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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** **A&B IRRIGATION DISTRICT'S PETITION FOR CLARIFICATION OF THE HEARING OFFICER'S MAY 29, 2009 ORDER**

COMES NOW, Petitioner A&B Irrigation District ("A&B"), by and through counsel of record, pursuant to Rule 770 of the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*), and hereby files this *Petition for Clarification of the Hearing Officer's May 29, 2009 Order* (hereinafter "*Reconsideration Order*").

GROUNDS FOR CLARIFICATION

A&B seeks clarification of two points of the Hearing Officer's *Reconsideration Order* pursuant to Rule 770 of the Department's Rules of Procedure.[1] First, on reconsideration the Hearing Officer stated the "catastrophic loss" language from the March 26, 2009 recommended order was "unfortunate, confusing, and does not accurately reflect the standard to be applied in the determination of whether there is material injury." *Reconsideration Order* at 2. Hence, the Hearing Officer deleted certain language from the order. *See id.* Despite this finding, ambiguity still exists as to the reference to "total project failure" in the *Recommended Order* and how that language is to be applied in the determination of material injury.

Next, in stating that A&B's decreed water had not been "readjudicated" the Hearing Officer concluded that A&B "has not been required to exceed reasonable pumping levels" and that this "conclusion is supported by the fact A&B currently utilizes fewer than the number of authorized wells to serve the project." *Reconsideration Order* at 2. The finding implies that A&B has capable production wells that are idle and not being used to pump water under A&B's decreed water right #36-2080. This is incorrect based upon the evidence in the record and should be clarified for purposes of a recommended order to the Director. Moreover, the conclusion relative to the "reasonable pumping level" finding should be clarified regarding the criteria or standards applied to reach that conclusion.

[1] Rule 770 provides: "Any party or person affected by an order may petition to clarify any order, whether interlocutory, recommended, preliminary or final. Petitions for clarification from final orders do not suspend or toll the time to petition for reconsideration or appeal the order. A petition for clarification may be combined with a petition for reconsideration or stated in the alternative as a petition for clarification and/or reconsideration." IDAPA 37.01.01.770.

I. The "Total Project Failure" Language in the *Recommended Order* Should be Clarified or Deleted Similar to the "Catastrophic Loss" Language.

A&B requested the Hearing Officer to reconsider specific language related to the injury standard set forth in the *Recommended Order*. *See A&B Petition for Reconsideration* at 2-3. A&B identified the definition of "material injury" in the CM Rules, the injury standard under Idaho law, and explained how the "total project failure" and "catastrophic loss" criteria were inconsistent with those concepts. On reconsideration the Hearing Officer agreed in part and concluded that a "catastrophic loss is not necessary to establish injury". *Reconsideration Order* at 2. Similarly, a "total project failure" at A&B should not be necessary to establish injury either.

In reviewing A&B's decreed water right #36-2080, the Hearing Officer noted that "[c]onsideration 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" and that "the portion of short wells in the project is not sufficient to show a failure of the project." *Recommended Order* at 18, 20. Based upon this language it appears that A&B's water right would not be materially injured until there was a sufficient number of "short systems" or "wells" to result in a "failure of the project". A&B disputes this premise for the reasons set forth in its *Petition for Reconsideration*. *See A&B Petition* at 2-6.

Although the Hearing Officer has clarified that a "catastrophic loss" is not required to show material injury to a water right, the same clarification should apply to the "total project failure" criteria stated in the *Recommended Order*. Stated another way, the *Recommended Order* does not distinguish any difference between a "total project failure" and "catastrophic loss" for purposes of an injury analysis. If A&B is forced to wait until there is a "failure of the project" in

order to have junior priority rights administered, it is clear that the project will be at the point of "catastrophic loss" for all of A&B's landowners.

Moreover, the "failure of the project" standard implies that there is a threshold number of wells or well systems that must be considered "short" before administration will commence. The Hearing Officer concluded that 5,000 acres in 2007 that "were served by well systems that delivered less than 0.75 miner's inches per acre" was insufficient to show "a failure of the project as a whole". *Recommended Order* at 20. While 5,000 acres represents 8% of a 62,000 acre-project, the injury to those individual landowners who farm those 5,000 acres could represent 100% of their farming operations. Indeed for a single landowner wholly dependent upon a well system that does not produce A&B's decreed diversion rate of 0.88, or even 0.75 miner's inch per acre, it is clear that the impacts are magnified and that the diminishment to A&B's water right is real and actual.

Again, A&B submits that this type of standard wrongly excuses injury to A&B's senior water right and should be clarified. Since A&B does not have to show a "catastrophic loss" to suffer material injury to its water right, the same standard should apply relative to the "total project failure" criteria. This language should be similarly clarified and deleted from the *Recommended Order*.

II. A&B Has Exceeded a "Reasonable Pumping Level" and the Abandoned Wells Support That Conclusion / Alternatively the Hearing Officer Should Identify the Factual Criteria or Standard That Was Applied for the Finding in the *Recommended Order.*

A&B requested the Hearing Officer to reconsider the finding that "A&B has not been required to exceed reasonable pumping levels." *A&B Petition* at 24-25. Despite the acknowledged fact that the Department has failed to establish an objective "reasonable pumping

level" in the ESPA by which to judge the Director's and Hearing Officer's conclusion, the finding was not reconsidered. As set forth in A&B's prior briefing and proposed findings in this case, the "reasonable pumping level" finding is not supported by any evidence in the record and should be set aside. *See A&B Memorandum in Support of Summary Judgment* at 28-31, *A&B Post-Hearing Memorandum and Proposed Findings* at 38-40.

In review, although the Department identified Sean Vincent as the author contributing to paragraph 18 in the January 29, 2008 Order, Mr. Vincent testified at hearing that he did not author the sentence regarding the "reasonable ground water pumping levels":

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

A. As far as I know --

Vincent Testimony, Tr. Vol. IX, p. 1845, ln. 25 – 1847, ln. 2.

At Mr. Vincent's deposition, the Department's counsel indicated that it was the Director that authored the "reasonable pumping level" finding:

> Q. Who drafted the reasonable pumping level sentence in paragraph 18?
>
> A. [MR. VINCENT]: I don't know, but it wasn't me.
>
> MR. THOMPSON: Okay. We'd like to know who did. So you guys can look into that.
>
> Are there parts of the findings of fact that somebody besides those people on that list drafted that you're aware of?
>
> MR. BROMLEY: I think we've disclosed, Travis, who drafted what, what their participation was with certain paragraph numbers, attachments. But I think ultimately, Travis, one thing to consider is that the order was signed by the director.
>
> MR. THOMPSON: So we can assume that finding – that sentence, paragraph 18, is drafted by the director?
>
> MR. BROMLEY: I don't know if you can assume or not.
>
> MR. THOMPSON: Do you know?
>
> MR. BROMLEY: I can't tell you. I don't know.

Vincent Depo. Tr. p. 190, lns. 12-25, p. 191, lns. 1-8.

Based upon the evidence in this case there is no factual basis to support the finding in paragraph 18 of the January 29, 2008 Order concerning the "reasonable ground water pumping level". Whereas the Director apparently set a "reasonable ground water pumping level" in his mind, it was not disclosed in this proceeding.

Similarly, in the *Recommended Order* the Hearing Officer concluded that A&B has not been required to exceed reasonable pumping levels. *See Recommended Order* at 36. The basis for this finding was that past rectification efforts "have been largely successful, indicating that there is water available if the proper efforts to secure it are pursued." *Id.* However, no "ground water level" was identified as being "reasonable" by which to conclude that A&B has not exceeded that level. The Hearing Officer added to this finding in the *Reconsideration Order* by noting that this conclusion is supported "by the fact that A&B currently utilizes fewer than the number of authorized wells to serve the project". *Reconsideration Order* at 2.

To the contrary, the finding that A&B "currently utilizes fewer than the number of authorized wells to serve the project" should be clarified, particularly in the context it is found in the *Reconsideration Order*. First, although A&B has 188 authorized points of diversion, it is only capable of using 177 active production wells on the project. *See* Dan Temple Testimony, Tr. Vol. III, p. 467, lns. 1-7. At hearing, A&B's Manager Dan Temple explained that of the 11 "inactive" wells, seven of those were abandoned due to declining ground water levels. *See id.* p. 467, lns. 8-15. The remaining "inactive" wells were "originally injection wells", not wells that pumped water from the aquifer. *See id.* p. 467, lns. 8-15; *see also*, A&B Expert Report at 3-12. The "injection wells" were not active production wells that previously provided irrigation water to the project, but they were "repermitted as production wells so that if I ever needed those, I could develop those as production wells instead of drilling a whole new well". *See id.*, p. 467, lns. 15-18. Of the six "injection wells" listed as authorized points of diversion, A&B has only converted one to an active production well. *See* Tr. Vol. III, p. 610, lns. 2-4.

Accordingly, whether or not any of the remaining "injection wells" could be used as active production wells is unknown at this point. Every well that formerly injected water into the aquifer has not been proven to be a capable "production" well. On this point Mr. Temple clarified that before an "injection well" can be converted to an active production well it has to be re-drilled and cleaned. *See* Tr. Vol. III, p. 610, lns. 11-13; p. 635, lns. 7-10. In summary, the fact A&B currently only uses 177 active production wells out of the 188 "authorized" points of diversion on water right #36-2080 does not support the conclusion that A&B "has not been required to exceed reasonable pumping levels". Just the opposite, the fact A&B has been forced to abandon 7 formerly active production wells shows that A&B has exceeded a reasonable pumping level since those wells no longer produce adequate water to irrigate the acres under those well systems. Stated another way, A&B has not purposely idled 11 "active production wells" that are capable of producing water to serve the project. The *Reconsideration Order* should be clarified based upon the evidence accordingly.

Moreover, the Hearing Officer should clarify what objective standards or criteria were applied to arrive at the conclusion that A&B has not exceeded a "reasonable ground water pumping level". As the record stands there was no factual basis disclosed by the Department, hence the Director's finding was not justified. The Hearing Officer's conclusion is apparently based upon A&B's past rectification efforts, the finding that "water is available" at undefined levels, and the fact A&B does not currently use all of its authorized points of diversion. As explained above, water is not available at all of A&B's wells since several wells have been abandoned. Moreover, no "reasonable pumping level" has been identified from which the Director or a reviewing court could judge the Hearing Officer's conclusion.

Although the Hearing Officer recommended the Director should set a "reasonable pumping level", which acknowledges no objective standard has been established, both the *Recommended Order* and *Reconsideration Order* conclude A&B has not exceeded such a level. Accordingly, the Hearing Officer's decision leaves A&B in the position of "guessing" at what that pumping level currently is for purposes of this case. At a minimum, the standards and criteria should be clarified so that A&B has a basis to take exception from that finding. While the Director concluded that A&B has not exceeded a "reasonable pumping level", no factual information was disclosed to support that finding. Although the Hearing Officer reached the same conclusion, it may have been for different reasons.

Since no "reasonable pumping level" has been established, A&B is forced to appeal those decisions in a factual vacuum and without the benefit of stated supporting criteria or standards. The *Recommended* and *Reconsideration Orders* should be clarified accordingly.

DATED this 12th day of June, 2009.

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