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ATTORNEYS FOR THE IDAHO GROUND WATER APPROPRIATORS

BEFORE DEPARTMENT OF WATER RESOURCES

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 **GROUND WATER USERS' RESPONSE TO A&B'S PETITION FOR RECONSIDERATION**

COME NOW the Idaho Ground Water Appropriators, Inc., and its Ground Water District members, for and on behalf of their respective members (collectively the "Ground Water Users"), through counsel, and hereby submit the following Response to *A&B's Petition for Reconsideration of Hearing Officers' March 27, 2009 Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* dated April 10, 2009 ("Petition for Reconsideration"). This Response is filed pursuant to the Hearing Officer's *Order Granting Motion to Reconsider for the Sole Purpose to Allow Additional Time for Responses* dated April 21, 2009.

ARGUMENT

I. A&B asks the Hearing Officer to Ignore the Material Injury Factors Outlined in CM Rule 42, and Instead Rule that Depletion Automatically Equals Material Injury

A&B Irrigation District ("A&B") argues that the Hearing Officer's *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* dated March 27, 2009 ("Recommended Order") "identifies a new injury standard for water right administration that does not follow Idaho law." Petition for Reconsideration at 2. A&B stretches the *Recommended Order* to argue that it makes "failure of the project" and "catastrophic loss" pre-requisite to administration. *Id.* at 3. That is not, however, the conclusion reached by the Hearing Officer.

When read in context with the key material injury findings in the *Recommended Order*, the phrases "failure of the project" and "catastrophic loss" do not create a "new standard," but simply support the Hearing Officer's conclusion that it is relevant to consider A&B's "system as a whole" in making a material injury determination. Recommended Order at 18. It is not disputed that A&B's water right number 36-2080 was intentionally licensed and decreed so as to not tie any particular well to any particular parcel of land. Ex. 157, p. 4398, 157A, 157B, 157D, Luke Tr. p. 1318, L. 22 - p. 1319 L. 4. Accordingly, the Hearing Officer correctly determined that A&B should take "reasonable steps to maximize the use of [the flexibility afforded it under its water right] to move water within the system before it can seek curtailment or compensation," and that the "[t]he question of material injury depends on a number of factors beyond the fact that A&B is not receiving 0.88 miner's inches from all well systems in Unit B during the peak period." *Id.* at 19, 11. Consideration of the system as a whole is entirely consistent with CM Rule 42.01.d., which gives relevance to "system diversion and conveyance efficiency."

The record in this case shows that A&B has not even evaluated improvement of its diversion and conveyance facilities or explored the possibility of further interconnections even though its water right clearly allows such improvement with little administrative hassle. D. Temple Tr. p. 704, L. 8-13. That A&B currently operates its wells in an efficient manner does not mean that its delivery system cannot be designed to better meet the needs of its members. In fact, it is A&B's inability to deliver water (rather than its ability to divert water) for which A&B is requesting curtailment. The lack of project failure and catastrophic loss simply evidences the fact that A&B has the ability to meet its members' water needs through rectification of its delivery problems.

The Hearing Officer's consideration of the system as a whole also finds support in CM Rules 40.03, which provides that water use and administration shall be "consistent with the goal of reasonable use of surface and ground water." As noted by the Idaho Supreme Court, "reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication." *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* ("*AFRD #2*"), 143 Idaho 862, 877, 154 P.3d 433, 48 (Idaho 2007); see also *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 118 (1912).

A key material injury determination of the Hearing Officer's concerned "whether irrigators' crop needs in Unit B can be met with less than the full amount of the water right." Recommended Order at 31. The Court in *AFRD #2* explained that the amount of water needed to grow crops is a relevant material injury determination. AFRD#2 at 876. A&B cannot escape its own representations that 0.75 miner's inches per acre is sufficient to meet its needs, or its records

showing that A&B has never diverted the full 1,100 cfs or 0.88 cfs at every well. Motion to Proceed at 7-8 and Ex. 155, 155A, Ex. 200U, Ex. 476; Luke Tr. p. 1176, L. 12 – p. 1177, L. 13, p. 1184, L. 1-24; D. Temple Tr. p. 632, L. 10 – p. 634, L. 23.

Consistent with the Ground Water Act and the Supreme Court's decision in *AFRD#2*, the Hearing Officer correctly concluded that A&B is "not entitled to curtail junior pumpers to reach [the full amount of their water right] if the full amount is not necessary to develop crops to maturity." Recommended Order at 31. The lack of material injury to A&B is supported by evidence of remote sensing data and by testimony of farmers who irrigate on the B Unit or nearby. *Id.* at 27, 29-31. These are the "standards" by which the Recommended Order evaluated injury to A&B and such evaluation is fully supported in Idaho law and the CM Rules.

In truth, A&B's complaint with the Hearing Officer's material injury determinations aim to limit the Director's discretion in administering water rights to the "terms of a decree." Petition for Reconsideration at 3. A&B repeats this false premise throughout their brief:

- "[T]he Director and watermaster are required to distribute water to A&B's decreed water right #36-2080." (p. 3)
- "[T] standard fails to recognize A&B's entire decreed water right and minimizes the injury that has been suffered." (p. 6, emphasis in original)
- The Recommended Order "fails to recognize A&B's water as decreed. . . . [and] does not recognize the decreed diversion rate . . . ." (p. 7)
- "the 'crop maturity' standard impermissibly varies from the decreed water right held by A&B." (p. 8)
- "does not justify a refusal to deliver water to the amount provide by A&B's decree. A&B holds a decreed water right #36-2080 for 1,100 cfs (0.88 miner's inch per acre)." (p. 9)

- A&B's "decreed diversion rate is appropriate and should be recognized." (p. 10)

- The fact that crops can be grown with less water cannot "replace what is provided by a water user's decreed water right." (p. 10, emphasis in original)

- Importantly, a water user's license or decree is binding upon the Direct and watermaster . . . ." (p. 10-11)

- "The Director and watermaster are required to distribute water based upon water rights . . . the Director and watermaster are obligated to deliver [the amount set forth in the decree] . . . . 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.'" (p. 11)

- "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." (p. 12)

- "A&B's landowners have a right to use the decree amounts of its water right. The Director cannot limit or reduce that amount . . . ." (p. 13)

- "A&B was seeking to deliver its decreed diversion rate . . . ." (p. 14)

- "Both the license and decree are binding upon IDWR and the Director." Emphasis original, p. 16;

- The Recommendation "fails to recognize A&B's water right as decreed. . . ." (p. 17)

- "The Director cannot "overlook the binding nature of a decree." (p. 23)

Simply stated, A&B does not believe the Director has any discretion to apply the factors set forth in CM Rule 42 when evaluating material injury. A&B argues repeatedly that the Director cannot evaluate material injury using the factors set forth in Rule 42, but rather that depletion automatically equals injury. IGWA already answered A&B's erroneous "depletion equals injury" arguments, and to avoid duplication, IGWA directs the Hearing Officer to its *Response to A&B's Post-Hearing Memorandum and Proposed Findings* at 2-7 (Feb. 13, 2009).

A&B's proposed "depletion equals injury" standard that is contrary to Idaho law. *American Falls Irr. Dist. No. 2, v. Idaho Dep't of Water Resources*, 143 Idaho 433, 439 (2007). Consistent with *AFRD #2*, the Recommended Order is correct and the finding that A&B's "failure to secure the full extent of the authorized water right does not by itself constitute injury." Recommended Order at 31. [1] As set forth, in the Recommended Order, the question about injury is "whether irrigators' crop needs in Unit B can be met with less than the full amount of the water right." Id. And, as correctly pointed out in the Recommended Order, such evaluation is required by State policy that limits the application of the "first in time first in right" doctrine so that it is not applied in a manner that blocks full economic development of the states' underground water resources. I.C. § 42-226.

II. A&B Wants to Eliminate State Policy that Seeks to Maximize the Use of the State's Ground Water Resources

A&B ignores the Idaho Ground Water Act that provides that senior ground water users are not entitled to their historic pumping level but only reasonable pumping levels and the Idaho Ground Water Act's determination that priority is not the only consideration in a delivery call against junior ground water users. I.C. § 42-226 *et. seq.* A&B also ignores State policy that seeks to secure the maximum beneficial use of the state's water resources as well as the promotion and full economic development of the state's ground water resources. *Poole v. Olaveson*, 82 Idaho 496, 502 (1960) and I.C. § 42-226. The Recommended Order correctly points out that if protection of A&B's poorest performing wells is the standard, then a small percentage of A&B's wells

[1] A&B cites two cases, *Caldwell v. Twin Falls Salmon River Land & Water Co. , 225 F. 584 (D. Idaho 1915) and Arkoosh v. Big Wood Canal Co.*, 283 P. 522 (Idaho 1929) to support their argument, but as set forth in the City of Pocatello's brief filed herein, those cases are distinguishable or do not apply.

> would define reasonable pumping levels and set an unreasonable standard for determining material injury. The fact that junior ground water pumpers may cause some level of reduction of the capacity of a minority of A&B's wells situated in an area of poor productivity does not lead to the conclusion that curtailment is appropriate. A finding of material injury leading to curtailment or mitigation cannot rest upon what would amount to a bottleneck in the system, similar to Schodde's means of diversion.

Recommended Order at 36. This finding is well grounded in state policy that promotes the maximum development of the state's water resources and does not block full economic development of the ESPA. To have it A&B's way would mean that one poor performing well could set the level of the aquifer which would be entirely contrary to public policy and Idaho law. A senior's overstressing a transmissivity-limited aquifer is simply not the fault of distant junior pumpers. While A&B argues that geography and geology should not be considered in water rights administration, the exact opposition is true; water right administration must be "tempered by geography and geology" anything different flies in the face of physical reality.[2] Based on the overwhelming evidence at hearing, the Recommended Order correctly determined that "conditions of a difficult area for water production do not justify curtailment or mitigation." Recommended Order at 34. As set forth in the Recommended Order, state policy protects not only priority, but also promotes full economic development, optimum use and public interest by requiring that water rights administration "equally guard all the various interests involved." I.C. § 42-101; Recommended Order at 34-36.

[2] A&B appears to assume that curtailment of junior users will actually provide sufficient water to A&B. But, as evidence at the hearing showed, the southwest area of A&B may not be helped by curtailing junior users. In addition, A&B neglects to acknowledge that up to two-thirds of the decline in water levels is due to something other than ground water pumping by juniors outside A&B. A&B's own pumping, along with drought and reduced incidental recharge are also contributing to reductions.

III. A&B's Argument in Section V. Should be More Properly Considered as Exceptions Filed With the Director and Not Considered by the Hearing Officer

A&B's request for relief in Section V. of their Petition for Reconsideration is unclear and appear to be pre-filed exceptions to the Director because they are asking that the Director re-evaluate the January 29, 2008 Order based on the evidence at hearing. The Director reviewed the total water supply and the use of water under A&B's water rights to determine whether A&B was injured and determined that there was not material injury. The Recommended Order came to the same conclusion based on additional evidence and evaluation. The Ground Water Users request that the Hearing Officer not recommend a change to the Director's findings for the same reasons that the Recommended Order should not be changed. See argument above.

V. Designation of a Ground Water Management Area is Discretionary and Unnecessary

Finally, A&B argues that the Director must designate the ESPA or a portion of the ESPA as a Ground Water Management Area because it is "vital to the further health and vitality of the ESPA." Petition for Reconsideration at 25. Idaho Code § 42-233b provides the Director the discretionary authority to designate a "ground water management area" if he has determined the ground water basis or designated part may be approaching the conditions of a critical ground water area. First, the designation is entirely discretionary and in this case the Director has declined to designate the ESPA or any portion underlying A&B as a ground water management area. Instead, the Director is managing the ESPA through water districts and has directed the

watermasters of Water District 120 and Water District 130 to curtail juniors when he has found material injury.[3] Second, the Director can only designate a Ground Water Management Area if the area is approaching conditions of a "critical ground water area." A critical ground water area is defined as

> any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits . . . .

I.C. § 42-233a. There is no evidence in this case that there is not sufficient ground water to provide a "reasonably safe supply for irrigation" even in the southwest portion because A&B has wells exceeding its needs in that area and with proper consideration of the hydrogeologic environment can access additional ground water. Ex. 479 and 481 Furthermore, there is no doubt that the ESPA, even in the area underlying A&B, is still above historic water levels and that the ESPA is at or near equilibrium. Ex. 463A, 463B, and 463C. Precipitation on the Eastern Snake Plain alone far exceeds the rate of withdrawal from all ground water rights combined, therefore, there is no reason to believe that there is not a reasonably safe supply still available. A&B's request was properly denied.

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[3] While the junior ground water users have thus far been able to provide adequate mitigation to avoid curtailment, that does not mean that the Director is failing to "administer" ground and surface water rights in the Eastern Snake Plain. *In the Matter of Distribution of Water To Various Water Rights Held By Or For The Benefit of A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, And Twin Falls Canal Company, Amended Order* (IDWR May 2, 2005); *In the Matter of Distribution of Water to Water Rights Nos. 36-02356A, 36-07210, and 36-7427,* Order (IDWR, May 19, 2005); *In the Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B and 36-07148* (IDWR, July 8, 2005)

CONCLUSION

For the foregoing reasons, A&B's Petition for Reconsideration should be denied.

DATED this 1st day of May, 2009.

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