointing out or putting in the number of private wells in irrigated acres within the A&B.

* * *

Q. And you testified this morning about the digital boundary, the place of use. Do you recognize that not all lands within that boundary are lands entitled to be irrigated by A&B's water right?

A. Yes, I do. And as I said this morning –

Q. There's private lands?

A. Right.

Q. State lands?

A. -- a lot of the 27,235 is completely separate from any lands that A&B irrigates. And I recognize that.

Tr. Vol. VI, p. 1277, lns. 6-14, 25; p. 1278, lns. 1-12.

Although the *Order* failed to provide any details about private ground water rights and whether or not those rights overlap acres served by A&B's senior ground water right #36-2080, A&B's experts did complete such an analysis which demonstrates that only 3% of A&B's project lands have a supplemental private ground water right. *See A&B Expert Report.* at 4-26 to 4-27. With respect to the Item G lands, only 733 acres out of 18,665 acres have an overlapping supplemental private water right. *Id.* at 4-26. Despite this small percentage, the existence of a private supplemental water right does not justify IDWR denying A&B's call for its senior ground water right #36-2080 on those acres, nor does it relieve A&B from the obligation to provide water to that landowner.

By failing to specifically analyze the Item G well systems and lands served by those wells, the Director's findings and injury analysis is incomplete, misleading, and inaccurate. As identified above, A&B provided the necessary information to the Director that demonstrated the acres irrigated by those well systems and the fact they could not produce and deliver a minimum of 0.75 miner's inch per acre. The Director's failure to perform the necessary analysis was improper and should be recommended to be set aside.

VI. 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 findings on the hydrogeology, well design, drilling and construction on the A&B project. *See Order* at 23-30. 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 the testimony provided at hearing, and do not provide a sufficient basis to refuse to deliver water to A&B's senior ground water right #36-2080.

First, the A&B project was designed and constructed by the U.S. Bureau of Reclamation, not A&B. Mr. Virgil Temple, who worked on-site for a well driller during the project's construction, confirmed that Reclamation sited the wells and designed the project. *See Virgil Temple Testimony*, **Tr. Vol. II**, p. 252-54. Mr. Virgil Temple testified 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. *Id.* Mr. Temple further explained that Reclamation tested the wells to determine if there was sufficient water production. *Id.*, p. 262-65.

Although the wells produced water when they were originally drilled and deepened by Reclamation, the Director, 50 years later, concluded that the wells were constructed at the wrong locations across the project, and that somehow justifies injuries caused by junior priority ground water diversions to A&B's senior ground water right. *See Order*, at 45, ¶ 30-31. As explained at the hearing, Reclamation, not A&B, designed the project and sited the wells based upon the gravity delivery of water through canals and laterals. The wells therefore had to be sited in certain locations to ensure water delivery and successful irrigation on the project. Farms were developed according to the project design based upon those well locations. *Virgil Temple Testimony*, **Tr. Vol. II**, p. 253, ln. 19 – p. 254, ln. 6. The Director cannot justify lowered ground water levels in certain wells on the project just because of their location and his claim they should not have been located there in the first place.

With respect to well construction, the testimony provided at hearing confirms that cable-tool drilling was an appropriate method, both at the time of original well construction, and today. Virgil Temple explained that cable-tool was a common and successful drilling method when he worked on the project. *Virgil Temple Testimony*, **Tr. Vol. II**, p. 249, 263-64. Indeed, A&B still uses cable-tool today. *Dan Temple Testimony*, **Tr. Vol. III**, p. 548, lns. 4-9, p. 549, lns. 15-19. IDWR's consultant, Dr. Ralston also confirmed that cable-tool drilling was an acceptable drilling method, at the time the project was developed. *Ralston Testimony*, **Tr. Vol. I**, p. 42-43, p. 143, lns. 1-6. IDWR staff member Allan Wylie further confirmed the use of cable-tool drilling as an acceptable method when the project was developed. *Wylie Testimony*, **Tr. Vol. VIII**, p. 1426, ln.

24 – p. 1427, ln. 4. IDWR staff member Sean Vincent confirmed the use of cable-tool drilling as an acceptable method both at the time the project was developed and today:

> Q. [BY MR. THOMPSON] And that method that they used, that cable tool drilling was a common practice at the time?
>
> A. Yes, and it still is.

Vincent Testimony, **Tr. Vol. IX**, p. 1855, lns. 20-23.

A&B's expert witnesses confirmed the adequacy of the original well design and construction, and agreed that cable-tool drilling is a reasonable drilling method to use even today. *A&B Expert Report* at 3-16 to 3-23. Moreover, 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. 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.

Therefore, the Director had no basis to take issue with the siting and drilling method and design used for A&B's wells. As such, his findings on this issue are not supported by the record and testimony provided at hearing and should be recommended to be set aside.

Apart from the well siting and construction methods, the Director also concluded that A&B's well deepening was not reasonable because it did not target interflow zones in the aquifer. *Order* at 45, ¶ 34. This finding is not supported by the evidence. A&B's manager, Dan Temple described the efforts A&B has expended to deepen wells and the fact that water is not always available at depth:

Q. [BY MR. THOMPSON] What sort of problems have you encountered even after deepening has been completed?

A. The main problem we've encountered is not, I guess, finding additional, those flow zones to aid the well, no additional water. That's the main problem. You've also got – well, that's it, I guess.

Tr. Vol. III, p. 543, lns. 5-12.

A&B's experts confirmed this in their analysis of well deepening on the A&B project, and further noted that mapping interflow zones would not result in more water in the western and southwestern areas of A&B where sediment interbeds reduce yield or produce sand. *See A&B Expert Report* at 3-21 to 3-22.

Finally, Dan Temple testified about the numerous factors that he and experienced contracting well drillers take into account when deepening existing wells or drilling new ones. *Dan Temple Testimony*, **Tr. Vol. III**, p. 545, lns. 5-24. Contrary to the Director's interpretation, A&B uses appropriate methods and available information from surrounding well logs when it drills existing or additional wells. Specifically, Mr. Temple explained:

Q. [BY MR. THOMPSON] What factors do you consider; do you consider the area?

A. Most definitely, yeah. You look at the area, wherever the drilling is going on. You look at all the surrounding logs of surrounding wells so you know what to expect. And we always have all that data to tell us, except maybe in the western portion where we are gaining it, where we went past our existing knowledge in depth, but we've gained that now . . .

Q. You look at the formation of the aquifer from those well logs?

A. Yes. Again I look at those well logs. I'm looking at the formation. I'm looking where the sediment layers are. I'm looking where the water flow zone is. I try to digest all of that to make the best guess what to do.

Q. Have you drilled test wells before?

A. Yes. Shortly after I took over as manager in that southwestern portion. . . . By knowing the history of that area, the problems we've had, the

lack of success that we had, when I made that location, with the help of a geologist that I hired, see if she confirmed my thoughts, move this direction, which she did, I went, but I still was very hesitant. I spent 10, $11,000 to drill an 8-inch test hole 3, 400 feet, I can't remember however deep I was going, before I put them on the production well, the 20-inch well.

Tr. Vol. III, p. 546, lns. 16-25, p. 547, lns. 1-12, 19-25, p. 548, lns. 1-3.

After reviewing the information, the District's and the well drillers' expertise, and the procedures used by the District, A&B's experts provided additional analysis to support the actions taken by A&B as they concluded a "new hydrogeologic study would not have resulted in different actions by A&B for well deepening or construction of new wells." *See A&B Expert Report* at 3-20 to 3-22. Finally, the record and testimony at the hearing confirmed A&B's experts' conclusion that A&B is not "artificially" limiting its access to water by smaller diameter wells, as suggested by the Director. *See Order* at 43-44, ¶ 29.

Next, A&B's experts explained in their analysis that for "those wells with well diameters less than 16 inches, A&B has used smaller pump bowls designed with multiple stages to achieve the needed pumping rate". *A&B Expert Report* at 3-22 to 3-23. No analysis or testimony was provided by IDWR staff to support the Director's conclusion that the well diameters and pump bowl sizes used in the Unit B wells are the reason that the wells could not produce adequate water. IDWR staff member Sean Vincent admitted he did not have any specific data to support this finding:

Q. [BY MR. THOMPSON] I guess of current wells, are you aware of any wells where well diameter is limiting the yield to A&B?

A. I'm not sure I know that to be a fact. . . .

Tr. Vol. IX, p. 1884, lns. 4-7.

Q. So I'm talking about any active production wells. Are you aware of any wells that A&B uses today that you found in your investigation, where

yield is limited due to the size of the diameter? Or is that just your general conclusion based upon that one abandoned well?

A. It's hard to say. It's hard to say. As I testified to earlier, the yield of a well was a combination of different components. We have a pump. We have an aquifer, and we have the well itself. And it's hard to figure out in each case what the limiting factor might be.

Q. So you can't point to a specific well that has reduced yield based upon diameter, today; is that correct?

A. I don't have that information at my fingertips.

Tr. Vol. IX, p. 1887, lns. 5-22.

Accordingly, the Director had no factual information to support his conclusion that well diameter size was limiting A&B's "access to available water supplies". *Order* at 45, ¶ 29. Since A&B uses acceptable drilling technology and bases its decisions on available hydrogeologic data, the Director was not justified in his finding that A&B does not comply with the requirement to "use reasonable access" to available water supplies. *Id.* Notably, Dr. Ralston testified that A&B's ongoing maintenance of the wells, deepening of the wells, and other actions to maintain operations at the District was reasonable:

Q. [BY MR. SIMPSON] Okay. In your view, were those actions reasonable based upon the conditions that were observed at the time they were taking those actions?

A. From what I could see, yes, they were.

Ralston Testimony, **Tr. Vol. I**, p. 149, lns. 1-7.

Dr. Ralston also recognized, after his review of the information related to the project, that A&B's efforts to deepen existing wells and drill new wells were acceptable:

Q. With re – Doctor, with respect to your review of the documents in the A&B's efforts to re-drill or drill new wells, did you come to an understanding of why those actions were taken?

A. I – I presume that they were taken because of water supply issues. I'm not sure I ever saw that articulated, but that was my presumption.

Q. Okay. And that presumption would be based upon – in part upon the declining ground water levels that you observed and reported on in your report?

A. I think the presumption of declining supply is valid. That's the reason they would take action, whether or not it is totally due to declining water levels, or pump problems, or other issues. But certainly, declining water levels is a factor in all of that.

Q. Would it be the primary factor?

A. Probably.

Q. Okay, would those actions be consistent with what you've observed in other aquifers where the water supply is declining?

A. Yes sir.

Tr. Vol. I, p. 150, ln. 14 – p. 151, ln. 13.

Dr. Wylie's testimony further confirmed A&B's rectification actions taken over time:

Q. [BY MR. SIMPSON] So based upon your review of the documents and your understanding of what has historically gone forward on the A&B project and listening to Mr. Temple's testimony here in this hearing, would it be your opinion that the rectification program implemented by A&B is reasonable?

A. Yes.

The evidence and testimony at hearing, including from the two experts used by IDWR with the most well drilling and design experience, demonstrates that it is reduced aquifer levels, not A&B's methods and procedures for drilling, that is the cause for reduced water supplies under A&B's senior ground water right. It is clear that A&B employs reasonable and common drilling practices for irrigation wells within the ESPA. Since the District's actions are "reasonable", the Director had no factual basis to conclude that A&B's actions are limiting its

access to water supplies under its senior right. The Hearing Officer should recommend that the Director's findings on these issues be set aside since they do not accurately reflect operating conditions on the ground at A&B.

V. The Director Wrongly Concluded the ESPAM Model and the A&B Scenario Are Not Intended for Water Right Administration.

In the *Order* the Director claimed that the ESPAM Model scenarios, "such as the A&B Scenario, are not intended for use in administering the state of Idaho's water".[4] *Order* at 33, ¶ 122. This finding in the *Order* is not justified and plainly contradicts the Director's final orders issued in other water delivery call 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. Stated another way, the Director has no basis to use the ESPAM model in administering some water rights in the Snake River Basin, and not others.

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). The A&B Scenario results show that between 80-84% of the ground water level decline in A&B is 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. Accordingly, under Idaho law, if junior priority ground water rights are interfering with the diversion and use of water under a senior water right, which as described above results in reduced pumping capacities and water shortages to A&B's

[4] The State does not "administer" water, rather watermasters "distribute" water in accordance with existing water rights. *See* Idaho Code § 42-607.

landowners, the Director has a clear legal duty to administer those junior priority rights. By refusing to even acknowledge the A&B Scenario, or the information from it that could be of further assistance in responding to A&B's call, the Director was able to ignore the injury to A&B's senior ground water right.

At hearing, Dr. Wylie, the person responsible for running the ESPAM at IDWR, testified that the A&B Scenario could be used in assisting in the administration of ground water rights:

> Q. [BY MR. SIMPSON] Dr.Wylie, you testified this morning regarding the A&B scenario. And would it be fair to say that your view is that the A&B scenario would not be used as a sole model scenario for administering or curtailing water rights, but would contain information that might be of assistance in administering water rights?
>
> A. I guess information that could be of assistance, if what you mean is provide the Department with information on how to set up such a scenario and information on how the various impacts from various sources relate to A&B, things like that, yes.
>
> Q. Okay. For example, from the A&B scenario that was run and then the results for which – you authored the report; correct?
>
> A. Correct.
>
> Q. Okay. Would it be fair to say that that report identifies that the water-level declines observed out at the A&B area are not the result – solely the result of A&B's own actions?
>
> A. That – that is a result of this scenario; correct.
>
> Q. And that they – the declines are the result of – primarily the result of actions outside of A&B's control?
>
> A. Correct. Actions caused by other – other sources besides pumping at A&B.
>
> Q. And would a primary source of those – those actions be ground water pumping?
>
> A. Pumping by others is more significant than pumping by A&B.

Tr. Vol. II, p. 1466, ln. 9 – p. 1467, ln. 17.

If the A&B Scenario can assist in water rights administration and it shows that pumping by junior ground water rights is causing declines in ground water levels at A&B, which results in injury to the water right as explained above, the Director has a duty to consider and use that information. Stated another way, 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 results of the A&B Scenario showed that pumping by junior priority ground water rights outside of the A&B project caused 80-84% of the decline in ground water levels under A&B.

The Director created a false criteria to justify not using the scenario and claimed the ESPAM "does not properly account for local hydrogeologic features" 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 does account 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 under A&B's call. *See A&B Expert Report* at 6-3. The Hearing Officer should recommend that the Director's findings regarding the ESPAM and A&B Scenario be aside and that the information available be used by the Director for purposes of responding to A&B's call.

VI. 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 provided testimony about the District's separate accounts for normal operation and maintenance work and one for well rectification due to falling ground water levels. *Temple Testimony*, **Tr. Vol. III**, p. 568, ln. 19 – p. 569, ln. 6. IDWR staff did not request Mr. Temple to provide additional cost information until the meeting January 4, 2008 meeting, which he did. *Id.*, p. 569, lns. 12-18. The information provided to the Department detailed the costs incurred by A&B in its well rectification account, #445, as well as increased power costs to due pumping at deeper levels. *See* **Ex. 122**. Finally, Mr. Temple explained that the District has been forced to spend over $3.5 million in the last five years for well rectification costs. *Id.*, p. 569, lns. 7-11.

The Director disregarded this information on the basis that "Given when the document was submitted and the time constraints under which this order must be issued, the Department did not fully develop findings regarding this information". *Order* at 36, ¶ 136. Mr. Vincent, the

IDWR staff member who reviewed the information, admitted his review was just a general comparison and that it needed additional review by someone more qualified:

> Q. [BY MR. THOMPSON] And you testified, if there was further review in this area, it needs to be reviewed with someone with more qualifications than yourself?
>
> A. Yeah. I'm not an economist. I am – or I was a project manager, though, and I know what it means to have a budget, and I know what the time value of money is. And so, you know, like I said before in my direct testimony, I think the first step that would need to be done is to have a formal audit of the costs.
>
> And then I think that, you know, somebody perhaps with more acumen in financial matters would want to take a look at this. But I felt comfortable as a project manager, that's used to operating with budgets, that's taking a first sort of crude cut.

Tr. Vol. IX, p. 1903, lns. 7-22.

Accordingly, it is clear the Department did not conduct any meaningful review of A&B's cost information. The only justification given for not conducting a thorough analysis in this area was insufficient time. Mr. Vincent admitted at hearing that "there was certainly not enough time to do that sort of analysis" to compare the costs between the accounts and whether or not they were associated with water level declines. *Vincent Testimony*, **Tr. Vol. IX**, p. 1911, lns. 15-22. Although Department staff did not even request this information from A&B until the meeting held on January 4, 2008, the Director claimed that timing was the excuse for not developing findings on this issue.

Since A&B filed its *Motion to Proceed* in March 2007, the Director had over 10 months to request and gather any information, including the cost data, necessary to respond to A&B's call. The Director's failure to perform that analysis should not be shifted to A&B, particularly when the Department did not request the information until January 4, 2008.

In addition to the costs already incurred, Mr. Temple also testified that the A&B landowners face a $25/acre increased in assessment for 2009, of which $23 is dedicated to the District's well rectification program. *Id.*, p. 569, ln. 21 – p. 570, ln. 4. The burden of the increased assessment falls squarely on A&B's landowners as explained by Mr. Adamms at hearing:

> Q. [BY MR. THOMPSON] Do you have any particular concerns for 2009?
>
> A. Well, one is our assessment is going to increase $25 per acre. So up to $95 for our O&M costs. So I'm going to have that increased cost for my water input. I got to figure out ways to cover that cost.

Tr. Vol. V, p. 895, lns. 10-16.

As ground water levels continue to fall within A&B, the costs for improving well systems to mitigate for reduced water supplies continue to rise. Whereas diversions by junior ground water rights are contributing to A&B's increased well rectification program, the Director disregarded that fact in responding to A&B's call. Since the Director used a false comparison to find that these costs were "reasonable", and admittedly failed to adequately review and evaluate the cost information supplied by A&B in January 2008, the Director's findings should be recommended to be set aside. Further, the Hearing Officer should recommend that the Director complete a proper review of the information that was requested of and supplied by A&B.

VII. The Evidence Does Not Support the Director's "Reasonable Pumping Level" Finding With Respect to A&B.

The evidence and testimony in the record, as describe above, plainly demonstrates that A&B has exceeded "reasonable pumping levels". Given the continued ground water level declines observed at the A&B project, wells that A&B has been forced to abandon, and the millions of dollars A&B must spend to pump water, it is clear the Director's statement that A&B

has not exceeded a "reasonable pumping level" is without any factual or legal support. *See Order* at 5, ¶ 18.

In order to discover the basis for findings in the *Order* A&B formally requested IDWR to identify "employees and any persons" who participated in its preparation. *See A&B Irrigation District's Request for IDWR to Identify Persons Involved in Preparing the Director's January 29, 2008 Order* filed February 19, 2008. The Department disclosed Sean Vincent as the sole employee who participated in preparing findings for paragraph 18. *See IDWR Disclosure* at 2. Although the Department identified Sean Vincent as the author contributing to the paragraph, Mr. Vincent testified at hearing that he did not author the sentence regarding the "reasonable ground water pumping levels":

> Q. [BY MR. THOMPSON]: And you testified that you did work on this paragraph, but it's true that you did not author the second sentence.
>
> A. That's correct.
>
> Q. And you do not know who did author that sentence; is that correct?
>
> A. That's correct. I don't know who authored that sentence. We talked about it in my deposition.
>
> Q. And you had meetings with various staff members before this order was issued; is that true?
>
> A. Of course.
>
> Q. And from those staff members that – what you are aware they are working on parts of the order, were you aware of any assignments or a specific study that was directed at a reasonable pumping level?
>
> A. Reasonable pumping level?
>
> Q. Yes.
>
> A. No, not – well, in regard to the A&B matter, no.

Q. So it's your testimony that as far as any factual basis or support for this finding, no Department staff was assigned to work on that; is that true?

A. As far as I know --

Vincent Testimony, p. 1845, ln. 25 – 1847, ln. 2.

Based upon the information disclosed by the Department, and the knowledge of Department staff who participated in preparing the *Order*, there is no factual basis to support the finding in paragraph 18 concerning the "reasonable ground water pumping level". Moreover, A&B has been precluded from discovering any factual basis for this finding in this proceeding, since IDWR has failed to disclose the basis for the finding. To the best of A&B's knowledge, the Director has failed to set a "reasonable ground water pumping level" pursuant to Idaho Code § 42-226 anywhere in the ESPA. Accordingly, since there is no factual basis to support the finding, the Hearing Officer should recommend that finding to be set aside. Moreover, the facts and evidence presented demonstrate that A&B has exceeded a reasonable ground water pumping level, particularly in those areas where wells have been abandoned.

Alternatively, the Hearing Officer should recommend the Director set a "reasonable ground water pumping level". Given the continued ground water level declines, the reduce pumping capacities, and the water shortages experienced at A&B, it is clear the present ground water management regime in the ESPA is not satisfying all water rights. Until the Director takes action and attempts some level of management of the resource, ground water users will be left in a "race to the bottom" of the aquifer.

VIII. By Ignoring Continued Water Level Declines and Water Supply Conditions in the ESPA Around A&B, the Director Wrongly Denied A&B's GWMA Petition

In addition to no factual support for the "reasonable ground water pumping level" finding, the Director had no support his denial of A&B's petition for designation of a Ground

Water Management Area (GWMA). Instead, 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. In essence, the Director performed no factual analysis of the water supply in the aquifer but instead relied upon a misinterpretation of the statutes.

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.

Tim Luke, IDWR's Section Manager for the Water Distribution section, recognized the statutory limitations on water districts:

> Q. [BY MR. THOMPSON] But the watermaster doesn't have the authority to go out and create a water management plan for an aquifer within a water district, does he?
>
> A. I don't think so, no.
>
> Q. He's just concerning with administering the rights?
>
> A. Right.

Tr. Vol. VI, p. 1339, ln. 24 – p. 1340, ln. 6.

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 the water supply in the ESPA. This is despite the evidence of a continuing decline in ground water levels across the aquifer.

At hearing, IDWR's witnesses recognized the continuing declines in ground water levels throughout the ESPA, including the area around A&B, and further recognized the fact the ESPA is not in a state of equilibrium. Dr. Ralston, who prepared a report for IDWR on the hydrogeology around A&B, confirmed that ground water levels were declining. *Ralston Testimony*, **Vol. I**, p. 127, lns. 14-20.

Dr. Wylie also testified as to the declines in water levels at A&B, and the likelihood those water levels would continue to decline in the future:

Q. [BY MR. SIMPSON] Correct. Now, Dr. Wylie, were you a part of the mass measurement that occurred comparing 2005 aquifer levels to 2008 aquifer levels?

A. The measurement? Oh, 2008?

Q. You understand that there are –

A. I understand that there was a mass measurement. I did not get to go out and measure wells.

Q. Did you review those results?

A. I have seen those results. I wouldn't say that I reviewed them.

Q. Okay. Do you recall, as you sit here, whether those results identified a continual decline in the areas around A&B?

A. They do show a continued decline.

Q. And they also show a continued decline in areas west of A&B?

A. Yes.

Q. And would those continued declines be consistent with figures 7, 8, and 9 that you testified to this morning regarding the declining slope of aquifer levels in areas around A&B?

A. Yes.

* * *

Q. (BY MR. SIMPSON): So absent the CAMP process that you identified, would it be your expectations that the declines will continue?

A. Yes. Without something happening surface water users are going to continue to get more efficient, climate change is going to continue to happen, and all of those things are going to impact the aquifer.

Q. And if domestic well production continues and if there are new wells on the aquifer being drilled, would those continue to impact ground water levels?

A. Yeah. Any – any use that increases the consumptive use of the aquifer water is going to have an impact.

Wylie Testimony, **Tr. Vol. VII**, p. 1420, lns. 7-25, p. 1421, lns. 1-5, 17-25, p. 1422, lns. 1-6.

The testimony of Dr. Wylie confirms the evidence provided to the Department by A&B, which 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. Notably, Dr. Wylie confirmed that the condition of a GWMA exists around A&B, since more water is discharged and is leaving the aquifer than is entering it in that area:

> Q. [BY MR. SIMPSON] Okay. How would you reconcile those numbers when you're looking at, for example, these hydrographs under A&B and what you've described as the decline of the ground water levels being observed at A&B vis-à-vis these rates of recharge?
>
> A. Okay. So how, if there's more recharge – substantially more recharge than pumping, is the water level still going down in the aquifer? Does that paraphrase your question?
>
> Q. Sure.

A. The only way you can have the declines is if the water leaving the aquifer is greater than the water coming in. And you can still have that when pumping is much less than recharge.

Q. So in particular to the A&B area, would it be fair to say that the water coming into A&B is less than the water that's either being pumped out or leaving the A&B area through the ground water table?

A. That's correct.

Q. And that results I those declines that we're observing in those figures from Dr. Ralston's report?

A. That's correct. The clear indication that there's less water coming into A&B than there is leaving the area around A&B.

Wylie Testimony, **Tr. Vol. VII**, p. 1520, ln. 18 – p. 1521, ln. 19.

Dr. Wylie's testimony confirms the conditions for a GWMA designation. By refusing to consider the existing water supplies and the evidence concerning the state of ground water levels across the ESPA, the Director erred in denying A&B's petition requesting designation of a GWMA. By simply relying upon a misinterpretation of the statutes, and his claim that water districts can replace GWMAs, the Director ignored the facts concerning the state of the aquifer around A&B and did not conduct any analysis to support denying A&B's request for that designation. The Hearing Officer should recommend that the Director designate a GWMA based upon the above evidence and testimony, or alternatively, set aside his finding on this issue.

CONCLUSION

The evidence and testimony submitted in this case plainly demonstrates the Director erred in denying A&B's water delivery call. The Director failed to use the proper legal standards and burden of proof. In doing so, the Director disregarded the SRBA Court's partial decree issued on May 7, 2003. Even though the Court confirmed A&B's right to beneficially use 1,100 cfs (0.88 miner's inch per acre), the Director afforded the decreed amount no "presumption" and

unlawfully placed the burden upon A&B to "establish" material injury to its senior water right. This procedure flipped Idaho's prior appropriation doctrine upside down and insulated interfering junior priority water rights from priority administration required by law. The Hearing Officer should recommend this analysis be set aside and that the Director revise his injury analysis using the proper standards.

The evidence and testimony further shows that A&B's senior ground water right is being injured by junior priority ground water diversions in the ESPA. As ground water levels continue to decline, A&B is prevented from diverting and delivering its decreed amounts under its water right from its 177 individual points of diversion. The Director failed to properly analyze A&B's water diversion and delivery from its individual wells, again ignoring the elements of A&B's decreed water right. Since A&B does not delivery water through a single distribution system across the project, the Director's analysis of A&B's total "average" water use failed to recognize the individual wells and water shortages. A&B's landowners testified to the need for the decreed rate of diversion per acre and the impacts to their farming operations when they are prevented from using that amount. The Hearing Officer should recommend that the Director's injury analysis be set aside and modified accordingly.

Next, the evidence shows that the original construction and design of the A&B project was proper. The use of cable-tool drilling, both in the 1950s and 1960s and today, is a reasonable and acceptable drilling method. Reclamation's siting of the wells to provide gravity water delivery, and A&B's continued operation and maintenance of those project wells, is not "artificially limiting" access to water in the ESPA. As demonstrated at hearing, the primary factor limiting A&B's water delivery is declining ground water levels and the reduced pumping capacities resulting from those declines. Consequently, A&B has been forced to abandon wells,

deepen existing wells, and drill new wells due to lowered ground water levels caused by diversions under junior priority rights. The Director completely failed to analyze the effects from junior priority diversions on the aquifers levels, including refusing to utilize the ESPAM, "the best available science".

Finally, the Director failed to evaluate the facts and the state of the ESPA in denying A&B's request for a GWMA designation. The evidence and testimony at hearing demonstrates that continued declining aquifers levels at A&B, the fact water rights are not being satisfied, and the fact less water is entering the aquifer around A&B than is being discharged, all lead to the condition of a GWMA. At a minimum, the Hearing Officer should recommend the Director to evaluate the facts for purposes of that designation request, rather than rely upon a misinterpretation of Idaho law to justify its denial.

Since ground water levels have declined, and continue to decline, even to the point of forcing A&B to abandon their use, it is obvious that junior priority diversions are preventing A&B from diverting and using the water needed under its senior right. In sum, the facts show that A&B's senior ground water right #36-2080 is being materially injured. The Director's *Order* should be recommended to be modified accordingly.

DATED this 23rd day of January, 2009.

BARKER ROSHOLT & SIMPSON LLP

Roger D. Ling

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

Attorneys for A & B Irrigation District