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WATER RESOURCES

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

A&B IRRIGATION DISTRICT,	)	CASE NO. CV-07-655
	)	
Petitioner,	)	<b>BRIEF IN OPPOSITION TO</b>
	)	<b>RESPONDENTS' MOTION TO</b>
vs.	)	<b>DISMISS</b>
	)	
DAVID R. TUTHILL, JR., in his official	)	
capacity as director of the Idaho Department of	)	
Water Resources, and <b>THE IDAHO</b>	)	
<b>DEPARTMENT OF WATER RESOURCES,</b>	)	
	)	
Respondents.	)	

COMES NOW Petitioner, A&B Irrigation District (hereinafter referred to as "A&B"), and in opposition to respondents' Motion to Dismiss filed herein, submits the following

points and authorities in support of its opposition to said motion.

### NATURE OF THE ACTION

A&B is the equitable owner of Water Right No. 36-02080, entitling it to divert 1100 cfs of water from 177 wells with electric pumps located throughout the project for the irrigation of 62,604.3 acres that are included within the A&B Irrigation District, with a priority of September 9, 1948. A copy of the Partial Decree for this water right is attached hereto. On July 26, 1994, a Petition for Delivery Call was filed with the Director of the Idaho Department of Water Resources, praying that the Director of the Department of Water Resources of the State of Idaho

...take such action as is necessary to insure the delivery of ground water to petitioner as provided by its water right, and to do all things reasonably necessary and appropriate to protect the people of the State of Idaho of depletion of ground water resources which have caused material injury to petitioner, and to designate the Eastern Snake Plain Aquifer as a ground water management area as provided by Section 42-233b, Idaho Code, and to otherwise supervise the allotment of water from and the use of water from the ground water management area above described to insure the full utilization of the water rights of the petitioner for the benefit of the lands within A&B Irrigation District. (See Attachment B to A&B's Petition for Peremptory Writ of Mandate.)

In that Petition, A&B established that it was suffering material injury as the result of the lowering of the ground water pumping levels within the ESPA by an average of 20 feet since 1959, with some areas of the aquifer lowered in excess of 40 feet since 1959, reducing the diversions of A&B to 974 cfs, a reduction of 126 cfs from the diversion rate provided in its water right. It further alleged that the reduction in diversion rate has reduced the diversions from 40 wells serving approximately 21,000 acres to a diversion rate which is less than is required for the proper irrigation of lands served by the said wells. It further alleged that the ESPA, an area of

common ground water supply within which junior-priority ground water withdrawals must be regulated, is approaching the conditions of a critical ground water area and the ground water supply is insufficient to meet the demands of petitioner under its rights. A Pre-Hearing Conference Order was issued by R. Keith Higgenson, the then Director of IDWR on May 1, 1995. (See Attachment C to Petition for Peremptory Writ of Mandate.) The Pre-Hearing Conference Order, entered following a pre-hearing conference held on November 16, 1994, made certain findings, which included the following, to-wit:

1. The matter was initiated by the filing of a petition on July 27, 1994 by the A&B Irrigation District for a priority delivery call for ground water from the Eastern Snake Plain Aquifer and for the creation of a ground water management area. (Findings No. 1)

2. At a pre-hearing conference concerning the petition held on November 16, 1994, a proposed stipulation by the parties was outlined which would allow the matter of the contested case to be held in abeyance for a time. The proposed stipulation is set forth in paragraph 5 of the Pre-Hearing Conference Order, which proposed, as an interim solution, the adoption and implementation by IDWR of an active enforcement plan of water rights authorizing diversions within the ESPA, requiring measurement of all ground water diversions in the ESPA, to cooperate in the submission of legislation to authorize authority for and formation of water measurement districts, a continued moratorium on new ground water permits, and for further studies and evaluation by IDWR, and other management procedures. Finally, the proposed stipulation requested that IDWR retain jurisdiction of the delivery call during the implementation of the interim solution and that it stay all proceedings on the formal contested case hearing until petitioner or respondent or respondents file a Motion to Proceed. The Director of IDWR then

adopted the proposed stipulation, in part, and ordered, among other things, that:

1. IDWR will develop a plan for management of the ESPA which will provide for active enforcement of diversion and use of water pursuant to established water rights.

2. IDWR retain jurisdiction of the petition for the purposes of continued review of information concerning water supply, the impact of use of ground water on other uses of the resource and the determination and designation of the ESPA as a ground water management area.

Under Idaho Code § 42-233(b), governing “Ground Water Management Areas”, a “ground water management area” is defined as any ground water basin or designated part thereof which the Director of the Department of Water Resources has determined may be approaching the conditions of a critical ground water area. A “critical ground water area” is defined under Idaho Code § 42-233(a) as “any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, . . . “ When a ground water management area is designated by the Director, the Director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from whence withdrawals are made and on any other hydraulically connected sources of water. Finally, the Director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of the water management area, shall order those water right holders on a time-priority basis, within the area determined by the Director, to cease or reduce withdrawal of water until

such time as the Director determines there is sufficient ground water.

However, the creation of a ground water management area does not obviate the duty of the Director to distribute water as provided by § 42-607, Idaho Code. Under this section of the Idaho Code, water is to be distributed according to the prior rights of each user from that water supply, and, under the direction of the Department of Water Resources, shall cause to be shut or fastened the facilities for diversion of water from the water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such water supply. Idaho Code § 42-602 provides that the Director of the Department of Water Resources shall have direction and control of the distribution of water from all natural water sources within a water district to the . . . pumps and other facilities diverting therefrom. Under this provision, the Director of the Department of Water Resources “shall distribute water in water districts in accordance with the prior appropriation doctrine.” This provision is consistent with Idaho Code § 42-237a(g) which grants the Director power to supervise the control, the exercise and administration of all rights for the use of ground waters and in the exercise of this discretionary power, he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. . . . Water in the well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, a present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond a reasonably anticipated average rate of future natural recharge. In carrying out his duty, the Director may not ignore his obligation to deliver water to a senior appropriator on the basis that a reasonable exercise of the

senior right may “block full economic development of underground water resources” as found in Idaho Code § 42-226. The last sentence of this provision provides that: “This act shall not affect the rights to the use of ground water in this state acquired before its enactment.” This was affirmed by the unanimous Idaho Supreme Court in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (Idaho 1994). As was the case in the *Musser* decision, the A&B water right has a priority of September 9, 1948. The adoption of the Idaho Ground Water Act occurred in 1951.

The Director and IDWR have been accumulating what they deemed to be necessary pertinent information to make a reasoned timely response to A&B’s delivery call made in 1994. The Director has obtained an order from the Snake River Basin Adjudication District Court authorizing the interim administration of water rights within the ESPA on the grounds that “interim administration of water rights . . . is reasonably necessary because an efficient means of administrating water rights from ground water sources . . . does not exist. The establishment of a water district . . . will provide the water master with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law.” Interim administration was also obtained on the grounds that it is “reasonably necessary to officially administer water rights and to protect senior water rights.” Between 2002 and 2006, five water districts have been created over areas within the ESPA. (See Attachment D to A&B’s Petition herein) There has been no administration based on the priorities of the rights.

On March 16, 2007, A&B filed its Motion to Proceed, thereby giving notice to the Director that the stay previously entered should be lifted, as provided in the Pre-Hearing Conference Order and that the Director proceed, without delay, in the administration of the ESPA in such a manner as to provide ground water to A&B under its ground water rights that are

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being interfered with and materially injured by junior ground water appropriators in the ESPA. (See Attachment E to Petition for Peremptory Writ of Mandate filed herein) Because absolutely no action had been taken by the Director by June 15, 2007, a letter was written to him on behalf of A&B, again requesting that the Director proceed in 2007 with the designation of the ESPA as a ground water management area and that curtailment orders for 2008 be issued prior to September 1, 2007 to stabilize and recover the aquifer from the effects of excessive ground water withdrawals on the aquifer from which A&B relies to provide a reasonably safe supply of water for irrigation of lands within the district. Again, the Director took no formal action to proceed with curtailment orders for the designation of any part of the ESPA as a ground water management area. The Director has refused to designate the ESPA as a ground water management area on the basis that he can accomplish the same goals by administering ground water rights within "water districts." It is for this reason that A&B has filed a Petition before this Court for a peremptory writ of mandate, and requested that an alternate writ of mandate be issued immediately upon the filing of the Petition.

#### **MOTION TO DISMISS**

The Petition of A&B filed herein seeks to obtain a peremptory writ of mandamus, which may be denominated a writ of mandate pursuant to Idaho Code § 7-301. Such writ may be issued by any district court, at its discretion, to any inferior tribunal or person to compel the performance of an act which the law expressly enjoins as a duty resulting from an office, trust or station. In this mandamus proceeding commenced by A&B, it seeks to compel the Director of the Department of Water Resources to discharge statutorily mandated obligations to exercise laws relative to the distribution of water in accordance with rights of prior appropriators. The

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Idaho Supreme Court in *Musser v. Higginson, supra*, clearly established that under Idaho Code § 42-602, it is the duty of the Director of the Department of Water Resources to have immediate direction and control of the distribution of water from all of the streams, rivers, lakes, ground water, and other natural water sources in this state to the canals, ditches, pumps and other facilities diverting therefrom. The court concluded that the Director's duty to distribute water pursuant to this statute is a clear legal duty, which is clear and executive. The *Musser* court also clearly noted that the fact that certain details are left to the discretion of the Director does not prevent relief by mandamus. Although the details of the performance of the duty pursuant to I.C. § 42-602 are left to the Director's discretion, the Director has the duty to distribute water. It is also significant and again noted that the *Musser* court specifically rejected the claim by the Director that his decision to distribute water in accordance with "rights of prior appropriation" as provided in § 42-106, Idaho Code, could be deferred until a decision has been made in the public interest as to whether those who are impacted by ground water development are unreasonably blocking full economic use of the resource as provided by I. C. § 42-226. The court stated:

We note that the original version of what is now I.C. § 42-226 was enacted in 1951, 1951 Idaho Sess. Laws, ch. 200, § 1, p.423. Both the original version and the current statute make it clear that this statute does not affect rights to the use of groundwater acquired before the enactment of this statute. Therefore, we fail to see how I.C. § 42-226 in any way affects the Director's duty to distribute water to the Mussers, whose priority date is April 1, 1892.

871 P.2d at p. 813.

Allegations in the Petition of A&B in this case have not been disputed. The Director's duty to distribute water has been clearly established. The fact that A&B has no plain, adequate, and speedy remedy in the ordinary course of law because of the ongoing nature of the

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harm and difficulty in determining the damages it would incur due to the Director's refusal to comply with I. C. § 42-602, has been clearly set forth in A&B's verified Petition and the Affidavit of Dan Temple dated August 27, 2007, filed in support of the Petition and has not been disputed.

The Director and the IDWR, respondents herein, have filed a Motion to Dismiss A&B's Petition for Peremptory Writ of Mandate for the alleged failure by A&B to state a claim upon which relief can be grounded pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure. The grounds for the Motion are:

1. The petitioner is not entitled to extraordinary writ relief because an adequate remedy at law exists.
2. The respondents are acting in response to petitioner's water delivery call in accordance with law.

Neither of the grounds alleged to be a basis for dismissal support the Motion to Dismiss. A&B has set forth in its verified Motion to Proceed facts that clearly establish that it has no adequate remedy at law in regard to its delivery call and the refusal of the Director to deliver water under its senior water right. Costs exceeding one-half million dollars per year have been incurred for numerous years to mitigate the injury caused by the lack of water administration in the ESPA, and unknown costs will continue in the future, which costs cannot be accurately predicted, that the refusal to deliver water pursuant to the water right of A&B will seriously affect the economic use and cultivation of farm land within A&B, thus affecting the entire community, which injuries and damages cannot be accurately forecast. Failure to address and enforce the water rights of A&B which are senior to junior diverters will result in chaos in

the future administration of water rights under the prior appropriation doctrine. A&B has also shown that it would not be economically feasible to obtain any additional alternative water supply for the irrigation of lands to which its ground water rights are appurtenant, and in the absence of meaningful management, including curtailment of junior diversions, the injuries that will occur in the future will increase in even greater amounts than are now being experienced. As was pointed out by the facts in the *Musser* decision, *supra*, the Director owes A&B a “clear legal duty to distribute water under the prior appropriation doctrine” and the Director’s refusal to honor A&B’s demand is “arbitrary and capricious” and that A&B has no “adequate, plain or speedy remedy at law.” The lack of an adequate remedy at law is further supported by *Musser* to the extent the Director is immune from a claim for damages under the Tort Claims Act adopted by the State of Idaho. (See Idaho Code § 6-904) The respondents have submitted no argument in their brief in support of a Motion to Dismiss on the grounds that A&B had an adequate remedy at law.

The second basis in support of respondents’ Motion to Dismiss is that the respondents are acting in response to petitioner’s water delivery call in accordance with the law. The argument and facts submitted by the respondent David R. Tuthill, Jr., Director of IDWR in his affidavit, and their brief, do not support their claims. The undisputable fact is that the Director has not made any effort since the stay on A&B’s original Petition for the delivery of ground water, to deliver ground water according to the priority of A&B’s ground water right.

The respondents support their Motion to Dismiss by misrepresenting the relief sought by A&B in its original Petition for water delivery, its Motion to Proceed, and its Petition for a Peremptory Writ of Mandate.

## RESPONDENTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

Respondents, in an effort to avoid the legal duty of the Director to delivery water by curtailing junior ground water right in the ESPA, proceed to misstate the facts and issues involved in A&B's Petition for a Peremptory Writ of Mandate. Respondents misstate the facts at their earliest opportunity, in the introduction found at page 2. They state that A&B's original Petition for Delivery Call was "stayed by stipulation of the parties and order. . . " (Emphasis added) No stipulation was ever entered into by the parties. The Pre-Hearing Conference Order of May 1, 1995 clearly points out that the then Director considered an "outline of the proposed stipulation" throughout the Order. Respondents then argue on the same page that a writ of mandate is without merit because the Director and Department had and continue to take all actions required by the May, 1995 Order and Motion to Proceed. The Pre-Hearing Conference Order of May 1, 1995 was an "interim" or "interlocutory" order, as clearly identified in the Order, and provided certain goals to be accomplished by IDWR so far as possible using available departmental resources. All of these goals were either fact gathering, reductions in future new diversions, limiting the use of supplemental water right diversions, and curtailing future ground water appropriations through December 31, 1997. In fact, the interim or interlocutory order was designed to provide the necessary pertinent information recognized to be needed to deliver water by the Idaho Supreme Court in American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources, 143 Idaho 862, 154 P.3d 433 (Idaho 2007). In addressing this issue, the court, at P.3d 446:

Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water. While there must be a timely response to a delivery call, neither the Constitution nor the statutes

place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water right to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

The Court further stated at 154 P.2d 449:

While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the 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, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The rules do not give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A&B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579.

It is the delivery of water to A&B that has been requested and then denied. It is also clear that the factors for determining material injury have been met as provided by Rule 42 of the Rules for Conjunctive Management of Surface and Ground Water Resources. 37.03.11.042 The first factor is the amount of water available in the source from which the water right is diverted. In this case, as it is in any diversion of ground water, the ground water table is significant and A&B is entitled to have that ground water table preserved. It is clear from the affidavit of Dan Temple and the verified Motion to Proceed that the amount of water that should be available has not been preserved by the Director. The second factor is the effort or expense of the holder of the water right to divert from the source. This has also been clearly pointed out in BRIEF IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

the undisputed documents submitted by A&B, which show the effort and expense that has been incurred by A&B to divert water from the ESPA, even though water tables have dropped so far in some areas that it was impossible to divert water from the source. The third factor is whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available. This has been established by the Department's own model run entitled The Sources of Drawdown at A&B, "A&B Scenario." (See Affidavit of Charles E. Brockway, Sr. submitted in opposition to Motion to Dismiss) The fourth factor is clearly met, as the rate of diversion is significantly less than the authorized diversion per acre as provided by Idaho Code § 42-202(6) which establishes a reasonable rate of diversion of one inch per acre. One inch per acre for the 62,604.3 acres would be 1,252 cubic feet per second, as compared to the 1100 cubic feet per second authorized to be diverted under the water right. The fifth factor has been established, in showing that the amount of water being diverted, as a result of receding ground water tables caused by junior ground water pumping, is substantially less than the amount authorized under A&B's water rights. (Down to a diversion of 970 cfs) The sixth factor, being the existence of water measuring and recording devices, has been established by the respondents themselves, who recognize that because of the existence of these structures within A&B, they were exempted from belonging to a water measurement district. The seventh factor has also been met by showing that A&B is employing reasonable diversion and conveyance efficiency and conservation practices and has used every available means to increase its rates of diversion, at its own expense, which is contrary to the law as in such case provided. (See *Wallentine, infra*) The remaining factor under Rule 42 is not applicable to the requirements of a senior-priority ground water right.

The Conjunctive Management Rules provide that upon a determination of material injury, responses to calls for water delivery must follow the provisions of Rule 40 of the Conjunctive Management Surface and Ground Water Resources Rules. Rule 40 requires the Watermaster of the water district to

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 within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) to lessen the economic impact of immediate and complete curtailment.

This rule does not allow the Director to wait a full year before he even considers whether or not he should provide delivery of water by curtailment. Respondents on pages 3 and 4 of their brief, under the analysis portion recognized that it was a "proposed stipulation" that was approved, in part, by the Director while respondents fail to note that IDWR retained jurisdiction for the purpose of continued review of the impact of the use of ground water on other uses of the resource and the determination and designation of the ESPA as a ground water management area. These matters were the tools that could and should have been used to provide ground water management and delivery. The Director and the Department have continued to refuse to deliver water, notwithstanding the availability of such information and resources necessary to order curtailment of junior water right diversions. Again, on page 4 of respondents' brief, they contradict their own analysis by recognizing that A&B, in its Motion to Proceed, requested the delivery of ground water, without delay, in such a manner as to provide ground water to A&B under its ground water rights that are being materially interfered with and materially injured by junior ground water appropriators. Respondents also admit on page 4 of their brief that they

received the June 15, 2007 letter from counsel for A&B, expressing its concern that the Director had taken no action in regard to A&B's Motion to Proceed. They also admit that at a meeting on July 26, 2007, the Director informed members of the Board of Directors of A&B and its manager that the Department did not anticipate curtailing junior priority ground water rights in response to the delivery call in 2007, and that it intended to respond to the delivery call by scheduling a hearing in early 2008.

Respondents on page 7 of their brief again attempt to misdirect the Court from the real issue, which is, the delivery of ground water to the holder of a senior ground water right. Instead, they argue that they have not failed to comply with their own order. The Director then submits an affidavit with numerous attachments in his attempt to show that he or his predecessor had in fact complied with many of the provisions in the Pre-Hearing Conference Order of May 1, 1995. Whether or not the Director and Department have carried out those goals contained in the 1995 Order is immaterial. It is clear that they have not developed a plan for management of the ESPA which will provide for active enforcement of diversion and use of water pursuant to established water rights. This is the very first goal that the Department intended to meet in its May 1995 Order, and has failed to meet. A plan for management must have an active enforcement of curtailment to meet the Director's statutory duties of water delivery, and no plan without curtailment will constitute a delivery of water.

Commencing on page 8 of respondents' brief, respondents would have this Court believe that by accomplishing activities that, in many cases, are directed to be accomplished by the Legislature, they somehow should not be required to take action to actually deliver water to a senior water right holder during times of shortage. The Rules for Conjunctive Management of

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surface and ground water resources deal primarily with the conflicts between surface and ground water users. The creation of water measurement districts should have been in effect long before applications for water permits were granted with ESPA as its source. The creation of ground water management areas did not comply with the planning for the ESPA, but dealt strictly with two specific areas that were within a ground water management area for a very short period of time, and then the designation was withdrawn on the basis that water management could occur by the creation of the water districts. A&B does not deny that water districts can be a tool in administering and delivering and distributing water according to the prior appropriation doctrine. Unfortunately, they have not been used for this purpose to this date in response to A&B's call. The filing of Director's Reports was required by statute, as is the authority for the need of water districts. There is simply nothing in the Tuthill affidavit or the brief from page 8 to page 17 that gives even a hint that the Director has attempted to in any way to meet his statutory duty to distribute water from the ESPA as required by Idaho Code § 42-602, nor has the Director indicated he has adopted rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources that shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. As the Idaho Supreme Court stated in *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (Idaho 1997), in discussing the rules for Conjunctive Management of Surface and Ground Water Resources adopted by the Department: "They do not provide for an administration of interconnected surface and ground water rights in the SRBA, nor do they deal with the interrelationship of water rights within the various basins defined by the Director and the SRBA District Court, and they do not deal with the interrelationship of those basins to each other and to

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the Snake River in this SRBA proceeding. The rules adopted by the 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. *See, e.g., Musser v. Higgenson, 125 Idaho 392, 871 P.2d 809 (1994).*" A&B at 958 P.2d 568, 579.

Finally, respondents seem to argue that by setting a hearing on A&B's petition for delivery somehow constitutes a timely delivery of water to a senior appropriator. This is not consistent with the most recent Supreme Court decision involving the Conjunctive Management Rules. In *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources, supra*, as has been previously indicated, the presumption that exists under Idaho law that a senior is entitled to the delivery of his water under his decreed water right, and at 154 P.3d 444, in addressing whether or not it was the burden of the person making the call to prove material injury, stated: "The Rules simply require that a senior who is suffering injury file a delivery call with the Director and allege that the senior is suffering material injury. This is presumably to make the Director aware that such injury is occurring and gives substance to the complaint. Additionally, the Rules ask that the petitioner include all available information to support the call in order to assist the Director in his fact finding. Nowhere do the Rules state that the senior must prove material injury before the Director will make such a finding."

In regard to timeliness in responding to a delivery call, the court at 154 P.3d 445 stated:

We agree with the district court's exhaustive analysis of Idaho's Constitution Convention and the court's conclusion that the drafters intended that there be no unnecessary delays in the delivery of water

pursuant to a valid water right. Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call. There is nothing in the Rules which would prohibit that from occurring, however.

Finally, the court in *American Falls Reservoir Dist. No. 2, supra*, at 164 P.3d 448-449 stated: "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."

As the Idaho Supreme Court aptly stated in *American Falls Reservoir Dist. No. 2, supra*, the Conjunctive Management Rules adopted by the Department must incorporate and do incorporate the law of the state in regard to water administration, including the Constitution.

In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), the Idaho Supreme Court considered the effects of a well drilled for irrigation purposes in 1976 upon a well drilled for domestic purposes in 1964, and the applicability of the Ground Water Act adopted in 1951. The court noted that Idaho Code § 42-226, section 1 of the original Act, was amended in 1953, which added the provision previously discussed whereby all rights to the use of ground water in this state acquired prior to the effective date of the ground water Act are in all respects validated and confirmed. This section now provides that: "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." The court also noted that I. C. § 42-227, which was not amended in 1953, provided that "domestic wells shall not be in any way affected by this act." This exemption for domestic wells was nullified by the amendment of I.C. § 42-227 in 1978, after the Parker domestic well was in existence. The court therefore held that the 1978 amendment did not change the exemption granted to domestic wells in 1951, and therefore the reasonable pumping level provision of I.C. § 42-226 is not applicable to domestic

wells. Wallentine, the owner of the irrigation well, argued that exempting domestic wells from the reasonable pumping level provisions would allow one shallow domestic well to block the development of all irrigation wells in a given area. This argument was rejected, noting that the State Water Plan was formulated and implemented for optimum development of water resources in the public interest. The court then, under the doctrine of prior appropriation, found that Parker had a vested right to use the water for his domestic well and that right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and Parker is required to change his method or means of diversion in order to maintain his right to use the water. The court cited *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933); *Hutchins, Protection and Means as Diversion of Ground-water Supplies*, 29 Cal. L.Rev. 1, 15 (1941). The court in *Noh* concluded: "If subsequent appropriators desire to engage in such a contest [a race to the bottom of the aquifer] that financial burden must rest on them and with no injury to the prior appropriators for loss of their water." *Id.* at 657, 26 P.2d at 1114.

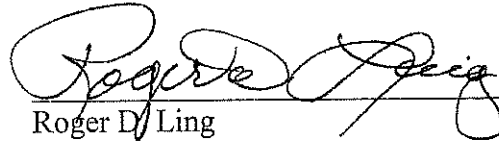
The Director, in his affidavit filed in support of his Motion to Dismiss, has not raised any legal defenses to the relief sought by A&B. A careful review of the defenses set forth in the Director's affidavit demonstrates that, as occurred in *Musser*, the Director is not distributing water to A&B pursuant to its senior groundwater rights with a priority of September 9, 1948.

### CONCLUSION

Respondents have not established in any manner that A&B has failed to state a claim upon which relief can and should be granted in the form of a peremptory writ of mandate.

Therefore, respondents' Motion to Dismiss should be denied, and A&B should be granted summary judgment on its Petition and a peremptory writ of mandate should be issued, directing the Director to proceed, without haste, in ordering curtailment of such junior appropriators as will be necessary to recover the water table in the ESPA to its 1959 water table, and that A&B recover its attorney fees and costs incurred herein, as prayed for in its Petition for Peremptory Writ of Mandate.

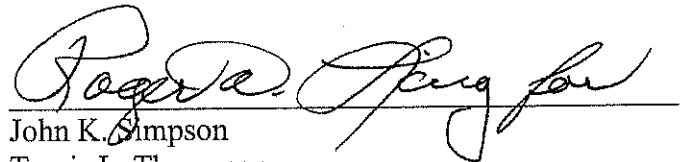
Respectfully submitted this 9th day of October, 2007.



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Roger D. Ling

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John K. Simpson

Travis L. Thompson

Paul L. Arrington

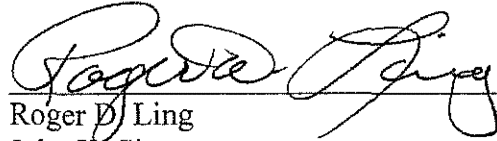
Attorneys for Petitioner A&B Irrigation District

**CERTIFICATE OF SERVICE**

I hereby certify that on the 9th day of October, 2007, I served a true and correct copy of the foregoing *Brief in Opposition to Respondents' Motion to Dismiss*, by the method indicated below, and addressed to the following:

Phil Rassier  
Idaho Department of Water Resources  
322 E. Front Street  
P. O. Box 83720  
Boise, ID 83720-0098

- U. S. Mail
- Hand Delivery
- Facsimile Transmission
- E-mail



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