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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA	)	**DOCKET NO. 37-03-11-1** **A&B's REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION**

COMES NOW, A & B IRRIGATION DISTRICT ("A&B" or "District"), by and through its counsel of record and submits this *Reply in Support of Petition for Reconsideration* of the Hearing Officer's March 27, 2009 *Recommended Order*. For the reasons discussed below, and those identified in A&B's opening petition, reconsideration should be granted.

I. The Injury Standards in the *Recommended Order* Are Not Consistent with Idaho Law and Should Be Reconsidered.

IGWA and Pocatello brush aside the "failure of the project" and "catastrophic loss" language in the *Recommended Order* regarding the proposed injury standard and instead characterize it as only supporting the Hearing Officer's "project-wide" analysis of A&B's decreed water right. *IGWA Br.* at 2, *Poc. Br.* at 2. While these arguments admit that the subjective criteria of a "failure of the project" and "catastrophic loss" are not grounded in Idaho law (neither IGWA nor Pocatello expressly support the criteria), they instead seek to shift the focus to an analysis of injury to A&B's decreed water right "as a whole". In the end, IGWA's and Pocatello's arguments advance the same result, an analysis that would force A&B to show a heightened injury to its water right which is not supported anywhere in Idaho law.

Despite the fact A&B operates one of the most efficient water delivery projects in the State, and has taken dramatic and costly steps to maintain its operation in the face of ever-declining ground water levels, IGWA advocates that A&B should "do more" to divert and deliver its decreed water right, rather than expect the Director to distribute water pursuant to its decree (including acknowledging its separate points of diversion). *IGWA Br.* at 3. In an effort to excuse the on-going injury IGWA seeks to shift the blame to A&B's water delivery operations. This argument implicitly advances the "project failure" standard by claiming A&B should take additional steps before it can show an injury to its decreed water right. IGWA even goes so far to claim that the "lack of project failure and catastrophic loss evidences the fact that A&B has the ability to meet its members' water needs through rectification of its delivery problems". *Id.* In other words, unless A&B's project fails, there is no injury. This is not the law in Idaho.

Pocatello supports the *Recommended Order* and its new injury standard in a different tact, by mischaracterizing A&B's argument and collaterally attacking A&B's decreed right.

First, Pocatello resorts to citing portions of the "factual and procedural background" part of the *AFRD #2* Court's opinion (direct citations from Director's May 2, 2005 Order in the Surface Water Coalition delivery call case) as a ***holding*** from that decision. As that case only concerned the facial constitutionality of the Department's Conjunctive Management Rules, not any review of a specific order from the Director (including his application of the rules in the Surface Water Coalition case which is presently on appeal to the Gooding County District Court, *A&B et al. v. Tuthill et al*, Case No. 08-551), the Court did not "hold" what Pocatello is claiming in its response brief. The Hearing Officer should reject Pocatello's argument. Nonetheless, A&B has suffered injury to its water right since it is prevented from using its decreed amounts from its decreed points of diversion. Junior priority ground water rights that interfere with the exercise of A&B's senior water right are subject to administration under the CM Rules.

Pocatello further supports its argument by impermissibly collaterally attacking A&B's decreed water right. *Poc. Br.* at 4. While the SRBA District Court decreed A&B's water right for 1,100 cfs (0.88 miner's inch per acre), Pocatello alleges that A&B has never "received 1,100 cfs on a sustained basis" and that A&B's landowners do not need that amount (0.88 miner's inch per acre). First, A&B has no duty to re-prove its adjudicated right in this proceeding. *AFRD #2*, 143 Idaho at 877-78. Accordingly, there is no lawful basis to review or rely upon any "pre-decree" information that Pocatello seeks to use to demonstrate A&B is not entitled to its decreed right today. Second, the evidence presented in this case plainly demonstrates that A&B's landowners can beneficially use the amount of water provided by the decree. *See A&B Post Hearing Memo and Proposed Findings* at 11-14; *A&B Post Hearing Response* at 20-24.

Moreover, the standard rate of diversion provided by Idaho law recognizes 1" per acre for irrigation use. *See* Idaho Code § 42-202(6)(authorizing 1 cfs per 50 acres). Numerous IGWA

members in Water District 130 divert up to and even use more than 1" per acre as reported by the official water district records kept by the Watermaster. *See A&B Rebuttal of Greg Sullivan Report* at 22-23, Figure 5 at 30. As such, Pocatello's effort to diminish A&B's decree and the water needed by its landowners is not persuasive.

Next, both IGWA and Pocatello further support the new "crop maturity" standard in an effort to discount the injury to A&B's senior water right. IGWA supports the *Recommended Order* and the comparison of testimony by its members to claim A&B does not "need" its decreed water right. *IGWA Br.* at 4. Pocatello argues that the "crop maturity" standard or the minimum amount of water required is all the water A&B's landowners can beneficially use. *Poc. Br.* at 5. Contrary to these arguments, the Director and watermasters do not simply look at the water supply and dole out a "minimum" amount to each water user based upon a perceived "crop maturity" standard. Instead, the Director and watermasters are obligated to distribute water based upon water rights and the objective criteria contained therein, including the priority date and diversion rate. Unless a senior water right holder will not beneficially use the water (i.e. waste will occur), the Director and watermaster must distribute water according to the right. Stated another way, if a senior can beneficially use the decreed water right, then the Director and watermaster do not have the discretion to refuse to deliver water to that right on the basis that they believe the senior should use less in order to allow junior rights to divert. The argument that a senior "can get by on less" to excuse injury by a junior is not the standard for administration in Idaho. Such a scenario unlawfully diminishes a senior's right, while at the same time authorizing juniors to pump their full rights out-of-priority. *See Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982).

Whereas Idaho law recognizes a senior's right to beneficially use a decreed amount of water, and to be protected in that use from injury by juniors, the "failure of the project" and "catastrophic loss" criteria are not a part of the Director's and watermaster's determination to deliver water.

II. A&B Should Not be Required to Interconnect its Individual Well Systems as a Prerequisite to Administration.

The A&B Project was "developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, ***it is <u>not</u> A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury***." *RO* at 19 (emphasis added). Ignoring this affirmation of A&B's vested legal rights, Pocatello demands that A&B "interconnect and otherwise obtain water (through supplemental wells)" before it can seek administration of junior priority groundwater rights that are depleting the aquifer.[1] *See Poc. Br.* at 8. Pocatello's arguments, however, cannot withstand scrutiny.

First, it is important to emphasize what Pocatello *does not* say in regards to several arguments made by A&B in its opening reconsideration brief. Pocatello does not dispute the fact that the Director licensed and recommended and the SRBA Court decreed water right #36-2080 with multiple points of diversions which are not, and have never been, interconnected. Pocatello does not accuse A&B of wasting water or of operating an inefficient or unreasonable delivery system – indeed, it cannot. Pocatello does not challenge the fact that forcing A&B to "interconnect" its systems would not solve the water shortage problem – rather, it would simply result in a reduced quantity of water provided to all landowners (forcing A&B to "injure" its own landowners by spreading the injury). *See Dan Temple Testimony*, Tr. Vol. 4, p. 703-04. Indeed,

[1] IGWA only addresses the interconnection issue in a backhanded attempt to discount A&B's material injury. IGWA suggests that A&B's material injury is derived from A&B's "inability to deliver water (rather than its ability to divert water)." *IGWA Br.* at 3. Yet, the undisputed facts remain – A&B's diversion and delivery of water is reasonable and A&B is diverting water consistent with its decreed elements.

interconnecting part of, or the entire A&B well system will not create more water in the ESPA or stop declining ground water levels.

Rather than discussing any of these issues, Pocatello accuses A&B of "ignor[ing] the terms of its water right" – asserting that A&B must "interconnect several well systems (including drilling supplemental wells to serve unreliable systems)" before it can seek administration. *Poc. Br.* at 8. In the end, Pocatello blindly asserts that, unless it interconnects its system or adds points of diversion, A&B's request for administration constitutes a disregard of the "public interest" and is not "reasonable." *Id.*

Contrary to Pocatello's belief, there are no "terms" in the decree for water right 36-2080 that mandate interconnection as a prerequisite for administration. The Director, who licensed and recommended the water right, did not include any such terms and none were placed on the decree by the SRBA Court. Rather, A&B is lawfully diverting and delivering water through its well systems as they were originally developed, licensed and decreed. Since "it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury," *RO* at 19, any claim that some undefined and unwritten "term" on A&B's decreed water right limits A&B's right to administration must be rejected.

Moroever, IGWA's argument that A&B must 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," is not sustainable. For A&B to maintain the system, conversion and conveyance efficiency that it now enjoys from all of its wells, since the construction of the project, does not allow for the drilling of new wells in the eastern part of the Unit B division for delivery to and used in the western part of the division, a distance of as much as 41 miles. Such a proposal would result in an extremely inefficient use of the groundwater of

the ESPA and would certainly result in the waste of water. It is respectfully submitted that if such a system were now in place, regulation of junior ground water appropriators would be denied on the basis that such a system, if it had been employed, would be a factor to be used to deny the administration of the junior ground water rights on the grounds that such a system is inefficient and contributes substantial waste of the resource. It is absolutely clear that the most efficient delivery system, without waste, is for the diversion from the decreed 177 wells at a rate of .88 miner's inch for each acre served by that well to which the water right of A&B is appurtenant. It is further submitted that "flexibility" is not synonymous with efficiency without waste.

Although IGWA would argue that the flexibility of A&B to divert more water per acre from some wells than other wells is a "necessary" factor to be considered to efficiently administer A&B's decreed water right #36-2080, it fails to note that flexibility for efficient administration was not included in the partial decree of said water right. It clearly is not a factor required to efficiently administer A&B's water right contemplated by I.C. § 42-1412 (1996) and the holding of the Idaho Supreme Court in *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1997).

As the Court clearly pointed out in *A&B Irrigation Dist. v. Idaho Conservation League*, *supra*, in its Opinion on Re-argument, the Rules for Conjunctive Management do not deal with the interrelationship of water rights within the various basins defined by the Director and the SRBA District Court. The Court stated: "The Rules adopted by IDWR are primarily directed toward an instance when a `call' is made by a senior water right holder, and do not appear to deal with the rights on the basis of `prior appropriation' in the event of a call as required." 958 P.2d at 579. The Court further made it clear that the SRBA District Court was required to hold an

evidentiary hearing to determine factually whether any proposed general provisions for Basin 36 and other areas is necessary either to define or to officially administer the water rights decreed by the court in the adjudication process. The Court further noted that it is well settled in the SRBA proceedings that general interconnection of all water in the Snake River system is well settled. The Court did not hold, and has never held, that a water right which has 177 points of diversion (wells) from which water may be diverted and delivered to the lands to which the water right is appurtenant, may be required to divert water from only a small percentage of said points of diversion to provide water from the aquifer to all of the lands to which the water right is appurtenant. Certainly, A&B's partial decree for water right #36-02080 does not contain such a requirement, and there is no legal justification or support for such position.

Somehow, IGWA urges that a reduction in diversion under a water right of ground water caused by a declining ground water table can be construed to be a faulty "delivery system" and the remedy of a senior appropriator of ground water is required to change its point of diversion to a point upstream, even though such a change in the point of diversion would result in an inefficient system and the waste of water. There is simply no legal basis under the laws of the State of Idaho that would justify the refusal to deliver water to a senior appropriator by claiming that the senior appropriator must go upstream, divert water above the diversion points of junior appropriators, and then to pipe the water some 40 miles to its place of use. Such reasoning is even more unsustainable than the earlier arguments in water development in Idaho that would claim that ground water appropriators are in a "race to the bottom" of the aquifer, and are not controlled by their priority of their water right.

In summary, A&B should not be required to undertake the interconnection of all or even part or all of its delivery system as a predicate to an injury finding to its senior water right. A&B

is diverting and using water efficiently, without waste, and consistent with its decree. Interference with A&B's senior water right is not excused on the theory that A&B should create a different distribution system than the one already in place at the time the water right was licensed and later decreed.

III. To the Extent Depletion in the Aquifer Levels in the Southwest Area Are Caused by Diversions Under Junior Ground Water Rights, Administration is Required.

Rather than address the facts and arguments in A&B's reconsideration brief relating to material injury in the southwest area, IGWA and Pocatello accuse A&B of attempting to "command the entire natural body of water." *See Poc. Br.* at 9-10. They would have the Hearing Officer overlook the material injury suffered by A&B in the southwest area – classifying A&B's call as an attempt to hoard the water resource. *Id.* Importantly, while both IGWA and Pocatello deem this case to be a "*Schodde* means of diversion issue," *see Poc. Br.* at 11, neither addresses the finding by the Hearing Officer that water levels have dropped such that it is "impossible" to rectify wells in certain areas of the project and that deepening wells in the southwest area is unlikely to produce more water. *RO* at 14 & 36. In short, this is not a "*Schodde* means of diversion issue." In *Schodde*, "the same amount of water went to Schodde's place as before." *See Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 397 (1929).[2] Here, water levels have declined and rectification of some wells is unlikely – if they will produce more water. *RO* at 14 & 36. The same amount of water is not going to A&B's place of use as before, hence the reason for the water delivery call in the first place. To the extent that these depletions

[2] Both IGWA and Pocatello criticize A&B for allegedly "relying" on *Arkoosh*. *See IGWA Br.* at 6, n.1, *Poc. Br.* at 11. Importantly, both overlook the fact that Schodde was still able to receive his water in the "same amount ... as before." *Arkoosh*, 48 Idaho at 397. To the contrary, ground water levels in the A&B project area have declined so far that rectification of some wells is "impossible" and A&B cannot receive the same amount of water as before under its decreed water right. *RO* at 18.

are caused by diversions under junior priority ground water rights, administration is necessary. *See* CM Rule 40.01 (junior diversions causing material injury must be regulated).

The responses do not dispute these findings.[3] In fact, IGWA admits that at least 1/3 of the aquifer's depletions are due to "ground water pumping by juniors outside A&B." *IGWA Br.* at 7, n.2. Yet, they seek to evade responsibility for their depletions – instead hiding behind the *Recommended Order's* erroneous conclusion that the southwest area is a "bottleneck in the system, similar to Schodde's means of diversion." *Id.* at 7 (quoting *RO* at 36). Since A&B is being materially injured due to deletions in the southwest area, administration is necessary. The geology of the aquifer and the fact it differs in various areas does not limit or excuse the Director's and watermaster's duty to administer water rights and protect a senior right from injury.

IV. The Director Should Set a "Reasonable Pumping Level."

The Director's January 29th *Order* and the *Recommended Order* both assert that A&B has not "been required to exceed reasonable pumping levels." *RO* at 36. There is absolutely no evidence in the record to support this conclusion. *See* Tr. P. at 1845-47 (Testimony of Sean Vincent affirming that there was no factual basis for the January 29th *Order's* conclusions on reasonable pumping levels). To the contrary, the evidence demonstrates that water levels have declined such that rectification of some wells is "impossible" and deepening wells in the southwest area is unlikely to produce more water. *Id.* at 14 & 36. Such "unreasonable lowering of ground water levels" demands that the Director take actions to protect senior water rights and the existing water supply. *See* CM Rule 10.18 (defining a reasonable pumping level as that

[3] Pocatello's only response to A&B's argument relating to the southwest area is to reaffirm its contention that A&B must interconnect its system prior to seeking priority administration. As discussed above, these arguments are without merit and are not supported by the record.

which is necessary "for the purpose of protecting the holders of senior-priority ground water rights against unreasonable lowering of ground water levels").

Pocatello does not dispute any of these facts. It does not even attempt to address the logical disconnect associated with accusing A&B of failing to reach a pumping level that has not even been established. Rather, Pocatello cites inapposite case law addressing whether or not a party may seek to compel certain water levels through administration. *See Poc. Br.* at 11-12.[4] Pocatello misses the point.

The Director, Hearing Officer and now Pocatello, *Poc. Br.* at 12, each accuse A&B of failing to reach a reasonable pumping level even though no such level has been established. Without any factual basis, such assertions amount to nothing more than conjecture. How can A&B, or the owner of any other senior water right, know whether they have reached a "reasonable pumping level" when no such level has been established ?[5] Contrary to the Director's and Pocatello's unsupported accusations, the "unreasonable lowering of ground water levels," such that rectification of some wells is impossible and other unlikely, *RO* at 14 & 36, demonstrates that A&B has exceeded reasonable pumping levels.[6]

V. The ESPA Should be Designated a Ground Water Management Area.

Without addressing any of the legal distinctions between a water district and a ground water management area ("GWMA"), or the facts demonstrating that the aquifer is in a steady state of decline, *see A&B Petition* at Part VIII, IGWA simply argues that such a designation is

[4] For example, *AFRD#2 v. IDWR*, 143 Idaho 862 (2007), addresses carryover storage and not ground water levels. Unlike A&B, the *Schodde* water user was not deprived of a decreed quantity of water. *See supra.* Unlike A&B's decreed right to divert ground water, the water users in *Nampa & Meridian Irr. Dist. v. Petrie*, 37 Idaho 45 (1923) had not "secured water from a natural subterranean stream" and, therefore, could not demand ground water.

[5] In addition, refusing to set a reasonable pumping level allows the Director to continue denying ground water calls based on the unsupported assertion that a reasonable pumping level has not been met. Such actions will essentially provide a free pass to continued depletions of the aquifer while senior water rights will continue to suffer the material injury created by the Director's refusal to act.

[6] CM Rules 10.18 recognizes that a reasonable pumping level can be established "either generally for an area or aquifer or for individual water rights on a case-by-case basis."

"unnecessary." *IGWA Br.* at 8-9. No mention is made of the fact that a GWMA authorizes the Director to take specific actions to protect the aquifer – actions not available to a watermaster and his regulation of water rights in a water district. *See* I.C. § 42-233b; *see also* Tr. P. Vol. VI at 1339-40 (testimony from Tim Luke addressing the statutory limitations of a watermaster in protecting the aquifer); *id.* at 1234-36 (Mr. Luke recognizing that a Water District and GWMA are not synonymous but can and do exist in tandem).

IGWA downplays the current state of the aquifer by claiming that there is sufficient water to provide a "reasonably safe supply for irrigation." *IGWA Br.* at 9. They fail to mention the fact that there is an increasing number of requests for administration – many more than the three major calls referenced by IGWA (i.e. the Surface Water Coalition, the Spring Users and the A&B calls). They fail to mention the fact that water levels have been declining and will continue to decline into the future. *See* Tr. Vol. VII, at 1420-22 (Dr. Wylie testimony).[7] Finally, IGWA fails to mention the fact that the declining aquifer has forced other water users, in addition to A&B, to deepen their wells (about 160 private wells). *See A&B Expert Report* at 5-3 to 5-5.

There is no question that ground water levels and supply in the ESPA is in need of increased protection. Aquifer levels continue to decline while demand for the resource remains steady. As such, it is essential that the ESPA be designated a GWMA to protect existing water rights and the ground water supply.

VI. The Hearing Officer Can Recommend That the Director Re-Evaluate the Findings of the January 29, 2008 Order Given the Findings Based Upon the Hearing in This Case.

The Hearing Officer is authorized to and has issued a *Recommended Order* in this case. *See* IDAPA 37.01.01.720. Given the findings made based upon the evidence presented during

[7] In light of this undisputed testimony, the Ground Water Users' claim that "precipitation on the Eastern Snake Plain alone far exceeds the rate of withdrawal from all ground water rights combined," *IGWA Br.* at 9, is extremely misleading.

the course of this proceeding and at hearing, it is clear that several bases for the Director's "no injury" finding in the January 29, 2008 Order are not justified. *See A&B Petition* at 17-18. Contrary to IGWA's and Pocatello's view, this is not simply a matter to be addressed at the exceptions stage with the Director. Instead, the Hearing Office can and should recommend that the Director to re-evaluate the January 29, 2008 "no-injury" decision in light of the findings made in the *Recommended Order*. Given the explicit findings made by the Hearing Officer that demonstrate the error in the Director's prior findings, it is appropriate to make that recommendation now, and it should come from the officer that presided over the hearing and made the findings. Moreover, since several of the bases for the Director's "no-injury" finding are not justified, the Director should re-evaluate his decision in light of the Hearing Officer's findings and recommendation. In summary, reconsideration of the *Recommended Order* on this point is warranted.

CONCLUSION

For the reasons stated above and those included in A&B's April 10, 2009 petition, the Hearing Officer should reconsider the *Recommended Order* accordingly.

DATED this 15th day of May, 2009.

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