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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)	DOCKET NO. 37-03-11-1
FOR DELIVERY CALL OF A&B)	
IRRIGATION DISTRICT FOR THE)	POCATELLO'S RESPONSE TO
DELIVERY OF GROUNDWATER AND)	A&B IRRIGATION DISTRICT'S
FOR THE CREATION OF A GROUND)	POST-HEARING MEMORANDUM
WATER MANAGEMENT AREA)	AND PROPOSED FINDINGS
_____)	

The City of Pocatello (“the City” or “Pocatello”) hereby submits its brief in response to the A&B’s Post-Hearing Memorandum and Proposed Findings (“A&B’s Closing Brief”). The City’s Response Brief responds substantively to A&B’s arguments and assertions that are either altogether new or involve a new twist on prior arguments and assertions, and specifically focuses on two areas of argument: A&B’s charge that the Director failed to properly apply a presumption of injury in evaluating the delivery call, and that declining ground water levels have injured A&B’s water right. A&B’s Closing Brief, Jan. 23, 2009, pp. 2-6, 9-14. In response to the

remainder of A&B's points, wherever possible and to avoid duplication in the record, the City has incorporated and referenced responsive arguments from past briefing as well as Pocatello's Proposed Findings of Fact, Conclusions of Law and Order.

I. IN A&B'S CALL—A GROUND WATER-TO-GROUND WATER CALL—THE DIRECTOR'S INITIAL EVALUATION WAS PROPER.

A. AFRD #2 does not eliminate the Director's discretion to determine whether injury is occurring at the time of a delivery call.

In support of the proposition that the Director wrongly evaluated A&B's delivery call because he failed to find injury, A&B relies on an interpretation of the holding in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) ("*AFRD #2*") which would turn that decision on its head. Under A&B's interpretation, the *AFRD #2* Court intended the following: 1) that a senior would initiate a delivery call by signing a sworn affidavit that he was not receiving the full amount of his decree; 2) that the Director would receive the affidavit and ask for supporting information; and 3) that, regardless of the nature and extent of the senior's supporting information, the Director would find injury. A fourth interpretation—not identified in A&B's brief but implicit in its argument—is that upon a finding of injury, the Director would take steps to curtail junior ground water users to ensure delivery of the senior's water right.

Under A&B's interpretation of *AFRD #2*, the only relevant action is for the Director to note that the affidavit alleges injury to a *senior* water right—the rest is entirely automatic. It is hard to see how this interpretation advanced by A&B differs from the "shut and fasten" administration it alleged as the standard for priority administration of conjunctive water resources at all stages of the *AFRD #2* litigation—a position advanced by A&B (and the rest of the Surface Water Coalition), rejected by the Gooding County District Court and not appealed:

It is also important to point out those issues which the district court decided against American Falls and [and A&B and the other members of the SWC] from which no appeal was taken. The district court noted that the CM Rules incorporate concepts to be considered in responding to a delivery call, such as: material injury; reasonableness of the senior water right diversion; whether a senior right can be satisfied using alternate points and/or means of diversion; full economic development; ... and reasonableness of use. The court observed that the Rules are not facially unconstitutional in having done so. The district court rejected American Falls' [and A&B's and the other members of the SWC] position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis.

AFRD#2, 143 Idaho at 869-870, 154 P.3d at 440-441. The Director must have discretion to evaluate the affidavit and supporting evidence because, as the *AFRD#2* Court noted, the Rules incorporate concepts such as “material injury, reasonableness of the senior water right diversion; whether a senior can be satisfied using alternate points and/or means of diversion; full economic development...and reasonableness of use.” *Id.* With the authority to evaluate comes the authority to reject—as the Director did here when he found that the supporting information was insufficient to sustain a finding of injury at the pre-hearing Order level.¹

A&B's position should be rejected for policy reasons as well. Under A&B's scenario, the Director would have no choice but to find injury and to shut down or curtail junior wells. In the context of A&B's delivery call, this would have required curtailment of juniors in March or April of 2007 unless and until a decision by the Hearing Officer found no injury. Few farmers could sustain operations for two years without irrigation supplies; query the impact two years of curtailment would have on cities (such as Rupert and Burley) that rely on junior ground water supplies. If a senior water right in Idaho is comprised of more than its priority date, the obligations of the Director have to be comprised of more than simple “shut and fasten”

¹ *See also*, Opinion Constituting Findings of Fact, Conclusions of Law and Order at § VIII.8 (“The Director has the authority and responsibility to investigate claims when a call is made that may result in curtailment.”)

administration. A&B's arguments regarding the Director's initial evaluation of its delivery call must be rejected.

B. A&B bore the burden of persuasion that the Director's Order was erroneous.

In this delivery call it was not the junior's burden to show that the Director's Order was incorrect—quite the contrary. As in any administrative matter, the party challenging the Director's Order bears the burden of persuading the finder of fact that the Order was incorrect. *AFRD#2* does not change the burden of proof—in *the event* the Director finds injury, obviously the junior must refute that showing. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449.

Here, where A&B failed to satisfy the Director that its claims of injury were valid, A&B bore the burden at trial to show that finding was incorrect.

C. The information submitted to the Director and at trial was insufficient to sustain a finding of injury at either stage of the case.

A&B's position in this matter has been that: a) A&B requires the entire 1100 cfs of its Water Right No. 36-2080; b) A&B is injured because it does not receive 1100 cfs; and c) A&B does not receive 1100 cfs because of declines in water levels caused by junior pumping. However, this position assumes the predicate that A&B ever had a total well capacity of 1100 cfs to sustain its uses during the peak of the season. As the Director noted in his FOF 61-62, A&B's annual reports showed 1007 cfs during 1963 and 970 cfs during 2006. If A&B never had an 1100 cfs water supply (as measured by well capacity), then it has never relied on an 1100 cfs water supply. In light of these facts, it is not surprising that the Director rejected A&B's assertion that it was injured because it did not receive 1100 cfs in water supply.

In addition to determining the nature of A&B's water supply over time, FOF 61-62, the Director examined whether or not A&B had an adequate water supply to satisfy beneficial uses, and concluded that its water supply was adequate. *See* Pocatello's Proposed Findings at ¶ II.C.

These conclusions were consistent with those drawn by Mr. Sullivan in his irrigation requirements analysis (*id.* at ¶ II.E) and by the A&B farmers testimony (*id.* at ¶ II.D).

Additionally, evidence at trial demonstrated that A&B’s diversions have always been smaller than its available water supplies. *Id.* at ¶ II.A. If A&B is suffering a shortage, it is a shortage of its own creation and—because additional water supplies are available—a shortage it can resolve without resort to administration.

A&B has failed to demonstrate water rights injury at any stage of the case. Its revision of the *AFRD #2* holding as a basis to seek a different outcome should be rejected.

II. WATER LEVEL DECLINE DOES NOT EQUAL INJURY

A&B relied on its assertion that because water levels had declined, it had suffered injury. A&B’s Closing Brief is replete with such assertions:

Ground water levels have declined significantly in the western portion of the ESPA, including the area around A&B...

Ground water pumping under junior priority water rights has caused declines in ground water levels across the ESPA, including at A&B...

[L]owered ground water levels have resulted in reduced pumping rates in A&B’s wells.

A&B’s Closing Brief, p. 9.

As a matter of law, as determined by the Hearing Officer in the Order Regarding Motion for Declaratory Ruling, May 28, 2008, A&B has no entitlement to historic water levels but is instead subject to the Ground Water Act. Under the Ground Water Act, the only entitlement any ground water user has—and this entitlement exists irrespective of the priority date—is to “reasonable ground water pumping levels”. I.C. §42-226. As described in Section III below, the “reasonable ground water pumping level” determination is one made by the Director, and triggered only upon a finding of shortage. By arguing that it is injured from declining water

levels, A&B puts the cart before the horse: the injury question must be answered by reference to sufficiency of the water supply and not by changes in water levels. Because A&B failed to demonstrate either prior to the hearing or at the hearing that it had an inadequate supply of water at any time, its injury claim fails on that basis.

However, as a threshold matter, there is no evidence that water level declines at A&B have lead to a reduction in water supplies for the B Unit. The only reference A&B makes in its brief to testimony or evidence of the link between declining ground water levels and reduced diversions are the bare assertions made by Mr. Temple during his testimony. By contrast, Dr. Ralston's testimony at trial was that there were no patterns of reduced well capacities that could be tied to water level declines. Transcript of Hearing, Vol. 1, pp. 188:2-189:7.

As pointed out in Pocatello's Proposed Findings, water level declines tied to decreases in well capacity cannot be reliably established for most of the B Unit. *See* ¶ III.A-B. Mr. Temple and Mr. Koreny both asserted that there were widespread water level declines and reduced well capacities, but Dr. Ralston's report shows that only the southwest part of the B Unit has actually experienced water level declines in concert with declining well production capacities. Exhibit 121. This is the so-called "922 problem area" that the Bureau of Reclamation, as early as the 1960's, recognized to have an unreliable ground water supply due to interlayered sedimentary rock formations underlying much of this part of the B Unit. Exhibits 157 and 157D. No evidence supports the proposition that A&B has suffered a loss of water supply in any region of the B unit beyond the "922 problem area" as a result of water level declines. For example, the evidence showed that the criteria (well capacity) for A&B farmer lay witness-wells was consistent over a period of years. Exhibit 356.

Whatever the effect of water level declines on well capacities, the evidence at trial showed that A&B has *never* diverted its total water supply as measured by well capacity. Pocatello's Proposed Findings at ¶¶ II.A.22-32. In other words, even if A&B's farmers require more water than has historically been delivered to them the water supply was—and is—available to make those deliveries. That A&B does not deliver (or the farmers do not request) larger volumes of water is not the fault of junior ground water users, and cannot be the basis for a finding of injury.

III. A&B IS PUMPING FROM A REASONABLE PUMPING LEVEL—UNLESS AND UNTIL IT DEMONSTRATES INJURY TO ITS WATER RIGHT, THE PUMPING LEVEL IS PER SE REASONABLE

On a related note, A&B suggests that in any event, it is entitled to a determination of reasonable pumping levels. However, A&B has never explained what triggers the Director's discretion to establish reasonable ground water levels. It cannot be any independent entitlement A&B has to ground water levels, as the Ground Water Act did away with any such entitlements. I.C. §42-226; *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982) (recognizing that, *inter alia*, domestic wells and other types of wells identified in §42-227 retain a right to historic ground water levels). And it cannot simply be an obligation triggered by the request of a senior ground water user, given that the Director's authority under the Ground Water Act to administer ground water rights is expressly conditioned on the constitutional precepts of maximum utilization and the public interest. I.C. §§42-231; -226. The better analysis is to view reasonable pumping levels as a determination that the Director must make only upon finding injury to a senior water right holder.

In the event of a finding of injury, and following a determination of reasonable pumping levels, the Director would then have to evaluate the water levels from which A&B is pumping to determine whether the water levels are unreasonable. If he determined that A&B's pumping

levels were unreasonable, he would then consider a remedy that includes the Ground Water Act concept of “full economic development” of the aquifer, as well as the constitutional concept of “public interest.” I.C. §42-226; Idaho Const. art. 15, §7. *At that point*, and under those circumstances, the question of compensating A&B for costs related to well deepening or improvement that went below a reasonable pumping level may be relevant. However, unless the Director completes such an analysis, costs are simply another measure of pumping level, and A&B has no basis to demand that the Director do anything with the information on costs provided.

IV. THE DIRECTOR HAD THE DISCRETION TO ANALYZE A&B’S DELIVERY CALL BY REFERENCE TO THE APPURTENANCE PROVISIONS OF ITS PARTIAL DECREE

At bottom, A&B would like the Director (and the Hearing Officer, presumably) to analyze their injury claims on a well system-by-well system basis. Under this methodology, A&B claims injury occurs to a particular well system if it does not pump 0.75 miner’s inches/acre², but does not answer the difficult question of why A&B no longer relies on the flexibility built into the partial decree—allowing ground water from any well to serve any acre in the place of use—and instead is turning to the juniors for either increased water levels through curtailment or money payments. A&B complains that IDWR failed to make a well system-by-well system evaluation because it did not understand the acreages associated with each well system place of use, or possibly because IDWR used “misinformation” to develop certain findings of fact in the Order. Both of these claims mischaracterize the Director’s evaluation of

² There is some confusion about what A&B wants in the way of a well system-by-well system analysis. The so-called “Item G” wells were all wells that did not produce more than 0.75 miner’s inches/acre and which A&B claimed were examples of injury to its water right. However, at trial A&B also claimed any well producing less than 0.88 miner’s inches/acre exemplified injury.

A&B's delivery call on the basis of all 62,604 acres in the place of use of Water Right No. 36-2080.

First, the Director noted early on in his Order that A&B had a partial decree (and underlying license) for Water Right No. 36-2080 with a 62,604 acre place of use. FOF 32. This fact was incorporated into one of the findings of fact supporting the non-injury finding. FOF 64. Finally, in the conclusions of law the Director relied on the fact that all ground water under Water Right No. 36-2080 was appurtenant to all the acres in the place of use. COL 23, 36. As found by the Hearing Officer in an oral pre-trial ruling on motions for summary judgment, the Director had the discretion to rely on the appurtenance provisions of the partial decree to evaluate the delivery call. So as a matter of law, the Director's District-wide framework for evaluating injury was correct.

A&B, however, suggests that the Department would have completed a well system-by-well system analysis except they failed to understand the acreages provided. However, Mr. Luke testified there was never any intent to do a well system-by-well system injury analysis. Instead, as he testified, the Department's attempt to analyze the Item G well shortages (contained in the final Order, FOF 65-75) was undertaken to be responsive to A&B's claims.

The issue of the Director's discretion to evaluate A&B's delivery call on a system-wide basis has been briefed repeatedly. Pocatello incorporates by reference its pre-trial briefing and argument on this matter, as well as its Closing Brief at ¶ I and its Proposed Findings of Fact, Conclusions of Law and Order at ¶ I.4. To the extent it is useful, Pocatello also incorporates the briefing on IGWA and Pocatello's Joint Motion for Partial Summary Judgment Oct. 3, 2008, and argument thereon by counsel for IGWA and Pocatello on November fifth, 2008.

V. THE ESPAM HAS NEVER BEEN USED TO DETERMINE INJURY IN A DELIVERY CALL.

A&B's Closing Brief at page 34 suggests: "If the A&B Scenario can assist in water rights administration and it shows that pumping by junior ground water rights...results in injury...the Director has a duty to consider and use that information." For this statement to be true, injury to water rights in Idaho would need to equal depletions. Only then could the ESPAM model—or any model—accurately determine "injury". However, as the various Director and Hearing Officer orders related to the plethora of delivery calls currently being litigated reflect, depletion does not equal injury in Idaho. *See, e.g.*, September 5, 2008, Final Order Regarding the Surface Water Coalition Delivery Call, Conclusion of Law ¶ 7. Determining injury to water rights is a more complicated concept, and includes evaluation of both the volumes of water necessary for beneficial use as well as the constitutional precepts of maximum utilization and the public interest. The ESPAM model does not determine the volumes A&B requires to make beneficial use of Water Right No. 36-2080; nor does it model these constitutional factors—indeed these are not even mathematical constructs.

The ESPAM model has not been used to determine injury in past delivery calls; instead, upon a finding of injury by the Director, the ESPAM has been run to determine the junior wells subject to curtailment. Only after determining the amount of water that a senior is entitled to, and determining whether the senior is short of that amount, is it appropriate to run the model.

In addition, the A&B Scenarios determined changes in water levels under the B unit and surrounding lands. As has been discussed previously (in this brief and others, and during trial) A&B has not shown a right to water levels. In the absence of an entitlement to water levels, the A&B Scenarios are simply inapplicable to resolving A&B's delivery call.

CONCLUSION

On the basis of the evidence received at trial, the post-trial papers filed by Pocatello in this matter, and for the reasons described herein, Pocatello requests that the Hearing Officer

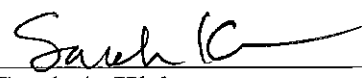
affirm the Director's January 29, 2008 Order, finding no injury to A&B's Water Right No. 36-2080.

Dated this 13th day of February, 2009.

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CERTIFICATE OF SERVICE VIA E-MAILING

I hereby certify that on this 13th day of February, 2009, a copy of **Pocatello's Response to A&B Irrigation District's Post-Hearing Memorandum and Proposed Findings for Delivery Call of A&B Irrigation District** was served by email only, addressed to the following:



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