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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	**CM-DC-2011-01** **PETITION FOR RECONSIDERATION OF INTERIM DIRECTOR'S APRIL 27, 2011 FINAL ORDER ON REMAND / REQUEST FOR HEARING**

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 Interim Director's April 27, 2011 Final Order on Remand / Request for Hearing.*

In addition to this petition, A&B is filing a *Stipulated Motion for Stay* with the agreement of the other parties to this action, IGWA, City of Pocatello, Fremont-Madison Irr. Dist. et al.

Pursuant to that motion, the parties have stipulated to a stay of further administrative proceedings pending final review by the Idaho Supreme Court in consolidated appeal case no. 38382-2010. Accordingly, pursuant to the outcome of that appeal, A&B reserves the right to amend this petition accordingly.

INITIAL ISSUES FOR RECONSIDERATION

I. Director Failed to Follow Idaho Law in Evaluating Injury to A&B's Decreed Water Right No. 36-2080.

A&B incorporates its prior memorandums, briefing, and the *Proposed Order on Remand* with respect to the Director's failure to follow Idaho law in evaluating injury to A&B's decreed water right no. 36-2080. The Director has failed to follow existing law, including the District Court's decision on judicial review in this matter. *See Clear Springs v. IDWR* (2011 Opinion No. 32); *Memorandum Decision and Order on Petition for Judicial Review* and *Memorandum Decision and Order on Petitions for Rehearing* (Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. 2009-000647).

The Director gives no presumption to A&B's decree and unlawfully re-adjudicates the water right. For example, despite the SRBA partial decree for water right no. 36-2080 in 2003, and the IDWR approved transfer subsequent to 2003 (Ex. 423), the Director goes behind the decree to assert that "1,100 cfs has not been available for diversion during the peak season when demand for water is at its greatest." *Remand Order* at 8 (FF 34), at 18 (CL 29). This finding not only violates Idaho law it ignores the facts in the record. A&B had the capacity to pump 1,100 cfs when the wells were on "allotment" from the late 1960s to the mid 1970s when ground water levels began to decline due to the proliferation of junior ground water pumping across the ESPA. Ex. 200, at 3-57, Figure 3-13. The lack of capacity today from reduced ground water levels is attributable to pumping under junior priority water rights. Ex. 200, at 3-24 to 3-57; R. 3086.

The information provided by A&B's experts plainly shows A&B's pumping capacity from the middle of the irrigation season during the peak demand period. *See Koreny Testimony*, Tr. Vol. IX, p. 2128. Accordingly, the Director has no basis to go behind A&B's decree and conclude that water unavailability today allows IDWR to ignore the decreed diversion rate for purposes of water right administration.

In addition, the Director provides no justification for his "minimum use" or "crop maturity" standard for water right administration. Both concepts ignore A&B's right to use its decreed diversion rate (1,100 cfs, 0.88 miner's inch/acre) for irrigation purposes. The testimony in the record is clear that A&B's landowners can beneficially use 0.88 miner's inch per acre. The Director has no basis to conclude otherwise, let alone meet the clear and convincing evidence standard that A&B's landowners would "waste" that amount of water if diverted and used for irrigation purposes.

Finally, the Director vaguely concludes that A&B's decreed quantity "exceeds the quantity being put to beneficial use" without identifying what rate of diversion applied on the A&B project results in unlawful "waste". Although the Hearing Officer and Director previously concluded A&B had a right to use 1,100 cfs (0.88 miner's inch) if the water was available, there is no finding as to what amount A&B is entitled to use under the *Remand Order*. R. 3102 ("A&B is entitled to the higher rate of delivery if its delivery system can produce the higher rate and that amount can be applied to a beneficial use."); R. 3322-23. Instead the Director erroneously concludes that "the quantity available to A&B is sufficient for the purpose of irrigating crops". *Remand Order* at 21 (CL 45). The Director references an "average" diversion across the entire project of 0.65 miner's inch per acre, but makes no finding as to whether a rate of delivery above that amount is necessary. What amount of water is available to A&B? What

amount is sufficient to irrigate a crop? The Director noticeably does not answer these questions and unlawfully refuses to administer to A&B's decreed water right. These findings should be reconsidered accordingly.

II. Director Erroneously Ruled on Issues Beyond the Scope of the Remand.

The District Court found the Director erred in failing to apply the evidentiary standard of clear and convincing evidence in evaluating injury to A&B's decreed water right no. 36-2080. The Court remanded the case to the Director "for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record." *Memorandum Decision* at 49.

The Director's *Remand Order* erroneously addresses issues beyond the scope of the District Court's ordered remand and contrary to the Director's prior decision, including: 1) finding that 11 wells may be put into production at any time or the wells may be reconstructed at another location (FF 15); 2) every problem well identified by A&B is located in the "geologic transition" zone (FF 20); 3) the depletive effect of ground water pumping is within 5 percent of being fully realized (FF 22); 4) the use of sprinkler irrigation "was expected" to reduce the per acre water requirement by 19.6 percent (FF 24); 5) definition of the peak irrigation season (FF 29); 6) A&B irrigates more acres than authorized by its calling right (FF 30); 7) evaluation of "greatest peak season low flow capacity" (FF 34); 6) assumption of entire project "interconnection" or average use of water across the project (FF 35-39, 42-44); 7) assumptions about A&B's capacity and ability to use that capacity project-wide (FF 44); 8) finding that pivot corners are routinely not irrigated on A&B project (FF49); 9) findings that "crop maturity" or "crop yields" is a standard for administration (FF 50-60); 10) finding that original location of wells or points of diversion approved by IDWR license and SRBA decree is now "unreasonable" (CL 41).

The Director's analysis and findings go beyond the scope of the District Court's remand and are in error. Accordingly, A&B is entitled to a hearing on the Director's actions regarding these issues pursuant to Idaho Code § 42-1701A(3).

III. The Director's *Remand Order* Erroneously Implies that all Wells on the A&B Project are Interconnected.

Despite the clear evidence in the record, the Director's *Remand Order* erroneously implies that all wells on the A&B project are interconnected for purposes of water delivery and use. The Hearing Officer's findings on this issue, previously accepted by the Director, state as follows:

> 3. A fundamental issue is whether the right established in no. 36-2080 should be measured in the aggregate. That is, if the amount that can be pumped from all wells is totaled and that total when averaged over the acres in Unit B would meet crop needs, is the right satisfied even though some well systems within the project may not provide the amount of water necessary to meet crop needs? Or should the right be analyzed on a system by system basis? That is, if a particular well system cannot supply the amount necessary to meet crop needs, is there material injury, even though on average there might be enough to meet crop needs. ***Either approach taken to the extreme can produce results inconsistent with the history and understanding of the water right.***
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> ***The theoretical right to apply the water from any pump to any land must be tempered by the reality of the system as it was designed and utilized and partially decreed. If the entire well system could be interconnected economically the issue of material injury would be gauged by the total capacity of the system to produce water.***

R. 3093, 3095 (emphasis added).

Despite his previous acceptance of the Hearing Officer's findings (R. 3322-23), the Director now takes the "total project" concept to the "extreme" and erroneously gauges water availability based upon "average" use across the A&B project, even though he previously found the wells are not interconnected.

For example, the Director wrongly assumes the 2006 peak season "low flow" on-farm delivery was 0.71 miner's inches per acre. *Remand Order* at 8 (FF 35). The finding incorrectly implies that all 62,604.3 acres received a rate of water delivery equal to 0.71 miner's inches per acre. Further, the Director analyzed A&B's historic diversions using a "mean" or total "average" calculation. *Id.* (FF 36-39). The Director further "averaged" monthly total volumes in reviewing A&B's historic water use. *Id.* (FF 43-44). Finally, the Director converts the "average" monthly use to arrive at a "peak season" diversion rate for prior years including 2006. *Id.* (CL 30, 31).

The A&B project is not "interconnected" so that each and every landowner can or has received a "mean" or "average" amount of water. The Director knows this fact and previously accepted the Hearing Officer's finding on this issue:

> The geography of the land within Unit B, the design of the system, and the practices in utilizing the system prior to entry of the partial decree indicate that ***the water right is not satisfied by showing that the combined total of water that can be pumped from all the wells is equal to the amount necessary to avoid material injury if the water were equally distributed.***
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> It appears that interconnection of the entire pumping system is not simple or inexpensive either legally or practically. Considering the fact that the project was developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, ***it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury.***

R. 3095-96 (emphasis added); R. 3022-23.

Despite the prior findings, the Director now wrongly concludes that "A&B had the ability or capacity on a project-wide basis to pump nearly 10,000 acre-feet of additional water during the peak demand." *Remand Order* at 9 (emphasis added). Again, the Director already concluded that A&B cannot pump water from any well on its project and deliver that water to any acre. Accordingly, the Director's *Remand Order* clearly contradicts the prior final order and therefore

must be reconsidered.

In addition to the erroneous "interconnection" assumptions, the Director also incorrectly uses "average-monthly" irrigation demand data to establish the entire project's irrigation requirements. Average-monthly irrigation demand data does not establish the peak capacity requirements for the A&B project because it is operated as an on-demand water system and the wells are operated to meet the demand as it occurs. *See Koreny Testimony*, Tr. Vol. IX, p. 2194. For example, excess capacity during the beginning of the month cannot be used to meet a high crop irrigation demand later in the month. Dr. Brockway showed that the peak capacity period for irrigation occurs on a daily basis and that failure to obtain sufficient water within an irrigation week will cause crop damage during a high-demand period. *See Brockway Testimony*, Tr. Vol. IX, p. 2290. This was confirmed by the Hearing Officer and previously accepted by the Director. R. 3110, 3322-23.

IV. Director Wrongly Assumes Available Water Supply to A&B.

Related to the Director's erroneous assumption about total project "interconnection" is his assumption about "available water" or "available capacity". In an attempt to justify his "no injury" conclusion, the Director erroneously "averages" historic well capacities and mixes those with current actual diversions. The Director even goes so far to find that well capacities and available ground water level in 1974 are still available to A&B today. *See Remand Order* at 18 (CL 29). The Director uses the "maximum low flow capacity of A&B production wells" that occurred in 1974 (1,087 cfs) and applies a current conveyance loss (3%) to claim that "the amount of water available for on-farm delivery during the peak season is 1,055 cfs, or 0.84 miner's inches per acre." This finding is not supported by the evidence in the record and should be reconsidered.

V. Director's Assumptions about A&B's 11 Authorized PODs Are Erroneous.

In addition to errors about available water supply, the Director assumes that A&B has 11 extra production wells that are available but are left unused. *See Remand Order* at 4 (FF 15), at 19 (CL 33, 34). Despite this conclusory finding the Director provides no analysis as to the available water at those wells or whether water could be pumped at those locations and feasibly delivered to A&B lands. The implication is that A&B is purposely not delivering available water to its landowners. Again, the Director's finding is erroneous and ignores the facts in the record.

The Hearing Officer previously found that of the 11 wells referenced, "there are six or seven temporarily abandoned wells and five or six that were initially constructed as injection wells but that have been repermitted as production wells." R. 3081. The Director previously accepted this finding. R. 3022-23. A&B abandoned the wells due to a lack of water supply. R. 3090; *see Temple Testimony*, Tr. Vol. III, p. 555, 565-66. A&B's manager testified that the District drilled one well over 700 feet and still the well produced no additional water. *Id.* The Hearing Officer recognized that rectification is "impossible" in some wells and that deepening wells in the southwest area is unlikely to produce more water. R. 3091, 3113; *see also*, Ex. 200 at 3-10, 3-12, Ex. 208. The Director previously accepted these findings. R. 3322-23.

With respect to the few injection wells that have been repermitted as authorized points of diversion on A&B's water right, the record shows the wells are not currently capable of pumping and delivering water. *See Temple Testimony*, Tr. Vol. III, p. 634-35. Moreover, the costs associated with drilling new wells (which may be necessary at the injection well sites), including the infrastructure for necessary power, would run well over $100,000 per site. *Id.* p. 554, 563. In short, A&B does not have 11 additional production wells capable of delivering water on the project today.

The Director attempts to justify his finding by referencing the CM Rules "reasonable means of diversion" factor. *See Remand Order* at 19. The fact A&B has 11 points of diversion that have been abandoned due to a lack of water does not constitute an "unreasonable" means of diversion. Moreover, A&B is not required to move its wells and file a transfer application with IDWR. This finding is erroneous as a matter of law. Moreover, the Director's finding incorrectly assumes that those wells are capable of producing water and are being purposely left idle by A&B.

Therefore, the Director's finding that A&B has additional wells that could be put into production to deliver water on the project today is erroneous and should be reconsidered.

VI. The Director's Finding Regarding the Location of Wells in the Southwest Area is Erroneous.

The Director attempts to excuse injury caused by junior priority ground water rights in the southwest area of A&B because of the "inherent hydrogeologic environment." *Remand Order* at 20. Similar to other findings, the Director's decision contradicts his prior final order. As to the original project design, the Hearing Officer found:

> Nonetheless, Dr. Ralston was asked "whether the design of wells as they were designed in 1950, whether that design was reasonable based upon information, knowledge and techniques available at that time?" Dr. Ralston answered, "Yes, I think they were reasonable."

R. 3091.

Additional IDWR witnesses testified that the wells were adequate at the time of construction. *Wylie Testimony,* Tr. Vol. VII; p. 1425-1427; *Vincent Testimony*, Tr. Vol. IX, p. 1856. Although the Hearing Officer misinterpreted the Idaho Constitution and erroneously analogized A&B's southwest area to the facts in *Schodde* by concluding that curtailment was not justified in the "public interest", there was no finding that the original location of the wells in the

southwest area constituted an "unreasonable" means of diversion. Despite licensing A&B's water right, recommending it for decree in the SRBA Court, and approving a transfer in 2006 with the same points of diversion, the Director now concludes that the U.S. Bureau of Reclamation should have never drilled wells in the southwest area in the first place. This "hindsight" approach to water right administration is contrary to Idaho law.

In addition, the Director's "after-the-fact" conclusion ignores the history of water availability in the southwest area, prior to the impacts caused by junior ground water pumping. For example, the Director incorrectly states that southwest area produces low well yields because of a different geologic environment and the presence of sedimentary interbeds. *Remand Order* at 4-5 (FF 18). The well yields in the southwest area at the time the wells were constructed in the 1970s are essentially the same as the central and eastern areas of Unit B.[1] The well yields in the southwest area are between 718 to 4,264 gallons per minute (gpm) with an average of 2,238 gpm. The well yields in the central and eastern areas of the project are from 673 to 4,712 gpm with an average of 2,459 gpm. Ex. 200, Appendix C. The reason that well yields have declined or wells have become dry in the southwest area is because ground water levels have declined to a point that is now below the transmissive portion of the aquifer and further deepening is not effective. *See* R. 1921; *Koreny Rebuttal to Petrich Expert Report,* pg. 13.

The Director provides no analysis as to the water availability in the southwest area prior to the onset of junior groundwater pumping. Yet he attempts to excuse any injury due to the

[1] The Director's isolation of the southwest area ignores the facts in the record. For example, the Director incorrectly states that the "every problem well identified by A&B is located in the geologic transition zone". *Remand Order* at 5 (FF 20). This is incorrect. Declines in ground water production have been occurring across the Unit B project. Figures 3-20 in the A&B Expert Report (Ex. 200) shows that prior to the onset of ground water level declines, almost all wells produced the irrigation requirement of 0.88 miner's-inch/acre. Figure 3-27 shows that by 2007 only 28 wells could produce this amount. Figure 3-32 shows that wells have been required to be deepened across the entire project after 1980 because of declining ground water levels. *See* Ex. 200.

geographic location of part of the A&B project. There is no supporting law to justify the Director's analysis on this issue.

In sum, the Director has no legal basis to excuse the injuries caused by junior ground water rights anywhere in the A&B project, including the southwest area. The Director's finding that pumping water in the southwest area is not "reasonable" should be reconsidered accordingly.

VII. Analysis of Irrigation Under Enlargement Water Rights Flawed.

The Director wrongly concludes that "[b]efore seeking curtailment of junior-priority ground water rights under 36-2080, A&B must have mechanisms in place to self-regulate its junior and subordinated enlargement acres". *Remand Order* at 17. A&B's junior priority water rights are subject to administration like any other junior priority water right. A&B does not have to "self-regulate" as a condition of administration to its senior-priority water right 36-2080. To date the Director has refused to find injury to A&B's senior right or issue a curtailment order for purposes of administration. Accordingly, A&B is not obligated to "self-regulate" its enlargement water rights. Such a condition results in unconstitutional administration of A&B's junior priority water rights. Moreover, the Director has no authority to impose a different standard upon A&B's enlargement water rights than other similarly situated enlargement water rights across the ESPA. If curtailment of junior priority water rights is necessary to satisfy A&B's senior water right no. 36-2080, then A&B's junior priority enlargement water rights will be subject to that administration. It's not the other way around. A&B does not have to curtail its own junior rights before the Director administers any other junior rights.

Under the Director's flawed reasoning any water user with an enlargement water right could not request administration of its more senior rights until it "self-regulated" or curtailed its own junior right. The Director erroneously applied Idaho law in his analysis on this issue.

VIII. A&B's Decreed Rate of Diversion / Motion to Proceed

The Director erroneously relied upon A&B's 2007 *Motion to Proceed*, rather than the decreed diversion rate in analyzing material injury to water right no. 36-2080. *Remand Order* at 18 (CL 25, 28). The rate of diversion identified in A&B's motion, which is an internal well rectification standard, does not replace the rate of diversion decreed by the SRBA Court for purposes of water right administration. R. 3101. Nothing in the CM Rules allows the Director to ignore the decreed rate of diversion for purposes of an injury analysis. The Director's reliance upon the rate referenced in A&B's *Motion to Proceed* is therefore flawed both factually and as a matter of law.

IX. Failure to Apply CM Rules to Junior Priority GW Rights.

Although the Director concludes that A&B's decreed diversion rate exceeds the quantity being put to beneficial use, and the necessary converse is that applying 0.88 miner's inch per acre results in unlawful "waste", the Director performs no analysis as to the "reasonableness" and "efficiency" of water use of affected junior ground water right holders.

The CM Rules require the Director to analyze the junior ground water right holders' water use. CM Rule 20.05; 40.03. Specifically, the rules state that they "provide the basis for determining the reasonableness of the diversion and use of water by . . . the holder of a junior-priority water right against whom the call is made" and "the Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste". *Id.* The Director's *Remand Order* contains absolutely no analysis of the juniors' water use in this case.

If A&B's landowners, who farm on one of the most efficient irrigation projects in the State of Idaho, cannot beneficially use 0.88 miner's inch per acre, then all hydraulically

connected junior priority ground water users must be held to the same standard. Although the record plainly shows that A&B's landowners as well as junior ground water users do beneficially use up to 1 miner's inch per acre for irrigation use, the Director ignores this evidence in the *Remand Order* findings. Regardless, the Director has a mandatory obligation to ensure junior ground water users are using water "efficiently" and "without waste". The failure to do so constitutes an unconstitutional application of the CM Rules and should be reconsidered accordingly.

X. Failure to Identify a Reasonable Pumping Level.

The Director's decision to refuse to set a reasonable pumping level under Idaho Code § 42-226 violates Idaho law. Idaho's Ground Water Act unequivocally states: "Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water levels as may be established by the director." Although this issue was beyond the scope of the District Court's remand, the Director again refused to set a reasonable pumping level to protect A&B's senior water right no. 36-2080 in the *Remand Order*.

The Director's non-decision is erroneous and should be reconsidered accordingly.

XI. Characterization of IGWA Witness as A&B "Board Member"

The Director erroneously stated that an A&B farmer called by IGWA was "an A&B board member." *Remand Order* at 10 (FF 52). Neither Mr. Stevenson nor Orlo Maughan serves on the A&B Irrigation District Board of Directors. Instead, both of those witnesses testified that they were members of the Magic Valley Ground Water District Board of Directors. *See Stevenson Testimony*, Tr. Vol. X, p. 2066; *Maughan Testimony*, Tr. Vol. X, p. 2119.

CONCLUSION

The Director's *Remand Order* violates Idaho law and does not reflect the facts in the record in this proceeding. In addition, the Director has entered findings beyond the scope of the District Court's ordered remand, contrary to previous findings, therefore A&B requests a hearing on those issues pursuant to I.C. § 42-1701A(3). For these reasons the *Remand Order* should be reconsidered and A&B is entitled to hearing on the Director's action.

DATED this 11th day of May, 2011.

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CERTIFICATE OF MAILING

I hereby certify that on this 11th day of May, 2011, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email for those with listed email addresses:

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