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Attorneys for Petitioner A&B Irrigation District

**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, ) **SUMMONS**  
 )  
 )  
 ) vs. )  
 )  
 ) **DAVID R. TUTHILL, JR.**, in his official )  
 ) capacity as director of the Idaho Department of )  
 ) Water Resources, and **THE IDAHO** )  
 ) **DEPARTMENT OF WATER RESOURCES,** )  
 )  
 ) Respondents. )  
 )  
 )

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAME PETITIONER(S): THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

SUMMONS

TO: THE IDAHO DEPARTMENT OF WATER RESOURCES, and its attorneys.

YOU ARE HEREBY NOTIFIED that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the petitioner(s) in the Petition for Peremptory Writ of Mandate.

A copy of the Petition for Peremptory Writ of Mandate is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Petition, it must contain admissions or denials of the separate allegations of the Petition and other defenses you may claim.
3. Your signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED this 23 day of Aug, 2007.

CLERK OF THE DISTRICT COURT

By 15 Santos Garza  
Deputy Clerk

Roger D. Ling, ISB #1018  
P.O. Box 396  
Rupert, Idaho 83350  
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STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

|   |   |                           |
|---|---|---------------------------|
| <b>A&amp;B IRRIGATION DISTRICT,</b>             | ) | CASE NO. <u>CJ 07-665</u> |
|   | ) |                           |
| Petitioner,                                     | ) | <b>SUMMONS</b>            |
|   | ) |                           |
| vs.   | ) |                           |
|   | ) |                           |
| <b>DAVID R. TUTHILL, JR.,</b> 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.                                    | ) |                           |
|   | ) |                           |

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SUMMONS

TO: DAVID R. TUTHILL, JR., in his official capacity as director of the Idaho Department of Water Resources

YOU ARE HEREBY NOTIFIED that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the petitioner(s) in the Petition for Peremptory Writ of Mandate.

A copy of the Petition for Peremptory Writ of Mandate is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Petition, it must contain admissions or denials of the separate allegations of the Petition and other defenses you may claim.
3. Your signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED this 23 day of Aug, 2007.

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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,**

Petitioner,

vs.

**DAVID R. TUTHILL, JR.,** in his official  
capacity as director of the Idaho Department of  
Water Resources, and **THE IDAHO  
DEPARTMENT OF WATER RESOURCES,**

Respondents.

)  
) CASE NO. CV 03-665  
)

) **ALTERNATIVE WRIT OF**  
) **MANDATE**  
)

**TO: RESPONDENTS, DAVID R. TUTHILL, JR., DIRECTOR, and IDAHO  
DEPARTMENT OF WATER RESOURCES, AND THEIR ATTORNEYS CLIVE  
J. STRONG AND PHILLIP J. RASSIER.**

Based upon the Petitioner's Application for Alternative Writ of Mandate, the verified

Petition for Peremptory Writ of Mandate and the Affidavit of Dan Temple filed herein, and good cause appearing therefor, the Court finds that a prima facie showing has been made for the entry of an alternative writ against Respondents as requested by Petitioner. Accordingly, this Alternative Writ of Mandate is issued pursuant to Idaho Rule of Civil Procedure 74(b), as follows:

1. David R Tuthill Jr., Director of the Idaho Department of Water Resources and the Department of Water Resources, an agency of the State of Idaho, (hereafter referred to as "Respondents") are hereby Ordered and commanded to: 1) respond to A&B's water delivery call (as requested in its original petition filed July 27, 1994, its *Motion to Proceed* filed March 16, 2007, and its June 15, 2007 letter to Respondent Tuthill) and distribute water in the Eastern Snake Plain Aquifer to the wells of A&B Irrigation District for diversion by A&B Irrigation District under its senior ground water right 36-2080 for the benefit of landowners in the Irrigation District as required by Idaho Code § 42-602 *et seq.*;

2. That Respondents are further Ordered to appear before this Court in the Minidoka County Courthouse, 715 G St., Rupert, Idaho, Courtroom 2, on Tuesday September <sup>25</sup>~~24~~ 2007, at the hour of <sup>10:30</sup>~~9:45~~ a.m. to show cause, if any they have, why they have not complied with the alternative writ of mandate and why the alternative writ of mandate should not continue in force and effect until this matter is tried by the Court on the merits.

DATED THIS 25 day of August, 2007.

  
JOHN M. MELANSON (JOHN M. MELANSON)  
DISTRICT COURT JUDGE (JOHN M. MELANSON) K. BUTLER



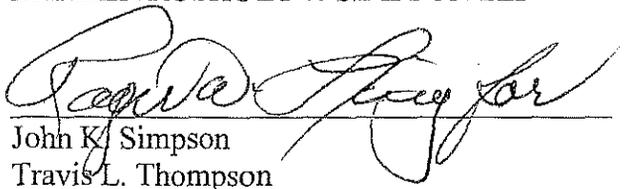
Court pursuant to 74(b) of the Idaho Rules of Civil Procedure for an Alternative Writ of Mandate, compelling the Respondents to respond to A&B's water delivery call (as requested in its original petition filed July 27, 1994, its *Motion to Proceed* filed March 16, 2007, and its June 15, 2007 letter to Respondent Tuthill) and distribute water to A&B's senior ground water right 36-2080 as required by Idaho Code § 42-602 *et seq.* and to appear before the Court at a time and place certain and show cause, if any they have, why they have not complied with the terms of the Alternative Writ of Mandate.

This Application is supported by Petitioner's *Petition for Peremptory Writ of Mandate* together with the Affidavit of Dan Temple, setting for the facts and grounds upon which the Application is based.

DATED THIS 27<sup>th</sup> day of August, 2007.

  
Roger D. Ling

BARKER ROSHOLT & SIMPSON LLP

  
John K. Simpson  
Travis L. Thompson  
Paul L. Arrington

Attorneys for A&B Irrigation District.



1. I am the Manager of the A&B Irrigation District ("A&B"), the Petitioner in the above-captioned matter. I am over the age of 18 and state the following based upon my own personal knowledge.

2. A&B is an Idaho irrigation district located within Minidoka and Jerome Counties. A&B is the beneficial owner of water right 36-2080 which entitles A&B to divert 1100 cfs of ground water from the Eastern Snake Plain Aquifer ("ESPA") through 177 wells throughout Minidoka and Jerome Counties for the irrigation of 62,604.3 acres within the irrigation district. Water right 36-2080 was decreed by the Snake River Basin Adjudication (SRBA) District Court on May 7, 2003. *See Attachment A to Petition for Peremptory Writ of Mandate.* The water right has a priority date of September 9, 1948.

3. In early 1994, A&B was not receiving, and had not been receiving, its full entitlement to water pursuant to water right 36-2080 to properly supply the irrigation needs of its landowners, all to the proximate detriment of A&B and its landowners.

4. On July 27, 1994, A&B filed a *Petition for Delivery Call* with the Idaho Department of Water Resources, (*see Attachment B to Petition for Peremptory Writ of Mandate*), seeking priority administration of its senior ground water right 36-2080.

5. A&B has made major investment in infrastructure and efficiency improvements to remain viable with the shortage caused by declining ground water levels. A&B and its landowners have invested heavily to increase efficiency and 96.5% of A&B's lands irrigated with ground water are irrigated with sprinklers and A&B has converted conveyance structures in many areas from open lateral to pipeline. A&B has been required to upgrade pump and pipe distribution systems, and has been required to increase the size of the pump motors at many

wells to provide the power needed to lift ground water from ever-deeper levels. The combined total motor upgrades for all wells is 3,845 hp.

6. A&B has also been required to endure costs from significant alteration of conveyance systems to bring water from new wells into the conveyance system and to decrease conveyance losses. During 1995 through 2006, A&B has expended approximately \$152,000 per year for well rectification efforts to divert water from the declining aquifer, and has expended in the years 2002 through 2005, approximately \$388,205 per year in drain well rectification, and reductions in operational waste to increase water supplies to meet a part of the shortages occurring as the result of declining ground water tables.

7. Since 1980, and primarily since 1994, A&B has made numerous attempts to solve the reduction in ground water irrigation supply caused by declining well yields. A&B drilled 8 new wells to replace wells that would no longer provide an adequate water supply as the result of the lower ground water tables, has deepened 47 wells, has replaced the bowls on 109 pumps in wells that are now pumping from substantially lower water levels, 137 pumps have been lowered to increase their capacity as a result of declining ground water tables, and 7 wells have been abandoned because they no longer provide adequate water. Deepening of wells with declining well yield problems (caused by falling ground water levels) has not provided an appreciable rectification of declining well yield, and since 1994 the total water supply from the A&B wells has declined to 970 cfs. Many of the wells that have been drilled deeper, some to depths of 800 feet, because of the low transmissivity and low well yields deeper in the aquifer, do not produce additional water. All of these issues cause A&B to suffer water supply shortages during peak demand periods.

8. From the annual measurement by A&B of approximately 150 of the 177 wells which divert water under water right 36-2080, it has been determined that there has been a decline since 1999 of over 12 feet in ground water levels over the district, on the average, and a decline of over 22 feet on the average since 1987. Total ground water declines within the district boundaries since the early 1960s generally range between 25 to 50 feet. The trend in ground water declines has become stronger and more pronounced which indicates that the declining ground water level problem is worsening.

9. 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 the minimum amount necessary to irrigate lands within A&B during the peak periods when irrigation water is most needed. In addition, the kilowatt/hours of electric power used to pump each acre/foot of water has been substantially increased as a result of the higher lift from a declining aquifer pumping level. It appears that annual costs of power have increased from this additional demand and use by approximately \$230,000.00 per year, at today's power rates paid by A&B.

10. On March 16, 2007 A&B filed a *Motion to Proceed* in the previously filed water delivery call case with the Idaho Department of Water Resources. See **Attachment E** to *Verified Complaint and Petition for Writ of Mandate*. On June 15, 2007 our attorney Roger D. Ling sent a letter to Director Tuthill in the same matter requesting action and a response to A&B's water delivery call. See **Attachment F** to *Petition for Peremptory Writ of Mandate*. To date, the Director and Department have refused to respond to either filing.

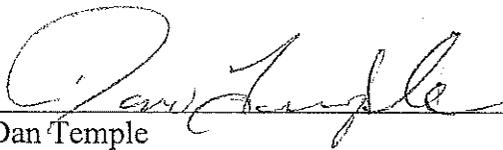
11. On July 26, 2007 Director Tuthill met with the A&B Board of Directors and

myself at the district's main office located at 414 11<sup>th</sup> St., Rupert, Idaho.

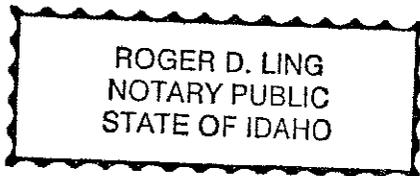
12. At that meeting Director Tuthill informed us that he would not take any action on the A&B water delivery call in 2007. Director Tuthill informed us that he would not administer any ground water rights that were junior to A&B in 2007 in response to A&B's water delivery call. The Director further informed us that he would not designate the ESPA as a groundwater management area in 2007 or send out any letters to junior priority ground water right holders prior to September 1, 2007 providing notice of potential curtailment for the 2008 irrigation season.

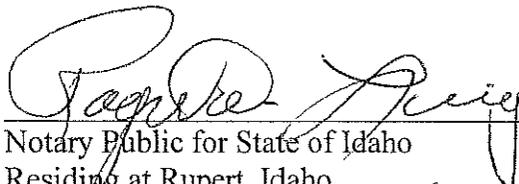
Further your affiant saith naught.

DATED this 22<sup>nd</sup> day of August 2007

  
Dan Temple

SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of August, 2007.



  
Notary Public for State of Idaho  
Residing at Rupert, Idaho.  
My Commission expires: 12/30/12

FILED-DISTRICT COURT  
CASE # \_\_\_\_\_

2007 AUG 23 AM 10:41

DUANE SMITH, CLERK  
*De* DEPUTY

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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. <u>CV-07-665</u>      |
|   | ) |                                |
| Petitioner,                                     | ) |                                |
|   | ) | <b>PETITION FOR PEREMPTORY</b> |
| vs.   | ) | <b>WRIT OF MANDATE</b>         |
|   | ) |                                |
| <b>DAVID R. TUTHILL, JR.</b> , in his official  | ) | Fee Category A: \$88.00        |
| 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 ("A&B"), by and through its attorneys of record, Roger D. Ling and Barker, Rosholt & Simpson LLP, and hereby petitions the Court to issue a writ of mandate against the Idaho Department of Water Resources ("Department") and its  
**PETITION FOR PEREMPTORY WRIT OF MANDATE**

Director, David R. Tuthill, Jr. (collectively referred to as the “Respondents”), commanding Respondents to respond to A&B’s water delivery call and to distribute water to A&B pursuant to its senior ground water right No. 36-2080 as required by the Idaho Constitution and Idaho Code § 42-602 *et seq.*

## GENERAL ALLEGATIONS

### PARTIES

1. Petitioner A&B is an irrigation district organized and existing pursuant to Idaho Code § 43-101 *et seq.*, within Minidoka and Jerome Counties.
2. Respondent, David R. Tuthill, Jr., is the Director of the Idaho Department of Water Resources and a resident of Ada County.
3. Respondent, Idaho Department of Water Resources, is the executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701, *et seq.*, with its state office located at 322 East Front Street, Boise, Ada County, Idaho.

### JURISDICTION AND VENUE

4. Jurisdiction is proper in this Court pursuant to Idaho Code §§ 1-705 and 7-301, *et seq.* (Writs of Mandate).
5. This Court, sitting in Minidoka County, is the proper venue for this matter pursuant to Idaho Code § 5-402, because the Respondents’ failure to act in response to the A&B water delivery call affects the property interests of A&B Irrigation District and its landowners within Minidoka and Jerome Counties.

### STATEMENT OF FACTS

6. A&B Irrigation District is the beneficial owner of water right No. 36-2080 which

entitles A&B to divert 1100 cfs of ground water from the Eastern Snake Plain Aquifer ("ESPA") through 177 wells and pumps throughout portions of Minidoka and Jerome Counties for the irrigation of 62,604.3 acres within the irrigation district. Water right 36-2080 was decreed by the Snake River Basin Adjudication (SRBA) District Court on May 7, 2003 (**Attachment A**). The water right has a priority date of September 9, 1948.

7. Water right 36-2080 is held in trust by the United States, for the benefit of the owners of the aforementioned 62,604.3 acres, all of whom are landowners within and are included within A&B Irrigation District.

8. In early 1994, A&B was not receiving, and had not been receiving, its full entitlement to water pursuant to water right 36-2080 to properly supply the irrigation needs of its landowners because of declining ground water levels in the ESPA, all to the proximate detriment of A&B and its landowners.

9. On July 27, 1994, A&B filed a *Petition for Delivery Call* with the Idaho Department of Water Resources, (**Attachment B**), seeking priority administration by the Director of its senior ground water right 36-2080. This Petition stated, in part, that:

6. By reason of the diversion of water by junior ground water appropriators located within the Eastern Snake Plain Aquifer, the Petitioner is suffering material injury as the result of the lowering of the ground water pumping level within the Eastern Snake Plain Aquifer by an average of twenty (20) feet since 1959, with some areas of the Aquifer lowered in excess of forty (40) feet since 1959, reducing the diversions of A&B Irrigation District to nine hundred seventy-four (974) cfs, a reduction of one hundred twenty-six (126) cfs from the diversion rate provided in the water right above referred to.

7. That the reduction in diversion rate as the result of the reduction in the ground water tables has reduced the diversions from forty (40) wells serving approximately twenty-one thousand (21,000) acres to a diversion rate which is less than is required for the proper irrigation of lands served by the

said wells.

...

9. That the Eastern Snake Plain Aquifer is an area of common ground water supply within which junior-priority ground water withdrawals must be regulated.

10. That the Eastern Snake Plain Aquifer is a ground water basin which may be approaching the conditions of a critical ground water area and the ground water supply is insufficient to meet the demands of Petitioner and other water rights within the Eastern Snake Plain Aquifer, an area of common ground water supply.

WHEREFORE, Petition prays 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, to do all things reasonably necessary and appropriate to protect the people of the State of Idaho from depletion of ground water resources which has caused material injury to Petitioner, and to designate the Eastern Snake Plain Aquifer as 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 by the Petitioner for the benefit of the lands within A&B Irrigation District.

*See Attachment B (Petition at 2-3).*

10. Following the pre-hearing conference, on May 1, 1995, the Department issued a *Pre-Hearing Conference Order* on May 1, 1995, (**Attachment C**). In accordance with a stipulation proposed by the parties involved, the Department ordered:

IT IS HEREBY ORDERED that the proposed Stipulation is adopted in part as the pre-hearing conference order of the IDWR, pursuant to Rule 513 of the IDWR's Rules of Procedure, and actions called for in the Stipulation will be accomplished in so far as possible using available departmental resources as follows:

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. Such plan will be adopted and implemented under the Administrative Procedure Act.

2. No drought-related emergency permits to divert ground water from the ESPA for limited seasons or periods of time will hereafter be issued except as provided in section 42-202A, Idaho Code.

3. IDWR will propose rules for supplemental water rights under the Administrative Procedure Act defining the term "supplemental water right," and governing the use and transfer of such rights and the relationship of use of water under such rights to the primary rights which they supplement.

4. IDWR will continue to seek to fully implement the provisions of section 42-701, Idaho Code, regarding the measurement and reporting of diversions of water statewide and particularly from the ESPA. This effort will expand as funding and staffing are made available. It will include the organization of water measurement districts as provided in title 42, chapter 7, Idaho Code, as amended by Chapter 291, 1995 Session Laws.

5. The amended moratorium order on appropriations of surface and ground water from the Eastern Snake River Plain Area entered by the Director on April 30, 1993 and subsequently approved and confirmed by the Legislature in Chapter 449, 1994 Session Laws shall remain in place at least through December 31, 1997, as provided by law.

6. IDWR retains jurisdiction of the petition for the purpose 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.

IT IS FURTHER ORDERED that action on the Petition is hereby stayed until further notice to the parties. Any party may file a Motion to Proceed at any time to request the stay be lifted.

...

IT IS FURTHER ORDERED that motions to dismiss the A&B Petition are denied.

IT IS FURTHER ORDERED that this matter shall proceed under the Rules for Conjunctive Management of Surface and Ground Water adopted October 7, 1994.

*See Attachment C (Pre-Hearing Order at 8-9).*

11. Respondents have failed to provide A&B with any information that they have

complied with the ordered actions identified above. To the best of A&B's knowledge, the Department has failed to adopt and implement a management plan to regulate and monitor the ground water resources within the ESPA. In addition, to the best of A&B's knowledge, the Department has failed to formally identify which actions it has taken to comply with the 1995 *Pre-Hearing Order*. Furthermore, no action has been taken by the Respondents to address A&B's request that the ESPA be designated as a ground water management area pursuant to Idaho Code § 42-233b.

12. Notwithstanding the proposed stipulation and *Pre-Hearing Order* entered in 1995, junior priority ground water right holders within ground water districts created pursuant to Chapter 52, Title 42, Idaho Code, and Water Districts created pursuant to Chapter 6, Title 42, Idaho Code, have been allowed to continue to deplete the water levels of the ESPA, the water supply for A&B's water right. As a result, A&B continues to suffer depletions of its ground water resources to the detriment of its senior ground water right 36-2080 and its landowners.

13. Since the issuance of the *Pre-Hearing Order* in 1995, the Department established Water Districts 100, 110, 120, 130, and 140<sup>1</sup> to administer all water rights that divert ground water from the ESPA. **Attachment D.** Interim administration of water rights within these districts was authorized by orders of the SRBA District Court. A&B is located within Water District 130 and diverts ground water from the ESPA.

14. The Department has determined that the ESPA is an area that has a common ground water supply. See IDAPA 37.03.11.050 (Conjunctive Management Rule 50).

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<sup>1</sup> The Director issued a final order creating Water District 140 on December 28, 2006. A petition for reconsideration was filed by Southwest Irrigation District on January 11, 2007. The petition is still before the Department and has yet to be resolved.

15. On March 16, 2007, A&B filed a *Motion to Proceed* with its water delivery call before the Department, (**Attachment E**). A&B requested the Respondents to lift the stay previously entered and to proceed with priority administration in the distribution of water to A&B under its senior water right 36-2080.

16. As set forth in the *Motion to Proceed*, A&B and its landowners continue to suffer injury as a result of A&B being denied a full supply of water during times of shortage under its senior ground water right by reason of out-of-priority diversions by junior ground water rights:

... Evidence of a shortage and resulting injury includes:

a. A&B has made major investment in infrastructure and efficiency improvements to remain viable with the shortage caused by declining ground water levels. A&B and its landowners have invested heavily to increase efficiency and 96.5% of A&B's lands irrigated with ground water are irrigated with sprinklers and A&B has converted conveyance structures in many areas from open lateral to pipeline. A&B has been required to upgrade pump and pipe distribution systems, and has been required to increase the size of the pump motors at many wells to provide the power needed to lift ground water from ever-deeper levels. The combined total motor upgrades for all wells is 3,845 hp. A&B has also been required to endure costs from significant alteration of conveyance systems to bring water from new wells into the conveyance system and to decrease conveyance losses. During 1995 through 2006, A&B has expended approximately \$152,000 per year for well rectification efforts to divert water from the declining aquifer, and has expended in the years 2002 through 2005, approximately \$388,205 per year in drain well rectification, and reductions in operational waste to increase water supplies to meet a part of the shortages occurring as the result of declining ground water tables. Since 1980, and primarily since 1994, A&B has made numerous attempts to solve the reduction in ground water irrigation supply caused by declining well yields. A&B drilled 8 new wells to replace wells that would no longer provide an adequate water supply as the result of the lower ground water tables, has deepened 47 wells, has replaced the bowls on 109 pumps in wells that are now pumping from substantially lower water levels, 137 pumps have been lowered to increase their capacity as a result of declining ground water tables, and 7 wells have been abandoned because they no longer provide adequate water.

Deepening of wells with declining well yield problems (caused by falling ground water levels) has not provided an appreciable rectification of declining well yield, and since 1994 the total water supply from the A&B wells has declined to 970 cfs. Many of the wells that have been drilled deeper, some to depths of 800 feet, because of the low transmissivity and low well yields deeper in the aquifer, do not produce additional water. All of these issues cause A&B to suffer water supply shortages during peak demand periods.

b. From the annual measurement by A&B of approximately 150 of the 177 wells which divert water under Water Right No. 36-02080, it has been determined that there has been a decline since 1999 of over 12 feet in ground water levels over the district, on the average, and a decline of over 22 feet on the average since 1987. Total ground water declines within the district boundaries since the early 1960s generally range between 25 to 50 feet. The trend in ground water declines has become stronger and more pronounced which indicates that the declining ground water level problem is worsening.

...

d. ... 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 the minimum amount necessary to irrigate lands within A&B during the peak periods when irrigation water is most needed. A&B was able to deliver at least 0.75 of a miner's inch prior to the major impacts caused by junior ground water pumping. Ground water pumping records show that during the mid 1960s A&B was able to pump about 225,000 acre-feet per year. During the last decade, A&B ground water pumping has dropped to as low as 150,000 acre-feet per year ...

f. The IDWR, by use of the Eastern Snake River Plain aquifer model that has been developed, can provide technical information that will be useful to the Director in meeting his obligation to delivery water to senior appropriators. One scenario entitled "Sources of Drawdown Beneath the A&B Irrigation District" and the analysis therein indicates that up to 84% of the ground water declines experienced at A&B are due to the effects of ground water pumping from others. Other scenarios using the ground water model, such as the "Curtaiment Scenario" show that curtailment of junior ground water diversions is an effective management strategy to reduce the declining ground water levels in the aquifer.

...

h. A&B has no other source or supply of water to replace its lost ground water supply needed to irrigate Unit B land. Even if surface water was available, it would not be economically feasible to deliver such water to the lands now being irrigated with ground water within A&B. To the extent conversion to surface water has been possible, it has been done, being required because of the lack of ground water supplies at any depth to irrigate these lands.

*See Attachment E (Motion to Proceed at 5-10).*

17. In addition, the *Motion to Proceed* sets forth the history of A&B's repeated efforts to have the Respondent Director of Respondent Department designate the ESPA as a ground water management area pursuant to Idaho Code § 42-233b:

6. On or about May 1, 1962, A&B submitted to IDWR its resolution of that date, requesting IDWR, then known as the Idaho Department of Reclamation, to make a comprehensive study of the Snake River plains ground water area north of the Snake River as early as possible, in anticipation of the need for the issuance of a Critical Ground Water Area order as the result of the average decline in 15 observation wells within the A&B Project of 1.3 feet per year and, since 1960, detailed records have established that 7 production wells have shown a decline of approximately 2-feet per year.

7. Approximately 13 years have expired since the filing by A&B of its Petition for Delivery of Ground Water [on July 27, 1994], and no management plan has been adopted by the Director for managing the ESPA, and although two ground water management areas were designated in 2001 within the ESPA and later dissolved, no ground water management area has been designated as provided by § 42-233b, Idaho Code, adopted by the Idaho Legislature in 1982, for the entire ESPA. 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.

*See Attachment E at 4-5.*

18. As of the date of the filing of this complaint, the Respondents have failed to formally respond to A&B's *Motion to Proceed*. A&B filed its motion over five months ago on March 16, 2007.

19. On June 15, 2007, counsel for A&B sent a letter to Respondent Tuthill regarding the A&B water delivery call and addressing the Respondents' failure to act on the March 16, 2007 *Motion to Proceed*. **Attachment F**. This letter notified Respondent Tuthill that "A&B Irrigation District expects you, as Director, to proceed in 2007 with the designation of the ESPA as a ground water management area and that curtailment order 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 Irrigation District relies to provide a reasonably safe supply of water for irrigation of its lands." **Attachment F**.

20. Respondents have failed to formally respond to Mr. Ling's June 15, 2007 letter to Respondent Tuthill.

21. On July 26, 2007, Respondent Tuthill met with the Board of Directors and Manager of the A&B Irrigation District at the district's main office in Rupert, Idaho. *See Affidavit of Dan Temple* at 4, ¶ 11. Respondent Tuthill informed the A&B Board and Mr. Temple that the Department would not take any action on the A&B water deliver call in 2007. *See id* at 4, ¶ 12. Respondent Tuthill further informed the A&B Board and Mr. Temple that he would not administer any junior priority ground water rights in 2007 and that he would not designate the ESPA as a ground water management area. *See id*.

22. Pursuant to Idaho Code § 42-602, *et seq.*, it is the duty of Respondent Tuthill, as Director of the Department, to direct and control the distribution of water from all natural water sources within water districts according to the prior appropriation doctrine. Pursuant to Idaho Code § 42-607, it is the Respondents' duty through the respective watermasters to distribute waters within the various Water Districts according to the prior rights of water users within the

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district so that in times of scarcity of water, the diversion facilities for junior ground waters are shut off or otherwise controlled as necessary to supply water for the prior rights of senior water right holders, including water right 36-2080 of A&B.

23. The orders creating Water Districts 100, 110, 120, 130, and 140 require the watermasters to perform the following duties “in accordance with the guidelines, direction, and supervision provided by the Director: . . .

d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director.”

*See Attachment D.*

24. Rule 40 of the Department’s conjunctive management rules (“Rules”) (IDAPA 37.03.11.040) provides a framework for and the legal obligations of the watermasters’ and Director’s response to calls for priority administration by senior ground water users in water districts in areas with a common ground water supply.

25. Respondents’ failure to respond to A&B’s March 16, 2007 *Motion to Proceed* and the June 15, 2007 letter, has provided “no guidelines, direction, and supervision” to the watermasters in Water Districts 100, 110, 120, 130, and 140. Respondents have unlawfully prevented any administration of junior priority ground water rights within these water districts for the 2007 irrigation season. Respondents have failed to perform their statutory duties to administer the distribution of water within Water Districts 100, 110, 120, 130, and 140 according to the prior appropriation doctrine so as to shut off or control the diversion of junior ground water rights to supply A&B’s senior ground water right 36-2080.

26. Idaho Code § 42-231 provides that:

It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

27. Idaho Code § 42-237a further empowers the Director of the Department to monitor and administer ground water resources in Idaho.

**COUNT ONE (WRIT OF MANDATE)**

28. A&B repeats and realleges the allegations set forth in paragraphs 1-27 of its *Petition for Peremptory Writ of Mandate*.

29. As a direct and proximate result of Respondents' failure and refusal to administer water rights according to Respondents' statutory duties to supply water to A&B under its water right which has a senior priority during times of water scarcity, A&B and its landowners have and will continue to suffer irreparable damage, in that the district is unable to divert and deliver an adequate supply of water to its landowners to allow them to properly irrigate their lands within the district when a full supply is required, causing irreparable damage to their growing crops. As a direct and proximate result of the refusal of Defendants to fulfill their statutory duties and responsibilities pursuant to Idaho Code §§ 42-602, *et seq.*, 42-231 and 42-237a, and Rule 40 of the Department's conjunctive management rules, A&B will continue to be irreparably damaged, and has no plain, adequate or speedy remedy at law.

30. As a direct and proximate result of Respondents' failure and refusal to respond to A&B's March 16, 2007 *Motion to Proceed* and its June 11, 2007 letter, A&B and its landowners have and will continue to suffer irreparable damage, in that the district is unable to divert and deliver an adequate supply of water to its landowners to allow them to properly irrigate their

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lands within the district when a full supply is required, causing irreparable damage to their growing crops. As a direct and proximate result of Respondent's failure and refusal to respond to A&B's March 16, 2007 *Motion to Proceed* and June 15, 2007 letter, A&B continues to be irreparably damaged, and has no plain, adequate or speedy remedy at law. Respondents' failure to respond and fulfill its statutory duties is clearly erroneous as a matter of law.

31. Respondents' failure and continued refusal to perform their statutory duties of controlling the distribution of water within Water Districts 100, 110, 120, 130, and 140 and their failure to distribute water according to the prior rights of senior water users within those districts so that, in times of scarcity of water, junior water right holders and their diversion facilities are shut off or controlled as is necessary to supply water under the prior water right of A&B, is depriving A&B and its landowners of the use and enjoyment <sup>of</sup> their property and is causing A&B and its landowners irreparable harm, which damage can only be remedied by an order of this Court compelling Respondents to perform their statutory duties thereby enabling A&B to use and enjoy its senior water rights to which it is entitled pursuant to water right 36-2080.

32. A&B is being unlawfully precluded from using and enjoying its property to the full extent allowed by its senior water right by the action of Respondents in failing to respond to the March 16, 2007 *Motion to Proceed* and June 15, 2007 letter. In light of Respondents' failure and refusal to respond, A&B does not have a plain, speedy or adequate remedy in the ordinary course of law. Respondents' actions violate A&B's constitutional rights to use its water and are contrary to the public policies of this state.

33. A&B is entitled to issuance of a peremptory writ of mandate pursuant to Idaho Code § 7-302 mandating the Respondents to perform their duties under Idaho Code § 42-602 *et* PETITION FOR PEREMPTORY WRIT OF MANDATE

*seq.* to distribute waters within Water Districts 100, 110, 120, 130, and 140 to supply A&B's prior right.

### REQUEST FOR ATTORNEYS FEES

34. As a further direct and proximate result of the Respondents' refusal and continued refusal to respond to the March 16, 2007 *Motion to Proceed* and June 15, 2007, letter, and the Respondents' continued refusal to perform their statutory duties and their failure to distribute water during times of scarcity to senior water rights holders, A&B has been required to employ the services of Roger Ling, attorney at law, and the law firm Barker Rosholt & Simpson LLP, and have also incurred various costs and will continue to incur various court costs and attorney fees. Therefore, under Idaho law, including but not limited to, Idaho Code §§ 12-117 and 12-121, the Respondents should be required to pay to A&B its reasonable costs and attorney fees.

WHEREFORE, A&B prays for the issuance of the following:

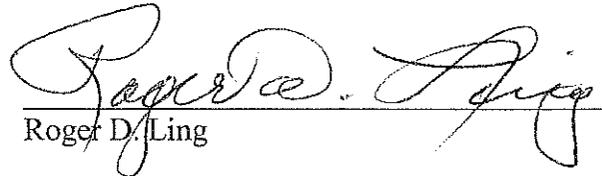
1. An Alternative Writ of Mandamus upon the filing of this Verified Petition and Affidavit, commanding the Respondents to respond to A&B's water delivery call (as requested in its original petition filed July 27, 1994, its *Motion to Proceed* filed March 16, 2007, and its June 15, 2007 letter to Respondent Tuthill) and to distribute water from the ESPA to the wells of A&B for diversion under A&B's senior ground water right 36-2080 as required by Idaho Code § 42-602 *et seq.*, or appear before the Court on Tuesday September 11, 2007, at 9:45 a.m. at the Minidoka County Courthouse, District Courtroom 2, located at 715 G Street, Rupert, Idaho and show cause why they have not elected to comply with the Alternative Writ;

2. A Peremptory Writ of Mandamus, after a trial on the merits, by which the Respondents are commanded to respond to A&B's water delivery call (as requested in its  
PETITION FOR PEREMPTORY WRIT OF MANDATE

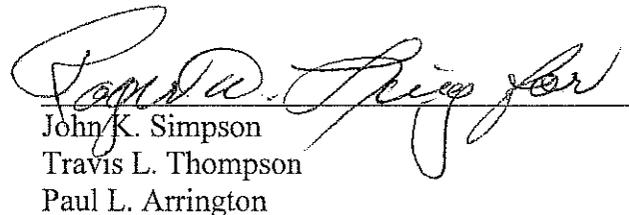
original petition filed July 27, 1994, its *Motion to Proceed* filed March 16, 2007, and its June 15, 2007 letter to Respondent Tuthill) and to distribute water in the ESPA to the wells of A&B for diversion from the ESPA in priority by A&B under its senior ground water right 36-2080 as required by Idaho Code § 42-602 *et seq.*;

3. For an order awarding A&B its reasonable costs and attorney fees; and
5. For such other and further relief as the Court deems just and equitable.

DATED THIS 3<sup>rd</sup> day of August, 2007.

  
\_\_\_\_\_  
Roger D. Ling

BARKER ROSHOLT & SIMPSON LLP

  
\_\_\_\_\_  
John K. Simpson  
Travis L. Thompson  
Paul L. Arrington

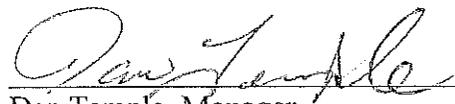
Attorneys for Petitioner A&B Irrigation District

VERIFICATION

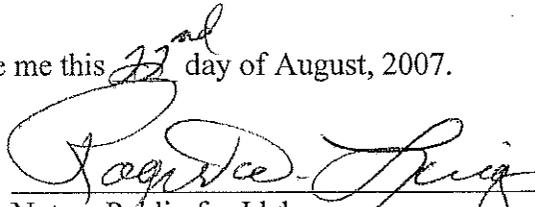
STATE OF IDAHO )  
 ) ss.  
County of Minidoka )

Dan Temple, Manager of A&B Irrigation District, being first duly sworn on his oath, deposes and states:

That he is the Manager of A&B Irrigation District, petitioner in the above-entitled matter, that he has read the above and foregoing *Petition for Peremptory Writ of Mandate*, knows the contents thereof, and the facts stated he believes to be true.

  
\_\_\_\_\_  
Dan Temple, Manager  
A&B Irrigation District

SUBSCRIBED & SWORN to before me this 22<sup>nd</sup> day of August, 2007.

  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: Rupert, Idaho  
My Commission expires: 10/30/12

