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 Petitioner 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** **PETITION FOR RECONSIDERATION OF HEARING OFFICER'S MARCH 27, 2009** ***OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS***

COMES NOW, Petitioner A&B Irrigation District ("A&B"), by and through counsel of record, and pursuant to Rule 720.02(a) of the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*), and hereby files this *Petition for Reconsideration of Hearing Officer's March 27, 2009 Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations*

(hereinafter "*Recommended Order*" or "*RO*"). The issues identified for reconsideration and the supporting bases are set forth below.

I. Clarification of Procedural Background & Parties.

The following items should be clarified for purposes of the record. A&B filed its *Motion to Proceed* in this case on March 16, 2007. The reference to the year on page 2 should be corrected to read "2007" instead of "2008". Next, only Fremont-Madison Irrigation District (represented by Rigby Andrus & Moeller) filed a *Notice of Appearance* in this case. *See Notice of Intent to Participate* (Nov. 13, 2007). The "Committee of Nine" is not a party in this case and any reference to the Committee of Nine (the advisory committee to Water District 01), *see* page 5, should be omitted. *See also*, Tr. Vol. 1, p. 5, ln.25 – p. 6, ln. 4.

II. The Injury Standard Set Forth in the *Recommended Order* Does Not Follow Idaho Law and Should Be Reconsidered.

The *Recommended Order* identifies a new injury standard for water right administration that does not follow Idaho law and should be reconsidered. In addition, the Director's "no-injury" determination should be revisited.

The *Recommended Order* correctly identifies the burdens of proof and the presumptions that A&B is afforded pursuant to the Idaho Supreme Court's decision in *AFRD #2 v. IDWR*, 143 Idaho 862 (2007). *RO* at 7-8. A&B's water right #36-2080 was decreed by the SRBA Court on May 7, 2003 with a diversion rate of 1,100 cfs (or 0.88 miner's inch per acre). Importantly, neither the January 29, 2008 *Order* nor the *Recommended Order* identify any "post-adjudication" factors (i.e. waste, forfeiture, abandonment, etc.) that would warrant distributing less than the decreed diversion rate to A&B for use by its landowners. *See AFRD#2, supra*

(cited in *RO* at 7-8).

That notwithstanding, the *Recommended Order* sets forth and applies the following injury standard in evaluating A&B's water delivery call:

> **6. Consideration of the system as a whole must also account for the effect upon individual systems when the number of short systems would constitute a failure of the project.**
>
> * * *
>
> **10. The portion of short wells in the project is not sufficient to show a failure of the project.** There is evidence that in 2007 there were 5,000 acres in Unit B that were being served by well systems that delivered less than 0.75 miner's inches per acre. The limited amount of this acreage is a consequence of costly rectification efforts. Temple testimony, pages 666-67. The wells that are short in the production of water that are unlikely to be susceptible to successful remediation are limited to the southern portion of the project. They do not serve a sufficient portion of the project to deem their failure a failure of the project as a whole considering the terms of the license and partial decree.
>
> * * *
>
> **5. The decline in water levels has not resulted in the need to withdraw significant amounts of land from cultivation.** To date there has not been a catastrophic loss of the ability to pump that has prevented the production of crops. . . . The withdrawal of twenty acres with a significantly reduced yield was not catastrophic to the farming operation. It would be difficult to classify the withdrawal and crop reduction as material when the scope of the farming operation is considered.

RO at 18, 20 & 26 (underline added).

According to the *Recommended Order*, A&B's water right is not materially injured unless there would be a "failure of the project" or "catastrophic loss" to an individual landowner's "farming operation". This is not the injury standard for water right administration.

Under the water distribution statutes and the CM Rules, the Director and watermaster are *required* to distribute water to A&B's *decreed* water right #36-2080. *See*

Idaho Code §§ 42-602, 607; CM Rule 40.01. The Director and watermaster have a "clear legal duty" to distribute water to senior water rights, pursuant to the terms of a decree. *See Musser v. Higginson*, 125 Idaho 392, 395 (1994); *State v. Nelson*, 131 Idaho 12, 16 (1998). The CM Rules define "material injury" as follows:

> **14. Material Injury**. Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42.

CM Rule 10.14.

A&B's water right is materially injured because diversions under junior priority water rights in the ESPA are causing a "hindrance to or impact upon" A&B's diversion and use of water under its senior water right. *See A&B's Post Hearing Memo and Proposed Findings* at 9-14 (Jan. 23, 2009). Consequently, the Director and watermaster must regulate "the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included with the district." CM Rule 40.01.a.

Contrary to the *Recommended Order*, A&B and its individual landowners do not have to suffer "failure of the project" or "catastrophic loss" in order to demonstrate injury to A&B's decreed water right. The standard set forth in the *Recommended Order* requires that A&B demonstrates that a lack of water will result in "failure of the project" or that its landowners will suffer "catastrophic loss". Otherwise, administration will apparenlty be denied and A&B will not be entitled to use the amounts of water in its decree. This is not Idaho's standard for water right administration.

By using a 0.75 miner's inch per acre benchmark, the *Recommended Order's* new standard excuses injury to A&B's water right because the injury suffered is not "sufficient" when

compared to the project as a whole. *RO* at 20. The *Recommended Order* uses the fact that A&B is a large irrigation project (approximately 66,000 irrigated acres in Unit B) against A&B – holding that since only "5,000 acres" were served by well systems producing less than 0.75 miner's inch per acre no material injury has occurred. *RO* at 20. Stated another way, the *RO* forces A&B to suffer depletions to its water right such that it is unable to deliver more than 0.75 inches per acre to a "sufficient portion of the project" in order to show a "failure of the project as a whole." Absent such a showing, administration would apparently be denied. This newly created benchmark merely excuses material injury and forces A&B to "self-mitigate" or accept the injury to its water right caused by hydraulically-connected junior priority ground water rights in the ESPA.

Injury to A&B's water right cannot be condoned in any proportion. It does not matter how many of the acres served by A&B's right are impacted – be it 50,000 acres, 5,000 acres, or 50 acres. If diversions under junior priority ground water rights are interfering with A&B's *decreed* senior right, A&B is entitled to administration in order to protect its senior water right, that is the very purpose of the prior appropriation doctrine. The Director cannot deny a call just because an irrigation project "as a whole" has not failed. Such a subjective standard, without any support in the law or regulations, fails to recognize the impacts suffered by individual landowners on A&B's project. The Director has no authority to dismiss the injury to A&B's water right just because reduced water deliveries may apply to some, but not all, or a "sufficient" portion of the landowners on the project.[1]

[1] Notwithstanding, all of A&B's landowners suffer even when a portion of project's landowners are delivered less water, since A&B has instituted a well rectification program to address wells producing less than 0.75 miner's inch per acre. For 2009 A&B's assessment for all landowners increased $25/acre, of which $23 was dedicated to

The *Recommended Order* has created a new "failure of the project" standard – by which, apparently, the Director is to gauge when, in his opinion, administration is appropriate. Yet, there are no objective criteria guiding such a decision, and none are provided by the water distribution statutes or CM Rules. Moreover, the standard fails to recognize A&B's entire decreed water right and minimizes the injury that has been suffered.

The *Recommended Order's* standard dismisses the impacts to A&B's individual landowners. Whereas A&B's landowner witnesses all testified that they have a need for and can beneficially use the per acre diversion rate provided by A&B's decree (0.88 miner's inch per acre) (*see A&B's Proposed Findings* at 11), the *Recommended Order's* standard appears to require "catastrophic loss" to an entire farming operation to justify an injury finding. Similar to the "failure of the project" requirement for A&B, the *RO* standard requires "catastrophic loss" to an entire farming operation to justify water right administration.[2]

The Director is not free to judge and weigh these individual impacts to temper administration. For example, even using the 5,000 acres of impacted acres identified in 2007 in the *Recommended Order*, would the recommendation change if the acres affected comprised of 50 (100 acre) farms owned and operated by different landowners? Would it change if the 5,000 acres was owned and operated by a single landowner? What if those acres constituted that landowners entire farming operation? At what point or under what circumstances is a 5,000 acre

---

increased expenses for the well rectification program. The increased assessments, due in most part to improve water delivery to those acres that receive less than 0.75 miner's inch per acre, directly affects the whole A&B project.

[2] Whereas various A&B landowners farm different parcels across the A&B project, the fact that they may receive more water on some well systems and less on others does not justify the injury to A&B's water right or the impacts to their individual farms, or portions thereof. The *Recommended Order's* example of Timm Adams' operation impermissibly justifies water shortage on part of his farm (20 acres in 2007) just because he farms 1,650 acres in total. Regardless of the affected acres, it is clear that Mr. Adams was affected by water shortage and injury to A&B's water right. Although he farms 1,650 acres, impact to any one of those acres affects Mr. Adams farming operation and his annual bottom line, as it does with any of A&B's landowners.

impact "sufficient" to demonstrate injury to A&B's water right, regardless of the size of the entire irrigation project? These questions expose the danger in such an analysis and show why the Director and watermasters are not authorized to implement water right administration in that manner. If they were so authorized the Director should have no problem curtailing 57,000 acres (approximately 7.5% of IGWA's members' irrigated area across the ESPA) since such a curtailment would not be "sufficient" to IGWA's members "as a whole" and would not constitute "catastrophic loss" for their overall farming operations.

A&B's landowners should not have to suffer "catastrophic loss" to justify administration of junior priority ground water rights. By that time administration will be too late to protect the senior water right. As such, the *Recommended Order's* new "failure of the project" and "catastrophic loss" standards should be reconsidered.

III. The "Minimum" Amount of Water Needed for Crop Maturity Standard Fails to Recognize A&B's Decreed Water Right and the Evidence in this Case.

The *Recommended Order's* "minimum amount needed" or "crop maturity" standard is not supported by Idaho law and fails to recognize A&B's water right as decreed by the SRBA Court. Although the Hearing Officer acknowledges that "A&B's water right is as stated in the partial decree" and that "A&B is entitled to the amount of its water", the analysis that follows in the *Recommended Order* does not recognize the decreed diversion rate (1,100 cfs or 0.88 miner's inch per acre) and creates a new standard, a "minimum amount needed" or "crop maturity" criteria, for the Director to use in water right administration.

First, the *Recommended Order* includes the following discussion relative to the level of protection afforded to A&B's landowners for purposes of water right administration:

> **3. The delivery rate of 0.75 is higher than that of nearby surface water users.** See SWC Delivery Call, Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation, at 55.
>
> **4. Crops may be grown to full maturity on less water than demanded by A&B in this delivery call.** Evidence from irrigators outside A&B is informative to the extent that it indicates that full crops can be produced on less water than demanded by A&B in this delivery call proceeding. In fact full maturity crops are grown on Unit B with less than the 0.75 amount. This may result in increased costs in power to the irrigators who may be required to run their pumps longer and increased labor to manage the water, but careful management by A&B and its irrigators has resulted in the production of crops to full maturity with less water than demanded by A&B.
>
> * * *
>
> [A&B] is not entitled to curtail junior pumpers to reach that full amount if the full amount is not necessary to develop crops to maturity. . . The question is whether irrigators' crop needs in Unit B can be met with less than the full amount of the water right.
>
> * * *
>
> **6. The Director's determination is supported by substantial evidence.** Several factors support the Director's determination. It is consistent with the Motion to Proceed which indicates 0.75 to be a minimum need. A minimum is not a desirable amount, but it is adequate. The 0.75 is consistent with the policy of rectification adopted by A&B. It is unlikely rectification would be prompted at a level below the amount necessary for crop production. More is sought, and more is better, but 0.75 meets crop needs. There is persuasive evidence that 0.75 is above the amount nearby irrigators with similar needs consider adequate.

RO at 30 & 33.

As examined below, the basis for the *Recommended Order's* finding is not supported by the evidence in this case and the "crop maturity" standard impermissibly varies from the decreed water right held by A&B.

A. Delivery Rate of Other Irrigation Entities

Water users across the state, and the ESPA, own and use different water rights. The comparison of A&B's water right to the rate of delivery of certain surface water canal companies or irrigation districts (i.e. NSCC) does not justify a refusal to deliver water to the amount provided by A&B's decree. *RO* at 30. A&B holds a decreed water right #36-2080 for 1,100 cfs (0.88 miner's inch per acre). A&B's water right is not the same as water rights held by other water delivery organizations. For this reason alone the comparison cannot support the Director's "no-injury" finding or the use of 0.75 miner's inch per acre as a delivery criteria.

There is no requirement that one water right holder's diversion and use of water must be, or should be, the same as another's diversion and use. If every irrigator's use can simply be compared to a single water right (i.e. a 5/8th inch delivery) for purposes of administration, there would be no need to claim and decree varying diversion rates. This has not been the practice developed in Idaho, since each water right stands on its own. The Director and watermaster have no authority to reference another's diversion and use and curtail a senior's use (within his water right) to that same level.[3]

Assuming a comparison can be made, it is undisputed Idaho law provides an irrigator with the right to appropriate and use 0.02 cfs (1 miner's inch) per acre. *See* Idaho Code § 42-202(6). A comparison of private ground water rights appropriated in Water District 130 reveals that approximately 55% of IGWA's members hold water rights with diversion rates exceeding 0.75 miner's inch per acre (with 40% over 0.85 miner's inch per acre). A&B's decreed diversion

[3] If this were so than all junior priority ground water right holders across the ESPA should be held to 0.75 miner's inch per acre.

rate per acre is comparable to those private ground water users in the area. Furthermore, A&B delivers 0.80 to 0.85 miner's inch per acre to its landowners in Unit A pursuant to its surface water rights. *See Dan Temple Testimony*, Tr. P. Vol. III, p. 523, lns. 14-22. Even using water rights of area ground water users and the delivery rate provided to Unit A within the A&B project, it is clear that Unit B's decreed diversion rate is comparable and well within the standard provided by Idaho law (0.02 cfs, 1 miner's inch per acre).

A water right comparison analysis does not justify reducing A&B's decreed diversion rate, and it does not support the Director's no-injury finding. If a comparison is made, however, the results demonstrate that Unit B's decreed diversion rate is appropriate and should be recognized. The *Recommended Order* should be revised accordingly.

B. Crop Maturity / "Minimum Needed" Standard

The Director and watermaster do not distribute water based upon a "crop maturity" standard.[4] Instead, the Director and watermaster distribute water to "water rights" based upon priority. *See* Idaho Code §§ 42-602, 607; CM Rule 40.01. Even the CM Rules do not authorize the Director to delve into and micromanage a individual water user's farming practices and only distribute water according to a "crop maturity" standard. The fact that a crop has been or can be grown with less than 0.75 miner's inch per acre (obviously depending upon crop type, climatic conditions, and other factors) does not define a new standard to replace what is provided by a water user's *decreed* water right. Importantly, a water user's license or decree is binding upon

[4] The *Recommended Order's* use of the term "full crop" is not defined and unclear. Although a water user may raise and harvest a crop, defining that as "full" is a misnomer given yield and quality. A&B's landowner witnesses testified that their crops have suffered, both in terms of yield and quality, due to inadequate water supplies. Hence, even though a landowner may plant, irrigate, and harvest a crop, that does not mean it is defined as a "full crop" or that the water right has not been injured in the process. Regardless, a "crop maturity" standard is not the standard for water right administration in Idaho and does not justify injury to a senior water right.

the Director and watermaster and is the referenced "standard" to be used for water right administration. *See* Idaho Code §§ 42-220 ("Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein."); 42-1420(1) ("The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.") (emphasis added).[5]

The Director and watermaster are required to distribute water based upon water rights, not some other standard of water use, including the "crop maturity" standard set forth in the *Recommended Order*. If a water right holder can beneficially use the amount of water set forth in a decree, the Director and watermaster are obligated to deliver that amount and juniors are prohibited from interfering with that use, i.e. injuring the senior's right.[6]

Absent "waste" or some other constitutionally permissible defense proven by a junior, A&B's landowners are entitled to use the amounts stated on A&B's decree. The Director cannot "second guess" this decreed amount and only deliver water that he deems appropriate for "crop maturity". Importantly, A&B's landowner witnesses all testified that they require and can beneficially use the amount of water provided in A&B's decree (0.88 miner's inch per acre). *See A&B's Proposed Findings* at 9-14.

The *Recommended Order* acknowledges that a "crop maturity" standard is essentially a "minimum needed" standard. However, a water user's "minimum needs" is not a valid basis for

[5] The Director was specifically authorized by the SRBA Court to perform interim administration in Basin 36 pursuant to Idaho Code § 42-1417. That statute authorized the Director and watermaster to distribute water pursuant to chapter 6, title 42, Idaho Code: "(b) in accordance with applicable partial decree(s) for water rights acquired under state law" (emphasis added).

[6] Even if a senior's crop can "mature" under an amount of water less than decreed, that does not mean the decreed amount cannot be beneficially used. Indeed, if a senior cannot beneficially use the water decreed, such use would constitute unlawful "waste". Pursuant to the findings in the January 29, 2008 *Order* and the *Recommended Order*, it is clear that A&B and its landowners do not "waste" water. Just the opposite, A&B is a highly efficient water delivery organization that delivers water to its landowners on-demand. *See RO* at 21-23.

the Director and watermaster to distribute water. Moreover, a landowner's "minimum need" will certainly change with cropping patterns, weather, precipitation, and other factors. A&B delivers water to its landowners and must be prepared to deliver what is requested, up to the decreed amounts on its water right. A&B cannot dictate what its landowners grow or how much water the landowner needs throughout the irrigation season. Instead, A&B delivers water upon demand, seeking to distribute the decreed diversion rate.

A subjective "minimum needed" standard cannot replace the water right and it is clear under Idaho law that a water user is not held to such a standard for purposes of water right administration. In *Caldwell v. Twin Falls Salmon River Land & Water Co.*, Judge Dietrich of the federal district court in Idaho rejected the concept of a "minimum needed" standard:

> So far as I am aware, ***it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs***, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. ***Economy of use is not synonymous with minimum use.*** Better four prosperous farmers than five who are unsuccessful because of the uncertainty in the water supply, and better four farms uniformly fruitful than five upon which failure is ever imminent, and to which it is bound to come on the average one year in five.

225 F. 584, 596 (D. Idaho 1915) (emphasis added).

Moreover, the Idaho Supreme Court has recognized that the individual farmer, not the Director or IDWR, is the person best acquainted with the land to know how much water is needed. *See Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383 (1930). Although *Arkoosh* concerned a "season of use" issue, the Court still found:

> The water user is acquainted with his land and his crops and should be in better position to determine when water should be applied than any other person.

> Various provisions of our statutes recognize his right to demand water. The respondents are entitled to apply water to their lands for the purpose of irrigation as early as it may be beneficially applied.

Id. at 395.

Similarly, the individual farmer, "is in a better position" than the Director or IDWR to determine how much water should be applied. Importantly, the SRBA District Court has also acknowledged that IDWR cannot limit what an individual farmer grows, nor the amount of water he can beneficially use under his water right. *See "Facility Volume" Decision* at 17 (the Department has no authority to "limit 'the extent of beneficial use of the water right' in the sense of limiting how much (of a crop) can be produced from that right"). Therefore, A&B's landowners have a right to use the decreed amounts of its water right.[7] The Director cannot limit or reduce that amount if it can be beneficially used. Moreover, the Director cannot limit A&B's landonwers' use of water under a decreed senior water right for the purpose of allowing junior priority water rights to pump their full allotments. *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908) ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to another person. Vested rights cannot thus be taken away.").

In sum, Idaho law does not ask the question "whether irrigators' crop needs in Unit B can be met with less than the full amount of the water right", instead it is "whether irrigators in Unit B can beneficially use the full amount of water right". Since A&B's landowners can and

[7] The "minimum needed" standard is akin to the riparian doctrine that was rejected in Idaho over a century ago. *See* IDAHO CONST. art. XV, § 3; Idaho Code § 42-106; *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 583 (1973). Rather than only allow A&B a "minimum needed", or what the Director deems is "reasonable", Idaho's prior appropriation doctrine requires the Director and watermaster to distribute water to A&B, according to its decree, and according to the priority stated. A "minimum needed" standard renders a water right meaningless, provided there is sufficient water for all users, junior and senior, to meet their "minimum needs".

routinely do beneficially use the full amount of A&B's decreed water right, the Director and watermaster must distribute water to that right accordingly.

In addition to the above points, the *Recommended Order's* basis for the 0.75 miner's inch per acre standard is not supported by the evidence referenced. First, the language of A&B's *Motion to Proceed* makes it clear that A&B was seeking to deliver its decreed diversion rate, not just 0.75 miner's inch per acre:

> d. That ***the decreed diversion rate under A&B's ground water right is necessary*** to provide a reasonable quantity for the beneficial use of water in the irrigation of lands of A&B. Because of the shortages suffered by junior pumping interference and declining ground water levels, A&B is unable to divert an average of ***0.75 of a miner's inch per acre which is a minimum amount necessary*** to irrigate lands within A&B during the peek periods when irrigation water is most needed.

Ex. 102 at 7 (emphasis added). A&B's motion references the need to divert the "decreed diversion rate" and notes that 0.75 miner's inch per acre is a "minimum" amount that is necessary. Dan Temple testified that the 0.75 miner's inch per acre criteria is a "minimum" amount, and that the A&B landowners have a need for the amount provided by the water right. *Dan Temple Testimony*, Tr. P. Vol. 3, p. 640, lns. 15-19, p. 641, lns. 3-4. Accordingly, the *Recommended Order's* reference that the Director's use of 0.75 miner's inch "is consistent with the Motion to Proceed" is inaccurate.

Second, the rectification standard used by A&B does not support reducing the amount of water A&B's landowners can beneficially use under the water right. A&B is limited in time and resources in the off-season to work on wells and pumps. Both Virgil and Dan Temple explained at hearing that it is not possible for A&B to work on all well systems that fall below the decreed diversion rate (0.88 miner's inch per acre), hence the 0.75 standard has been used to create a

priority list of wells for the district to address. *See Virgil Temple Testimony*, Tr. Vol. 2, p. 365, ln. 14 – p. 366, ln. 16; *Dan Temple Testimony*, Tr. Vol. 4, p. 501, lns. 13-21 & p. 755, lns. 19-23. Therefore, A&B's rectification is directed at working on the wells that are producing the least amount of water in the district. A&B could not raise its standard to a higher level and still work on all those wells on an annual basis. Contrary to the *Recommended Order*, the district's standard is not definitive of the amount of water A&B believes is "necessary for crop production".

Since, the law and facts in the record do not support the *Recommended Order's* conclusion on this issue it should be reconsidered.

IV. A&B Does Not Have to Interconnect its Separate Points of Diversion (Wells) as a Condition to Seek Administration of Junior Priority Ground Water Rights.

The SRBA Court decreed A&B's water right, with 177 separate points of diversion (wells) on May 7, 2003. *RO* at 4. A&B diverts and delivers water to its landowners in a highly efficient and reasonable manner. A&B and its landowners do not "waste" water. Although some well systems on the project have more than one well, and in some cases more than one well can supply water to a particular landowner, these systems were originally set up and constructed by BOR. *Dan Temple Testimony*, Tr. Vol. 3, p. 475, lns. 10-16; p. 478, lns. 1-4. As acknowledged in the *Recommended Order*, the A&B project was "developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury". *Id.* at 19.

Notwithstanding the above statement, the *Recommended Order* goes on to state "there is

an obligation of A&B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from juniors." *Id.* The recommendation is not supported by facts in the record and is inconsistent with Idaho law. Consequently, the recommendation should be reconsidered.

First, the recommendation implies that A&B's present diversion and delivery system is not "reasonable" and that because BOR did not seek to limit particular farm units to particular wells at the time of licensing, A&B now has an "obligation" to "move water" within its system before seeking administration.[8] Importantly, A&B's decree for water right #36-2080 did not "condition" or limit A&B's ability to seek administration of junior priority water rights in any way. A&B's water right was licensed and partially decreed with individual wells serving different farm units across the project. As reflected in the *Recommended Order*, that is how the project was actually developed. *RO* at 15-16. Both the license and decree are binding upon IDWR and the Director. *See* Idaho Code §§ 42-220, 42-1420. The Director cannot license a water right, recommend it to the SRBA Court, and then refuse to distribute water to the right after it is decreed just because the right has multiple points of diversion which are not interconnected.[9] In addition, attempting to move water from well systems, or increase the lands served by a particular well would only reduce the amount of water provided to all landowners served by those wells during allotment. *See Dan Temple Testimony*, Tr. Vol. 4, p. 703, ln. 16 – p. 704, ln. 7. In essence, such an action would force A&B to "injure" it own landowners by

[8] A&B disputes the *Recommended Order's* use of "pre-decree" information on this issue. Regardless of what BOR requested or "envisioned" at the time of licensing in the 1960s, it does not justify denying A&B's request for administration of its decreed water right today.

[9] Moreover, since A&B's landowners can beneficially use the amount of water provided by A&B's decree (0.88 miner's inch per acre), there is no basis to attempt to move water from certain well systems (those producing more water) to others (those producing less water).

taking water away from some and giving it to others.

Nothing in the water distribution statutes or CM Rules requires a senior water right holder to "interconnect" different points of diversion, or show that it is not feasible, as a condition to seek administration of junior priority rights that are injuring the senior. As such the *Recommended Order* fails to recognize A&B's water right as decreed and impermissibly shifts the burden to A&B to prove certain conditions or take additional measures in order to receive water under its senior water right. The recommendation to require A&B to "interconnect" or prove otherwise before seeking administration of junior priority ground water rights should be reconsidered accordingly.

V. The Evidence as found in the *Recommended Order* Demonstrates that Several Bases for the Director's "No-Injury" Determination are not Justified, Therefore the Director Must Re-Evaluate the January 29, 2008 *Order*.

The *Recommended Order* makes several findings which demonstrate the Director's bases, or reasons for the "no-injury" determination in the January 29, 2008, are erroneous. Accordingly, at a minimum, the Hearing Officer should recommend that the Director re-evaluate his prior order. In fact, since those bases no longer support the "no-injury" determination, the Director has a duty to re-evaluate the prior order accordingly.

First, the Director denied A&B's call on the erroneous assumption that 0.75 miner's inch per acre was the "maximum rate of delivery" to all landowners on the project and that A&B could deliver about 98% of that delivery rate when the water use was totaled and averaged across the project. *See* January 29, 2008 *Order* at 43-44, ¶ 23. The *Recommended Order* found there was no basis for this conclusion and that the BOR's statement in it 1985 Report was wrong and that acceptance of that conclusion "would in effect rewrite the water right down from 0.88

miner's inch rate of delivery to 0.75." *RO* at 24-25. Since the Director wrongly assumed 0.75 was a "maximum rate of delivery" and this was a foundational basis for his prior "no-injury" order, his prior order should be re-evaluated accordingly.

Second, the Director concluded that A&B used an "inefficient well and delivery system" to find "no-injury" to its senior water right. *See Order* at 44, ¶ 23. Again, the evidence presented and the findings in the *Recommended Order* show otherwise. Importantly, the *Recommended Order* found that A&B operates its wells and delivery system in a highly efficient manner. *RO* at 21-22. The Director's prior decision is not supported by the evidence, therefore the "no-injury" decision should be re-evaluated accordingly.

Finally, the Director wrongly concluded that A&B was not injured because it failed to use "appropriate technology", "drilling techniques", and "reasonable well drilling standards." *See Order* at 44-45, ¶¶ 28 – 34. Again, this finding served as a foundational basis for the Director's "no-injury" Order. Whereas the *Recommended Order* concludes that "cable tool drilling was appropriate" and that A&B does use "acceptable drilling techniques" there is no basis for the Director's prior findings in this area. *RO* at 20-21.

Since the Director's reasons for denying A&B's call are not supported by the record and evidence in this case, the Hearing Officer should, at a minimum recommend the Director re-evaulate his prior *Order*. The Director cannot simply affirm his January 29, 2008 *Order* since the bases for that decision are not justified.

VI. Depletions of the Aquifer Levels in the Southwest Area Caused by Pumping Under Junior Ground Water Rights Constitutes Material Injury.

Classifying the southwest portion of the project as a "bottleneck in the system," the *Recommended Order* states that "the conditions in the southwest area that make the recovery of water from the wells difficult do not justify curtailment or other mitigation." *RO* at 34. This treatment of the southwest area is inconsistent, however, with the remaining portions of the *Recommended Order* and the Director's and watermaster's duty to distribute water to A&B's senior water right. *See* Idaho Code § 42-602 & -607.

The *Recommended Order* states that "well deepening is likely to be successful in the north portion of the project and ***relatively low in parts of the southern portion of the project.***" *RO* at 14 (emphasis added). Speaking further on this point, the *Recommended Order* confirms that ground water levels have depleted to the point that rectification is difficult and "in some instances ***impossible***." *RO* at 36 (emphasis added). The *Recommended Order* recognizes and affirms the fact that the Unit B project utilizes multiple well systems to deliver water to its water users, that the well systems are not interconnected and that interconnecting the systems would be a significant and unreasonable undertaking. *See RO* at 15-19. Notwithstanding this recognition of the historical and decreed development of the A&B water right, the *Recommended Order* seeks to compel A&B to "reach water from those wells or to import it from other wells." *RO* at 36. In classifying the southwest area as a "bottleneck in the system," the *Recommended Order* diminishes the material injuring being suffered by the senior water right.

The *Recommended Order* draws support for this conclusion from historical documents addressing the development of wells in the southwest area. *See RO* at 13-15. It claims that "the

need to import water to areas of low well production was considered early in the project," and that "the potential need to import water form more productive areas were foreseeable." *Id.* at 15. Yet, these historical, pre-decree, documents cannot dictate the Director's administration of A&B's *decreed* water right today. Rather than recognizing and affirming "the reality of the system as it was designed and utilized and partially decreed," *RO* at 18, the *Recommended Order* implies that the southwest area is not protected from injury by juniors because it is considered a "difficult area".

Furthermore, just because it was "foreseeable" that the water supply would be variable, does not mean that junior water rights should not be responsible for their depletions to the water supply and injuries caused to senior rights. Indeed, the variability "foreseen" was based on the hydrogeology of the system, not due to impacts caused by pumping under junior priority rights.. Such variability does not create an obligation to "self-mitigate" for material injury caused by junior ground water rights. Similarly, across the ESPA, surface water users, with senior priority natural flow water rights have recognized that there is variability in the timing and availability of natural flow based upon climatic conditions. To compensate for the natural variability, they have acquired storage water rights in the various reservoirs along the Snake River and its tributaries. Importantly, as was made evident in the Surface Water Coalition call, this "foreseen" variability of the water supply – leading to the acquisition of storage water rights – does not forestall the Director's obligations to administer the water rights they acquired and does not create or impose an obligation to self- mitigate for material injury caused by interfering junior priority ground water rights.

Water right administration is not tempered by geography and geology. The Department cannot simply ignore a portion of A&B's water right just because the geology is different in part of the aquifer under its project. The law does not support any action that treats the water users in the southwest area differently from those in the north and east areas of the project. All water users have a right to use a portion of the same senior water right and all water users have the right to demand protection from out-of-priority ground water diversions that are materially injuring A&B's senior water right.

Although water is not available to the same degree in the southwest area, A&B did operate and use successful wells in that area for over 30 years. *A&B Expert Rpt.* at 3-8; *Koreny Pre-Filed Testimony* at 5, ¶ 12. The fact that less water is available today does not excuse the injury A&B is suffering. Rather, it triggers water right administration as required by Idaho law. Indeed, the very essence of the prior appropriation doctrine is that, in times of shortage, a junior water right must either curtail or mitigate for the injury caused by the junior water right. *See* CM Rules 40, 42 & 43.[10]

The *Recommended Order* properly recognizes that the holder of a decreed water right cannot be forced to "re-adjudicate" or reprove that water right through the administrative process. *RO* at 7 (*citing AFRD#2 v. IDWR*, 143 Idaho 862, 878 (2007)). Yet, despite that

---

[10] The *Recommended Order* deems this a question of risk, asserting that

> When those decisions [i.e. the initial assumptions at the time of development] fall short of the desired results the question is whether Unit B should bear the burden of the costs of rectification or whether junior ground water users should bear the burden either through curtailment or contributing to the costs of rectification.

RO at 26. This question, however, has been answered by this Hearing Officer in a prior administrative hearing. *See Opinion Constituting Findings of Fact, Conclusions of Law & Recommendation* (Spring Users' Call) (Jan. 11, 2008) ("The Spring Users are entitled to curtailment to the extent that the junior ground water users interfere with the water the Spring Users would otherwise have under their water rights"). To the extent that material injury is caused by diversions under junior ground water rights, that injury must be rectified by curtailment or an approved mitigation plan. *See* CM Rules 40, 42 & 43.

recognition, the *Recommended Order* uses historical information to limit A&B's water right. Historical documents do not and cannot change the material facts before the Hearing Officer. Water right #36-2080 was decreed with a specific priority date, diversion rate and acre limitation. The decree was issued with the understanding (deemed a "reality" by the *Recommended Order* at 18) that the individual well systems were not interconnected and that water was not imported between well systems. The *Recommended Order* recognizes that the development of these wells was reasonable. *RO* at 14 & 34. Furthermore, the facts show that A&B has essentially exhausted its options. It has spent significant amounts of money rectifying wells, it has been forced to abandon wells as the water level drops and it becomes "impossible" to rectify those well, *see RO* at 36, and it has temporarily converted nearly 1,400 acres to a surface water supply. Yet, ground water levels continue to decline. The Director cannot overlook these facts merely because the southwest area is a "difficult" area.

The *Recommended Order* cites to *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), to support the conclusion that the material injury in the southwest area should be overlooked as a "bottleneck." *See RO* at 34-36. Yet, that case is distinguishable and cannot be expanded to prevent priority administration to materially injured senior water rights. First, the water right in *Schodde* was not a decreed water right. To the contrary, A&B's water right has been partially decreed in the SRBA Court. No junior priority ground water user objected to the 177 points of diversion A&B claimed, nor the "extent and nature" of A&B's water right, which was appropriated and decreed with separate, not interconnected, well systems. Consequently, they cannot attack that right and the manner in which A&B diverts water now for purposes of administration. Accordingly, unlike *Schodde*, the "reality" of the development of A&B's water

right – i.e. separate well systems that are not interconnected and that do not incorporate imported water, *RO* at 18 – has been affirmed by the SRBA Court. Neither the Director, nor the *Recommended Order*, can overlook the binding nature of a decree. *See* Idaho Code § 42-1420 (a decree is binding as to the "nature and extent" of a water right). *Schodde* does not stand for the position that administration can be avoided should the Director consider it to be a "bottleneck" or "difficult" area in terms of geology.

Second, the water user in *Schodde* was still able to obtain water – albeit without the water wheel. Here, the *Recommended Order* has specifically recognized that it is "impossible" to rectify wells in certain areas of the project. *See RO* at 18. Notwithstanding this finding, the *Recommended Order* commands A&B to "reach water from [its] wells or [] import it from other wells." *RO* at 36. The law, and in particular *Schodde*, does not support a decision that forces the senior water right to self-mitigate for the material injury where, as here, depletions to the source have rendered rectification "impossible."

In *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 397 (1929), the Idaho Supreme Court analyzed *Schodde* and emphasized why that decision cannot be interpreted as broadly as it is in the *Recommended Order*. In *Arkoosh*, the Court observed that "*Schodde* . . . is clearly distinguishable because therein the interference was ***not* with a water right** but the current. In other words, ***the same amount of water went to Schodde's place as before***." (Emphasis added). Unlike *Schodde*, this case involves interference with a decreed "water right." Also unlike *Schodde*, ground water depletions have prevented A&B from receiving "the same amount of water … as before." Indeed, that was the very reason for A&B's call, it was not receiving the "water" under its decreed water right. The water user in *Schodde*, on the other hand, did receive

his water! As such, the *Recommended Order* cannot rely upon *Schodde* as a basis to limit or condition A&B's senior water right. Accordingly, the *Recommended Order's* refusal to recognize material injury in the southwest area should be reconsidered.

VII. A&B has Exceeded a "Reasonable Pumping Level"

The *Recommended Order* confirms that, in some well systems, ground water levels have depleted to the point that rectification is difficult and "in some instances ***impossible***." *RO* at 36 (emphasis added); *see also RO* at 14 ("well deepening is likely to be successful in the north portion of the project and relatively low in parts of the southern portion of the project"). Yet, the *Recommended Order* insists that "the burden remains with A&B" to deepen its wells and chase its water. *Id.* It is unclear what more A&B could do if, as the Hearing Officer recognizes, it is "impossible" to rectify certain wells. Moreover, the fact A&B has abandoned several wells demonstrates a "reasonable pumping level" has been exceeded since those wells cannot produce sufficient water despite deepening.

The *Recommended Order* states that "A&B has not been required to exceed reasonable pumping levels." *RO* at 36. Yet, there is no evidence or an objective "reasonable pumping level" by which to judge this conclusion. In essence, it cannot be stated that A&B has not been required to exceed a reasonable pumping level unless that pumping level is actually set. Indeed, during the hearing, Sean Vincent, the Department employee responsible for the statements regarding reasonable pumping levels, admitted there was no factual basis for the January 29, 2008 *Order's* conclusions on this matter. *See* Tr. P. at 1845-47. The *Recommended Order* apparently draws the same conclusion without any supporting facts.

The evidence, however, supports the opposite conclusion. 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. In fact, the *Recommended Order* specifically recognizes that rectification is "impossible" in some wells and that deepening the wells in the southwest area is unlikely to produce more water. *See RO* at 14 & 36.[11] While A&B concurs that the Director should set a reasonable pumping level, the evidence does not support the *Recommended Order's* conclusion that that level has not yet been reached.[12] Accordingly, the *Recommended Order's* reasonable pumping level conclusions should be reconsidered.

VIII. Designation of a Ground Water Management Area is Vital to the Future Health and Vitality of the ESPA

The *Recommended Order* incorrectly determined that a ground water management area ("GWMA") is identical to a Water District – with identical functions, purposes and obligations. *See RO* at 37-39. It concludes that "no tangible benefit" would result from the designation of a GWMA. *Id.* at 39. This conclusion is based on three factual underpinnings – each of which fails to address the vital importance of a GWMA designation for the ESPA.

First, the *Recommended Order*, after citing Idaho Code section 42-233b, cites to the testimony of Tim Luke as stating that "I think anything that you do in a [GWMA] can also be

---

[11] The *Recommended Order* overstates the issues when it claims that a "relatively small percentage of A&B's wells would define reasonable pumping levels and set an unreasonable standard for determining material injury." *RO* at 36. There is no statutory requirement that the reasonable pumping level in one area must be identical to that in another area. In fact, it may be arbitrary and capricious to create a uniform reasonable pumping level that ignores the unique hydrology of any given area – just like it would be unreasonable to establish a duty of water for each irrigated acre, regardless of source, across the ESPA. Therefore, a reasonable pumping level in the southwest area may be different that a reasonable pumping level in another area of the aquifer.

[12] A&B still disputes the prior finding that it is subject to the Ground Water Act and the "reasonable pumping level" standard and reserves the right to appeal that issue, and all others. However, A&B agrees that the Director should set a "reasonable pumping level" to guide administration and provide certainty to ground water right holders to prevent the "race to the bottom" of the ESPA.

done in a water district." *Id.* at 38. This testimony, and the resulting conclusion in the *Recommended Order*, fails to recognize the stark differences between a GWMA and a Water District. For example, a water district is "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 (emphasis added). To that extent, a watermaster and the Director have a clear legal duty to ***distribute water*** "in accordance with the prior appropriation doctrine." Idaho Code §§ 42-602, 607.

Different than a water district, a GWMA designation provides the Director with additional authority aimed squarely at addressing issues related to protecting the aquifer, not just administration of existing water rights. *See* Idaho Code § 42-233b. While management of a GWMA may have implications and benefits for the administration of water rights within a water district, its scope is much broader. For example, a GWMA designation protects the source through (i) the development of a "ground water management plan ... provid[ing] for managing the effects of ground water withdrawals on the aquifer," (ii) the requirement of a more thorough and "individual" review by the Director of any applications for permits, and (iii) the potential requirement of annual reporting of "withdrawals of ground water and other necessary information" necessary to analyze the available water supply. *Id.* The designation of a GWMA forces the Director to protect the aquifer – not just administer existing water rights. It gives the Director authority to manage the aquifer outside of the water delivery call context – forcing the Director to protect the declining aquifer even if a call is denied. Tim Luke recognized that there are statutory limitations on the authority of the watermaster to protect the aquifer – and that the water master's duties are limited to administration of water rights. *See* Tr. Vol. VI, p. 1339, ln.

24 – p. 1340, ln. 6.

Mr. Luke further recognized that a GWMA and a water district are not synonymous, but that they can and do exist in tandem:

> Q. And based on your experience with familiarity with water districts and water distribution statutes, would you agree that there are different statutes governing water districts as to opposed to those statutes governing critical ground water areas, ground water management areas?
>
> A. Yes, there are different statutes.
>
> Q. And it's true that water districts in critical and ground water management areas can coexist or that their boundaries can overlap one another?
>
> A. Yes.
>
> Q. And you would agree that's the case for certain aquifers in areas in the ESPA?
>
> A. Yes.
>
> MR. THOMPSON: I'll mark this as 245. (Exhibit 245 marked.)
>
> Q. (BY MR. THOMPSON): Would you identify this exhibit, Mr. Luke?
>
> A. This is amended final order creating Water District 140.
>
> Q. And is this an example where there are critical ground water areas that overlap with a water district?
>
> A. Yes.
>
> Q. And would you agree that those – so just because you have a water district doesn't mean you can't have a critical ground water area or a ground water management area within that district; is that correct?
>
> A. Yes, I'd agree.

Tr. P. 1234-36.

Furthermore, the claim that there is "no tangible benefit" to designating the ESPA as a GWMA or that such a designation "does not add to the authority of the Director" is belied by the fact that the legislature adopted a ***separate*** statutory provision addressing GWMA designations. It is telling that, even with provisions addressing the creation, management and duties of water districts, the legislature adopted section 42-233b. Indeed, Courts must presume that the Legislature was aware of the law regarding water districts at the time that it adopted provisions regarding GWMA. *See Robinson v. Batemann-Hall, Inc.*, 139 Idaho 207, 212 (2003) ("[t]he legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits no other construction").

The second factual underpinning of the *Recommended Order's* conclusion that a GWMA is not necessary is the assertion that "the designation of a [GWMA] requires notice to cease or reduce withdrawal of water be give only before September 1. The Director may enter the same type of order within a water district but is not under the same time constraint." *RO* at 38. This conclusion fails to recognize that the Director's authority to manage a GWMA extends far beyond the administrative context – requiring management of the declining aquifer even if a call is denied. This will ensure that the available water supply in the aquifer is protected and not exhausted to the point that no water user can benefit. In this case it is clear that ground water levels have declined and will continue to decline unless the Director takes action to protect the water supply.

The final factual underpinning is that "IDWR has not been processing applications for permits since 1992." *RO* at 39. Therefore, the *Recommended Order* concludes," any significant

reductions in the aquifer level will be a consequence of other facts than the ground water pumping subject to the moratorium." *Id.* Even assuming this is correct, this conclusion fails to address the need for a GWMA area due to the continued depletions of the aquifer – whatever the source. The evidence presented at trial demonstrates that the aquifer levels continue to decline. *See* Tr. Vol. I at 127, lns. 14-20 (*Ralston Testimony*). Dr. Wylie testified that the water levels will continue to decline in the future. *See* Tr. Vol. VII, p. 1420, lns. 7-25, p. 1421, lns. 1-5, 17-25, p. 1422, lns. 1-6. A&B's Expert Report 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.

The *Recommended Order's* assertion that "any significant reductions in the aquifer level will be a consequence of other factors," *RO* at 39, is not dispositive of this issue. Indeed, the statutes provide no distinction between the sources of the decrease in water supply. Rather, the code provides designation as a GWMA when the area is "approaching the conditions of a critical ground water area" – which is defined as "any ground water basin ... not having sufficient ground water to provide a reasonably safe supply for irrigation or cultivated lands, or other uses in the basin." *See* Idaho Code § 42-223a & 233b. There is no requirement that the cause of the insufficient ground water supply must be as a result of excessive ground water pumping.

As stated in A&B's post-hearing memorandum, at a minimum, the southwestern portion of the ESPA qualifies for designation as a GWMA due to the fact that 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. This fact was confirmed by Dr. Wylie, who testified 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. *See* Tr. Vol. VII, p. 1520, ln. 18 – p. 1521, ln. 19.

For the foregoing reasons, the Hearing Officer should reconsider the *Recommended Order's* conclusions that a GWMA designation is not necessary.

CONCLUSION

For the foregoing reasons, the Hearing Officer should reconsider the *Recommended Order*.

DATED this 10th day of April, 2009.

BARKER ROSHOLT & SIMPSON LLP

Roger D. Ling
Attorney at Law

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

Attorneys for A&B Irrigation District