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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** **PETITION FOR RECONSIDERATION OF DIRECTOR'S JUNE 30, 2009 *FINAL ORDER REGARDING THE A&B IRRIGATION DISTRICT DELIVERY CALL***

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 Director's June 30, 2009 Final Order Regarding the A&B Irrigation Delivery Call*

(hereinafter "*Final Order*"). A&B requests oral argument on this *Petition for Reconsideration.*

I. Clarification of Parties.

The following item should be clarified for purposes of the record. The "Committee of Nine" is not a party in this case and the reference to the Committee of Nine (the advisory committee to Water District 01), *see Final Order* page 3, should be omitted. *See also*, Tr. Vol. 1, p. 5, ln.25 – p. 6, ln. 4. This clarification was made in the Hearing Officer's *Reconsideration Order* and should be clarified for the record in the *Final Order* as well.

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

The *Final Order*, relying on the *Recommended Order*, identifies a new injury standard, "total project failure," for water right administration that does not follow Idaho law and should be reconsidered.

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). A&B's landowners can beneficially use the rate of diversion provided by the decree (0.88 miner's inch per acre) and have demonstrated a <u>need</u> for that water. This rate of diversion was explicitly recognized by the Hearing Officer (*RO*, at 23 and 25) and impliedly by the Director (*FO*, at 5). Thus A&B is entitled to that amount of water for purposes of administration as against interfering junior priority rights.

In the *Reconsideration Order* (or "*RO*"), at 2, the Hearing Officer correctly recognized that "total project failure" is not the standard in Idaho. Yet, the Hearing Officer continued to apply that standard by recommending denial of A&B's call because there has not been a "failure of the project." The Director apparently affirmed as well. *See Final Order* at 4. This standard is not supported by Idaho law.[1]

"Total project failure" is not a measure of material injury. The Hearing Officer and Director rely on the fact that A&B has wells out of production still receives water to show there is no material injury to A&B's water right. Those wells are dry not because A&B does not need them to meet the needs of its irrigators, but because they have been abandoned for lack of production or because they were formerly injection wells, not proven production wells. This is undeniable evidence that a reasonable pumping level has been exceeded. The failure of the Hearing Officer and the Director to so find is contrary to Idaho law and must be reconsidered.

The burdens of proof and the presumptions that A&B are afforded are set forth in *AFRD #2 v. IDWR*, 143 Idaho 862 (2007). *See RO* at 7-8. According to *AFRD#2*, A&B is afforded a presumption that it can use the water authorized under its decree, subject to "post-adjudication" factors (i.e. waste, forfeiture, abandonment, etc.) that would warrant distributing less than the decreed diversion rate for water right 36-2080. *See AFRD#2, supra* (cited in *RO* at 7-8). None of these factors have been demonstrated in this case.

However, after setting forth the correct burden of proof, the *Recommended Order* demands that A&B demonstrate a "failure of the project" in order to prevail in its call:

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[1] In the *Clarification Order*, the Hearing Officer attempted to characterize the "failure of the project" standard as merely a "finding of fact, not a measure of material injury." He stated that "material injury may occur before a total project failure." Yet, the Hearing Officer continued to deny A&B's call based on his finding that there has not been a "failure of the project", which was adopted by the Director in the *Final Order* as well.

> **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.**
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> * * *
>
> **10. The portion of short wells in the project is not sufficient to show a failure of the project...**

RO at 18 & 20.

While the *Clarification Order* attempted to characterize this as a "finding of fact, not a measure of material injury," the Hearing Officer still recommended denial of A&B's call based on the apparent "finding of fact" that the project has not totally failed. This is not the injury standard for water right administration; the Director's adoption of this standard in the *Final Order* is erroneous and should be reconsidered.

Contrary to both orders, A&B and its individual landowners do not have to suffer "failure of the project" in order to demonstrate material injury. Rather, material injury occurs whenever there has been a "hindrance to or impact upon the exercise of a water right." CM Rule 10.14. At most, "failure of the project" demonstrates the extent of material injury. *See AFRD #2*, 143 Idaho at 874 ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.").

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). As such, 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.

By adopting and applying a 0.75 miner's inch per acre benchmark, as opposed to A&B's decreed right of 0.88 miner's inch per acre, the *Final 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. *Final Order* at 4, *RO* at 20. The *Final 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. *Id.*[2] This false benchmark merely excuses the injury suffered and forces A&B to "self-mitigate" or accept material injury.

The "failure of the project" 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 *Final Order* requires "failure of the project" to justify an injury finding and shifting the burden to junior users.[3]

A&B's landowners should not have to suffer "failure of the project" to justify administration of junior priority ground water rights. The Director should reconsider the proper presumption afforded A&B's decreed water right and find injury based upon the

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[2] 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. CM Rule 10.14. That is the very purpose of the prior appropriation doctrine. The Director cannot deny a call just because there has not been "failure of the project."

[3] 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.

evidence presented.

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 *Final Order's* "minimum amount needed" or "crop maturity" standard is not supported by Idaho law and ignores A&B's decree.

A&B has adjudicated its water right in the SRBA and has a decree for that water right. There is no basis on which to hold A&B to a lower rate of diversion. The Director and watermaster are required to deliver the amount of water in a decree where the water right holder can beneficially use that amount of water. A&B has put its water to beneficial use. A&B needs its full .88 miner's inch per acre water right. Baring any evidence of waste, A&B is entitled to its full decree, not a crop maturity/ "minimum standard" amount and not .75 miner's inch per acre.

A. Crop Maturity / "Minimum Needed" Standard

The proper inquiry is whether the water will be put to beneficial use, that is, is there a need. If there is a need for water in an amount decreed, than that is the amount required. There is no such standard as "minimum need." If a water right holder can beneficially use the amount of water in his 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.[4]

The Director and watermaster are statutorily mandated to distribute water to

[4] 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.

"water rights" based upon priority. *See* Idaho Code §§ 42-602, 607; CM Rule 40.01. The CM Rules do not authorize the Director to delve into and micromanage farming practices.

A license or decree is binding upon the Director and watermaster and sets the "standard" to be used in 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). If a water right holder can beneficially use the amount of water in his 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. [5] (*See also*, A&B's *Petitioner's Exceptions Brief*, pp. 9-11).

No one has presented evidence that the farmers within the boundary of A&B cannot put the water to beneficial use. Put another way, there has been no evidence that the irrigators in A&B's district do no need the water amount from A&B's decreed water right.

The *Final Order's* "minimum needed" standard is not supported by the facts or law and should be reversed. Idaho water law does not hold a senior water user to the "bare minimum" for purposes of administration, particularly where junior users are not held to the same standard. While A&B's landowners are in the best position to determine how much water is needed and when, they have a right to use up to their decreed

[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).

diversion rate of .88 miner's inch per acre and the Director and watermaster are bound to deliver that amount in administration.

B. A&B Landowners Can Beneficially Use more Than 0.75 Miner's Inch/Acre.

The *Final Order's* basis for the 0.75 miner's inch per acre standard is not supported by the evidence.

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:

> 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.

Further, 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. 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.

A&B provided testimony that its landowners regularly use and require the decreed diversion rate (0.88 miner's inch per acre) for their farming operations. *See A&B's Proposed Findings* at 9-14. A&B should not be required to mitigate lower

delivery rates with rectification efforts beyond its capability. Thus, the *Final Order* wrongly limits A&B's water right to only 0.75 miner's inch per acre in this proceeding.

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.

A&B adopts and reasserts its prior briefing on this argument. *See* A&B's *Petitioner's Exception Brief*, pp. 13-15.

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, including requiring A&B to interconnect some or all of its individual points of diversion. A&B's water right was licensed and partially decreed with individual wells serving different farm units across the project. These "farm units" are owned and operated by separate individuals or entities, with distinct operating characteristics, resources and farming patterns. 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.

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 precondition to seeking the administration of junior priority rights that are injuring that water right. This requirement unlawfully disregards the "presumption" A&B is afforded for its decreed senior groundwater right. *See AFRD #2*, 143 Idaho at 878. (*See*

also A&B's *Petitioner's Exception Brief*, p.15 for discussion of why interconnection of system is cost prohibitive.) As such the *Final 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.

V. The Director's Final Order Does Not Comply with the Idaho Administrative Act's Requirement to Provide a "Reasoned Statement" and to Rely on Findings of Fact "Exclusively on the Evidence in the Record." Further, the Director is Bound by the Hearing Officer's Interpretations and Recommendations Adopted in This and Prior Calls.

A. The Director's *Final Order* Does not Comply with Idaho Code § 67-5248.

The Director's *Final Order* does not comply with Idaho's APA which requires:

(1) An order must be in writing and shall include:

> (a) a reasoned statement in support of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.

And additionally:

> (b) Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.

I.C. § 67-5248 (emphasis added). The Director's *Final Order* satisfies neither condition.

Moreover, he has failed to specifically identify which findings remain from his January 29, 2008 Order. Without this clarification, A&B cannot properly appeal those findings. The adoption of the Hearing Officer's *Recommended Order*, which determined that much of the foundation from the Director's original Order was in error, should have clarified the Findings of Fact and Conclusions of Law from that original Order that carry forward. It did not.

Specifically, the Director's Conclusion of Law #5 in the Final Order is vague and

does not identify a "reasoned statement" as required by Idaho's APA. His bald statement that the "record does not support the relief requested" is simply insufficient. *Final Order*, at 5. A&B cited the record for the relief requested and deserves a Final Order that provides a reasoned explanation for why that request was denied.

Additionally, the Director's Conclusion of Law #6 is also completely lacking a reasoned statement as required by law. The Director states only that the Hearing Officer's interpretations in prior cases will not be made part of the record in this matter.

B. The Director is Bound by the Hearing Officer's Interpretations and Recommendations.

The Hearing Officer incorporated his prior interpretations and recommendations from his orders in the Thousand Springs and Surface Water Coalition Delivery Call Cases:

> Prior to this proceeding the Hearing Officer has made recommendations in the Spring Users case and the Surface Water Coalition case. The recommendations in those cases included interpretations of the State Constitution, Idaho statutes and the Conjunctive Management Rules. Those interpretations will be the subject of judicial review and may be modified or found to be in error. However, for now the interpretations in the prior recommendations are incorporated in this recommendation to the extent that they are relevant. To the extent necessary for clarity they will be repeated. Further explanation will be made as necessary for the particular issues in this case.

Hearing Officer's March 27, 2009 *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations*, pp.8-9. (Emphasis added.) Rather than incorporate those findings, the Director summarily disregarded them as follows:

> The records developed in the contested cases initiated by Blue Lakes, Clear Springs, and SWC are distinct from the record developed in this delivery call hearing. Any interpretation not included by the Hearing Officer in his Recommended Order should not be considered by the Director in this contested proceeding and should not be made part of the

> record. Therefore, the Director does not accept the recommendation of the Hearing Officer on this point.

Director's *Final Order*, at 4, ¶21 (emphasis added). As discussed above, I.C. 67-5248 requires the Director to provide a justification for this decision. He has failed to do so. The Director adopted the Hearing Officer's prior interpretations of law, regardless of the fact that the calls are in some ways different. The Director now attempts to change his mind but provides no justification for this decision, as required by law. The Director seems to contend that he is not bound by his prior orders. IDWR's ever-changing position is arbitrary and not justified.

The Hearing Officer's constitutional and statutory interpretations in the Matters of Thousand Springs Area Delivery Calls and in the SWC Delivery Calls were adopted by the Director in those prior cases and are binding on the Director's conclusions here. Though some of those conclusions are on appeal, the Director nonetheless adopted them in those matters and he is bound to follow those conclusions here. Further, he has failed to provide a "reasoned statement" as to why his interpretation of the law has changed from less than 1 year ago when he issued Thousand Springs Area Delivery Final Order on July 11, 2008 and the SWC Final Order on September 5, 2008.

C. Hearing Officer's Prior Interpretations that are Binding on the Director by Adoption

The Hearing Officer found in both SWC and the Thousand Springs Area Calls "a presumption that a senior water user is entitled to the amount of water set forth in the partial decree." *SWC RO*, at 25; *Thousand Springs RO*, at 9. The Hearing Officer quoted this passage from *AFRD* #2 in both:

> The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already

> has.... [T]he burden is not on a senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right..."

American Falls Reservoir District No. 2 v. IDWR 143 Idaho, 862, 878. *See SWC RO*, at 25; *Thousand Springs RO*, at 9. (Emphasis added). The Hearing Officer also found the "decreed amount of a water right is a maximum amount to which the right holder is entitled. The right holder is presumed entitled to that amount, and the burden is upon a junior right holder to show a defense to a call for the amount of water in the partial decree." *Thousand Springs RO*, at 10, ¶4, citing *AFRD*, at 878-879. (Emphasis added). The Hearing Officer also wrote in both Orders "it is clear that the Legislature did not intend to grant the Director broad powers to do whatever the Director might think right." *SWC RO*, at 38; *Thousand Springs RO* at 16. (Emphasis added).

Both Orders acknowledge that "[t]he concept of 'first in time, first in right' is a fundamental principle of Idaho water law. Idaho Code section 42-106 provides, 'As between appropriators, the first in time is first in right.' Case law has enforced this rule for generations." *SWC RO*, at 36-37; *Thousand Springs RO* at 16. However, "[t]he appropriation must be for 'some useful or beneficial purpose.' Idaho Code section 42-104. A water user cannot waste water." *SWC RO,* at 38; *Thousand Springs RO*, at 16. Thus, "[t]he hallmark of water adjudication is first in time, first in right when the water is applied to a beneficial use without waste." *Thousand Springs RO*, at 24; *See also SWC RO*, at 36. (Emphasis added).

A&B has met these conditions. A&B is the senior water user, A&B has a licensed and decreed water right and A&B can put the entirety of that water right to beneficial use. There has been no showing of waste in these proceedings.

Based on the Hearing Officer's prior findings, there is no question as to A&B's rights. The Hearing Officer has found that "AFRD #2 recognized the presumption that the senior water right holder is entitled to the licensed or decreed water right." *SWC RO*, at 38. (Emphasis added). He further found that "senior users are presumed to have the full extent of their rights if they can apply the water to the beneficial use for which it was appropriated. If a portion of the water is not available as a result of junior ground water pumping, there should be curtailment of the junior rights in the absence of a mitigation agreement." *SWC RO*, at 43. (Emphasis added).

Turning to the concept of "minimum full supply," the Hearing Officer noted that "[u]se of the protocol of a minimum full supply is not an avenue to modify licensed or decreed rights" SWC *RO*, at 45. (Emphasis added). He significantly noted that "use of the concept of a minimum full supply tempts administration that requires the senior surface water users to alter their practices or show why they have not while permitting the junior users to continue pumping the full amount of their rights out of priority." *Id.* (Emphasis added). Further, "[u]sing the minimum full supply as a fixed amount in effect readjudicates a water right outside the process of the SRBA.... In practical effect it adjudicates a new amount of the water right outside the SRBA without a determination of specific factors warranting a reduction." *SWC RO*, at 48. The Hearing Officer cautioned that "[c]hanges in facilities, diversion, conveyance, and irrigation practices from earlier years should be considered... This again must be considered with caution to avoid rewriting a water right through the process of determining a baseline water need for predictions of material injury." *SWC RO*, at 52. The Hearing Officer concluded that "[r]easonableness, not achievable farm efficiency, is the standard in determining whether

irrigators are wasting water. *See CM Rule* 42.01." *SWC RO*, at 56.

The above findings and interpretations show time and again that beneficial use and need are the standard by which to measure A&B's decreed water right. Yet despite these findings of fact and interpretations, by which he is bound, the Director refuses to find material injury to A&B's water right, refuses to shift the burden to the junior users to show why they should not be curtailed and then refuses to provide any reasoned explanation for his decision. This is contrary to Idaho law and should be reconsidered.

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

A&B adopts and reasserts its prior briefing on this argument. *See* A&B's *Petitioner's Exception Brief*, pp. 16-19.

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 A&B's landowners in the southwest area differently from those in the north and east areas of the project. All landowners have a right to use a portion of the same senior water right and they all 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 material injury. Rather, it triggers water right administration. *See* CM Rules 40, 42 & 43.[6] (*See also* A&B's *Petitioner's Exception Brief* pp 18-19.)

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

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

A&B adopts and reasserts its prior briefing on this argument. *See* A&B's *Petitioner's Exception Brief*, pp 20-24.

It cannot be stated that A&B has not been required to exceed a reasonable pumping level unless and until that pumping level is actually set.[7] The Hearing Officer also recommends, and A&B concurs, that the Director set a reasonable pumping level. *RO* at 36. The evidence does not and cannot support the *Orders'* conclusions that that level has not yet been reached without identifying a specific ground water level.

A&B requested the Hearing Officer reconsider his finding that "A&B has not been required to exceed reasonable pumping levels." *A&B Petition for Reconsideration* 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. *See Reconsideration Order* at 3, *Clarification Order* at 1.

The Hearing Officer's finding and the Director's adoption of that finding are both based on the erroneous assumption that A&B is not using all of its wells. As discussed above, A&B has been forced to abandon these wells, not by choice, but because the

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> 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.

[7] 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.

pumping levels have been exceeded and it is no longer practical or monetarily feasible to operate these wells.

The Director wrongly states that "the issue of whether reasonable pumping levels have or have not been exceeded was thoroughly reviewed during the hearing." *Final Order* at 4, ¶23. It was not. IDWR did not disclose any information or personnel to support its finding which precluded A&B from finding out what the "level" was.

Moreover, so long as no "reasonable pumping level" is set, a reviewing court cannot judge the Hearing Officer's or the Director's Orders. The lack of objective criteria renders the finding unsupportable. Given the lack of foundation for the Director's findings and the Hearing Officer's recommendation, it should be set aside at this point as arbitrary and capricious.

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. (*See A&B Memorandum in Support of Summary Judgment* at 28-31, *A&B Post-Hearing Memorandum and Proposed Findings* at 38-40.)

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." Rather, the fact A&B has been forced to abandon 7 formerly active production wells shows that 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). Yet despite that finding the Hearing Officer nonetheless concludes that "reasonable pumping levels" have

not been exceeded. There is no support from either facts or evidence to support the "reasonable pumping level" finding in the *Recommended Order* and adopted by the *Final Order*.

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

A&B adopts and reasserts its prior briefing on this argument. *See* A&B's *Petitioner's Exception Brief*, pp 24-29.

A ground water management area ("GWMA") is not identical to a water district. The *Final* and *Recommended Order*s' contrary conclusions, which are based on three factual underpinnings, are in error.

There are important 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.

On the other hand, a GWMA designation provides the Director with additional authority aimed squarely at addressing issues related to protecting the aquifer, in addition to the 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.

The designation of a GWMA requires 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. Therefore, the *Final Order's* finding that a GWMA should not be established should be reversed.

CONCLUSION

For the foregoing reasons, the Director should reconsider the *Final Order*.

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