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. **THE IDAHO DEPARTMENT OF WATER RESOURCES** and **GARY SPACKMAN** in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents. _____ 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 _____	**CASE NO. CV-2009-647**

PETITIONER A&B IRRIGATION DISTRICT'S OPENING BRIEF

On Appeal from the Idaho Department of Water Resources

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for A&B Irrigation District

Phillip J. Rassier
Chris M. Bromley
Deputy Attorney Generals
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700

Attorneys for Respondents Idaho Department of Water Resources and Interim Director Gary Spackman

(See Service Page for Remaining Counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

CONSTITUTIONAL & STATUTORY MATERIAL

RULES & REGULATIONS

STATEMENT OF THE CASE

This is an appeal of the Director of the Idaho Department of Water Resources' ("Department" or "IDWR") *Final Order Regarding the A&B Irrigation District Delivery Call* ("*Final Order*"), dated June 30, 2009. The case began over 15 years ago when the A&B Irrigation District ("A&B" or "District") filed a delivery call to prevent injury to its senior water right 36-2080, with a priority date of September 9, 1948. After witnessing continued declines in aquifer levels and water supplies for its landowners, A&B administration of junior priority rights and the designate the Eastern Snake Plain Aquifer ("ESPA") as a Ground Water Management Area ("GWMA"). After a stipulation was filed, the matter was stayed until 2007, when A&B filed a motion to proceed.

Reluctant to address aquifer declines or injury to A&B's water right, the Director refused to take action on A&B's call until ordered to by District Judge John K. Butler on October 23, 2007. The Director denied A&B's call by order on January 29, 2008, and a contested case followed with former Chief Justice Gerald F. Schroeder presiding as the Hearing Officer. Initially, A&B filed a motion for declaratory ruling challenging the applicability of Idaho's Ground Water Act, (Idaho Code §§42-226 *et seq.)* ("GWA"), to its senior priority right. The Hearing Officer ruled that A&B's pre-1951 ground water right was subject to the GWA and the case proceeded to a hearing in December 2008.

A&B presented evidence of continued ground water declines and injury to its senior water right including declining water deliveries to its landowners, spending millions of dollars in improving and replacing pumps and wells across the project, and even abandoning wells that could not supply adequate water. Despite this evidence in the record, the Director affirmed his "no-injury" decision and refused to take any measures to protect the ESPA.

The Director's *Final Order* violates Idaho's Constitution, the plain terms of the GWA, and the Department's own *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CMR" or "Rules") (IDAPA 37.03.11 *et seq.*).

For example, the Director misinterpreted the law by finding that A&B's senior ground water right is subject to the "reasonable pumping level" provisions of Idaho's Ground Water Act. Contrary to the plain language of the statute, the Director retroactively applied the GWA and wrongly concluded that A&B was not entitled to protection of its historic pumping levels.

The Director also erred in misapplying the proper presumptions and burdens of proof relative to A&B's decreed water right. Although water right 36-2080 was decreed by the Snake River Basin Adjudication ("SRBA") District Court on May 7, 2003 for 1,100 cfs (or 0.88 miner's inches per acre), the Director unconstitutionally reduced this rate of diversion to 0.75 miner's inches per acre. In addition, the Director wrongly created and applied a "failure of the project" and a "minimum amount needed" for crop maturity standard to find no-injury to A&B's senior right.

The Director further erred in concluding A&B had not exceeded a "reasonable pumping level" even though the evidence in the record did not disclose an objective standard by which to judge this conclusion. This decision prevents meaningful judicial review since there is no "reasonable pumping level" to evaluate. The record shows that A&B has abandoned some wells because of a lack of water even after drilling to depths exceeding 700 feet. Hence, regardless of the pumping level there is no water available in some of A&B's wells.

This coupled with his decision not to designate the ESPA as a GWMA pursuant to Idaho Code § 42-233b, is a violation of Idaho Code § 42-231 requiring the Director to "do all things

reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources" in the ESPA.

Finally, the Director erred in making conclusions in his *Final Order* that were not supported by "reasoned statements" as required by Idaho's APA. The Director denied A&B the relief requested in taking exceptions to the Hearing Officer's *Recommended Order*, yet he provided no detailed statements as to why the relief was being denied.

In summary, the Director's *Final Order* is not supported by Idaho law and should be set aside. Absent meaningful judicial review, A&B and other water right holders in the ESPA will be forced to engage in a "race to the bottom" of the aquifer, a result prohibited by Idaho law.

ISSUES PRESENTED ON APPEAL

A&B presents the following issues on appeal:

A. The Director erred in concluding that water right 36-2080, with a priority date of September 9, 1948, is subject to the provisions of the 1951 Idaho Ground Water Act (Idaho Code §§ 42-226 *et seq.*), even though the GWA provides that "This act ***shall not effect*** the rights to the use of ground water in this state ***acquired before its enactment***".

B. The Director unconstitutionally applied the CMR when he disregarded the proper presumptions and burdens to apply for A&B's decreed senior water right for purposes of administration by (i) reducing A&B's diversion rate per acre from 0.88 to 0.75 miner's inches per acre; (ii) creating a new "failure of the project" standard for injury; and (iii) using a "minimum amount needed" for crop maturity standard.

C. The Director erred in failing to analyze A&B's 177 individual points of diversion for purposes of an injury analysis to A&B's senior water right.

D. The Director erred and unconstitutionally applied the CMR by finding that A&B must interconnect individual wells or well systems across the project before a delivery call can be filed even though water right 36-2080 was developed, licensed and decreed with as many as 130 individual well systems.

E. The Director erred in finding that A&B has not been required to pump water beyond a "reasonable ground water pumping level" even though (i) the Director provided no factual support for this conclusion, (ii) the evidence demonstrates that A&B has been forced to drill wells deeper and even abandon wells as water supplies become more and more depleted; and (iii) no such level has never been determined as required by Idaho Code § 42-226.

F. The Director erred in failing to designate all or a portion of the ESPA as a Ground Water Management Area pursuant to Idaho Code § 42-233b.

G. The Director violated Idaho Code § 42-231 by failing to protect the ESPA, set a reasonable pumping level or designate a GWMA.

H. The Director erred by failing to issue a final order in compliance with Idaho Code § 67-5248.

STATEMENT OF FACTS

I. The A&B Irrigation Project and its Senior Ground Water Right 36-2080

The North Side Pumping Division of the Minidoka Project was initiated, designed, and constructed by the United States Bureau of Reclamation ("BOR") to develop irrigable land in Jerome and Minidoka Counties in the early 1950s and 60s. R. 1111. BOR completed the project in 1963.[1] *See* Ex. 200 at 2-2 to 2-3. The project consists of two units, Unit A that serves approximately 15,000 acres with surface water from the Snake River, and Unit B that serves

[1] For a detailed history the A&B irrigation project see Ex. 200 at 2-1 to 2-9.

approximately 66,000 acres with ground water from the ESPA.[2] R. 1111-12. BOR transferred operation and maintenance of the project to the A&B Irrigation District in 1966. R. 3080.

A&B Irrigation District is the beneficial owner of water right 36-2080,[3] which authorizes the diversion of 1,100 cfs from 177 separate points of diversion, or wells, with a priority date of September 9, 1948. R. 3081. The SRBA Court decreed water right 36-2080 on May 7, 2003. Ex. 139.

A&B's Unit B groundwater project is not a single distribution system like a typical irrigation project. A&B diverts groundwater from individual wells which comprise over 130 separate "well systems". Tr. Vol. III, p. 467, lns. 3-7, pp. 473-74; p. 475, lns. 2-9. A "well system" consists of one or more wells that provide water to a distribution system serving a certain number of acres to one or more landowners. *Id.* p. 474-75; *see* Ex. 200 at 4-32 (a table of A&B's separate well systems and the acreage served by each system). Therefore, water pumped at an individual well is delivered to specific acres.[4]

A&B measures water at each well and delivers it upon demand to its landowners. Tr. Vol. III, pp. 469-70, 514. A&B compiles annual reports each year to detail a well's performance and the total acre-feet pumped and delivered. Ex. 133 (Example Report: 2007 found at A&B 2782-98).[5] A&B strives to deliver the decreed rate of diversion under its senior water right 36-2080 (0.88 miner's inch per acre). *Id.* p. 541. Once the demand on a particular well exceeds the water supply, such as during the peak of the irrigation season when water is needed most, the

---

[2] A&B's decreed water right 36-2080 provides water to 62,604.3 acres. R. 1112. A&B also appropriated other beneficial use and enlargement water rights to irrigate an additional 4,000 acres on Unit B. *Id.* This case only concerns A&B's senior ground water right 36-2080 on Unit B.

[3] Water right 36-2080 is held in trust by the United States, for the benefit of A&B's landowners. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106 (2007).

[4] Not all wells on a "well system" can provide water to each acre served by that system. Tr. Vol. III, p. 475, lns. 10-16, p. 477 ln. 22 – p. 478, ln. 4 (emphasis added) (*see also* pp. 476-77, an explanation of an "interconnected" system provided at Ex. 238).

[5] The Annual Pump Reports found at Exhibit 133 were bate-stamped for IDWR's record as "A&B ___".

District goes on "allotment" and each landowner receives a prorated rate of delivery per acre based upon the original acres under water right 36-2080. *Id.* 518-21.

A&B improved its delivery system over time by piping laterals, eliminating drain wells, and directly hooking up wells to landowners' irrigation systems. Ex. 200 at 2-6; Tr. Vol. III, p. 489. A&B maintains the canals, pumps, and motors on its individual well systems on an annual basis and has instituted a "rectification" program for wells that lose water production. Tr. Vol. III, pp. 490-92, 550-58. As part of its "rectification" program, A&B deepens wells, rebuilds pumps, replaces pump bowls, and adds horsepower. *Id.* at 556-58. A&B has also been forced to drill new wells, or add new points of diversion, as part of this program. *Id.* at 559.

II. A Depleting Ground Water Supply and the Delivery Call

Between the time the A&B project was completed in the early 1960s and 1995, IDWR issued over 30,000 new ground water rights in the ESPA. Ex. 200 at 5-17 (Figure 5-2). In early 1994, A&B was witnessing significant ground water declines and its landowners had not been receiving a full irrigation supply under its senior water right 36-2080. R. 12-14**.** Pumping levels dropped by as much as 46.4 feet, R. 3087, leaving A&B's landowners unable to beneficially use over 10% of its authorized diversion rate (1,100 cfs minus 126 cfs shortage), R. 13. Depletions rendered some wells useless and they were abandoned. R. 835; R. 3090.

Given the depleted water supply and the drop in aquifer levels, A&B filed a *Petition for Delivery Call* on July 27, 1994, seeking the administration of junior priority ground water rights that were interfering with A&B's senior right. R. 12-14. A&B also asked the Director to designate the ESPA as a GWMA pursuant to Idaho Code § 42-233b. *Id.*

Shortly after the *Petition* was filed, the parties to the proceeding stipulated to hold the contested case "in abeyance for a time." R. 670. Pursuant to the terms of the stipulation, IDWR

was obligated to "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." R. 676. The Director entered an order which incorporated the terms of the stipulation, and the matter was thus stayed. R. 669-77 (the "*Stay Order*").

Notwithstanding the stipulation and *Stay Order*, IDWR failed to make any effort to "develop a plan for management of the ESPA." Instead, junior priority ground water right holders continued to deplete the ESPA and aquifer levels continued to drop after 1995.[6] Specifically, ground water levels within A&B dropped another 12 feet on average from 1999 to 2006, which followed an average 22 feet decline from 1987, and a 25 to 50 foot average decline since the 1960s. R. 836. This continued decline in aquifer levels at A&B followed a similar trend in water levels throughout the ESPA. Ex. 200 at 5-23 to 5-31.

Faced with continued aquifer level declines and the resulting inability to divert and beneficially use its water right, coupled with a refusal by IDWR to take the actions required by the 1995 *Stay Order*, A&B filed a *Motion to Proceed* on March 16, 2007. R. 830**.** A&B requested IDWR to lift the stay and proceed with administration to prevent injury caused by junior priority ground water rights. The *Motion* identified the continued impact that a depleted water supply was having on A&B and its landowners, including: (i) investing in infrastructure to convert 96.5% of A&B's lands to sprinkler irrigation; (ii) upgrading of pumps and piping distribution systems; (iii) increasing motor sizes to lift ground water from deeper levels; (iv) spending $152,000 per year (1995-2006) for well rectification efforts; (v) spending $388,205 per year (2002 to 2005) for well rectification and reductions in operational waste to increase

[6] The Department has determined that the ESPA is an area of common ground water supply. IDAPA 37.03.11.050 (Rule 50). Therefore, depletions by junior ground water right within the ESPA necessarily affect A&B's water supply under its senior water right 36-2080.

water supplies; (vi) drilling at least 8 new wells; (vii) deepening at least 47 wells; (viii) replacing bowls on 109 pumps; and (ix) abandoning 7 wells. R. 834-35. Notwithstanding these efforts:

> a. … [S]ince 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.***

R. 835-36 (emphasis added).

Although A&B was able to pump approximately 225,000 acre-feet per year in the 1960s, its diversions dropped to as low as 150,000 acre-feet during the last decade. *Id.* Finally:

> 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.

R. 838.

Despite A&B's *Motion* and request for administration, former Director David Tuthill refused to act on the call until ordered to by District Judge John K. Butler on October 29, 2007. R. 1106. The Director issued an order on January 29, 2008, denying A&B's call and request for a GWMA designation. R. 1105. The *Order* erroneously concluded that A&B had not suffered material injury for various reasons, including wrongly assuming that A&B's physical delivery capacity was limited to 0.75 miner's inches per acre, that A&B's well drilling techniques were inappropriate, and that wells were not properly sited by BOR when the project was initially constructed.[7] R. 1147-49. Importantly, the Director applied the wrong legal standard and

[7] The Hearing Officer's findings on these points demonstrated the errors made by the Director in the initial order. R. 3091, 3097-98; *see also* R. 3312-13.

determined that despite its decreed water right, A&B carried the burden to establish "material injury" by "prima facie evidence". *Id.* 1147**.**

A&B challenged this decision and filed a petition requesting an administrative hearing on February 13, 2008. R. 1182. The case proceeded with discovery, pre-hearing motions, and the filing of expert and lay witness testimony throughout 2008. A hearing was held from December 3 through December 18, 2008. The Hearing Officer issued an *Opinion Constituting Findings of Fact, Conclusions of Law & Recommendations*, on March 27, 2009 ("*Recommended Order*"), R. 3078, an *Opinion Granting in Part and Denying in Part A&B's Petition for Reconsideration of Hearing Officer's Opinion*, on May 29, 2009, R. 3231, and a *Response to A&B's Petition for Clarification*, on June 19, 2009, R. 3262.

A&B filed exceptions to the *Recommended Order* on June 26, 2009, R. 3284, and the Director issued his *Final Order* on June 30, 2009. R. 3318. A&B requested and was denied reconsideration of the *Final Order*, and this appeal followed.

LEGAL STANDARDS

I. Standard of Review on Appeal of a Final Agency Order.

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). Generally, a Court is charged with deferring to an agency's decision. *Mercy Medical Center v. Ada County*, 146 Idaho 220, 226 (2008). The Court, however, is "free to correct errors of law." *Id.*

An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful

procedure, " (d) "is not supported by substantial evidence in the record as a whole" or (e) is "arbitrary, capricious or an abuse of discretion." *Chisholm*, 142 Idaho at 162 (citing Idaho Code § 67-5279(3)).

An agency's decision must be supported by "substantial evidence". *Id.* at 164 ("Substantial evidence … need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusions as the fact finder"); *Mercy Medical Center, supra* (agency decision must be "supported by substantial and competent evidence"). The "reviewing courts should evaluate whether 'the evidence supporting [the agency's] decision is substantial." *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 261 (1985). This Court is not required to defer to an agency's decision that is not supported by the record. *Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

An agency action is "capricious" if it "was done without a rational basis." *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id*.

Although the Court grants the Director discretion in his decision making, *supra*, the Director <u>*cannot*</u> use this discretion as a shield to hide behind a decision that is not supported by the law or facts. Such decisions are "clearly erroneous" and must be reversed. *See Galli v. Idaho County*, 146 Idaho 155, 159 (2008) ("A decision is clearly erroneous when it is not supported by substantial and competent evidence"). The Director's *Final Order* in this case fails the above standard of review and therefore should be set aside.

II. The Procedures for Responding to a Water Call are Well-Established Under Idaho Law and Guide the Director's Duty to Administer Water Rights.

Drawing from the Supreme Court's decision in *AFRD #2, et al. v. IDWR, et al.*, 143 Idaho 862 (2007), the Hearing Officer delineated the procedures for responding to a delivery call. R. 3084-85. The purpose of administration is to ameliorate material injury to a senior right caused by junior priority rights, assuming those junior rights seek to continue to divert out-of-priority. CMR 10.14 defines "material injury" as the "hindrance to or impact upon the exercise of a water right caused by the use of water by another person." *See* R. 3088-89.

The holder of a senior water right initiates a water call by filing a petition under oath with the Department alleging that by reason of the junior's diversion of water, the senior is suffering material injury (the "initial showing"). *See* CMR 40.01; *AFRD #2, supra* at 877. Upon making the initial showing, the senior is presumed entitled to his decreed or licensed water right. *AFRD#2, supra*, at 878-79; R. 3084. This presumption remains throughout the proceedings and the holder of the senior water right cannot be forced to re-prove or re-adjudicate the senior water right – nor can the rules or statutes be read to create that burden. 143 Idaho at 878.

The burden then shifts to the junior water right holders to present evidence indicating that the call is futile or to challenge, in some other constitutionally permissible way, the senior's call. *AFRD #2, supra*; *see* CMR 42.01 (factors to be considered in determining defenses to material injury and reasonableness of water diversions). Idaho law requires junior appropriators to prove that their diversions and use of water does not injure a senior. *Jossyln v. Daly*, 15 Idaho 137, 149 (1908); *Moe v. Harger*, 10 Idaho 302, 303-04 (1904); *seeAFRD#2*, 143 Idaho at 873 ("Requirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules").

Based on the law, it is the junior appropriator's duty to provide evidence that the senior water user cannot beneficially use the decreed diversion rate.[8] Thus, while the senior water right enjoys a presumption that it is entitled to the amount of water shown in its decree or license, the junior water right is protected by the ability to allege, and present evidence, that the requested water will be wasted or otherwise not put to beneficial use.

Here, the Director required no such showing by the junior ground water users. Instead, the Director flipped the established standards and burdens on their head and wrongly determined that it was A&B's burden to prove material injury to its senior water right:

> 21. Contrary to the assertion of A&B, and as previously stated, depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with CM Rule 42; therefore, ***the establishment of injury is a threshold determination that must be established by prima facie evidence***.

R. 1147 (emphasis added).

By shifting the burden to A&B to re-prove its decreed water right and creating new standards for a material injury analysis, the Director misinterpreted the proper legal standards and unconstitutionally applied the CMR to A&B's senior water right.

ARGUMENT

At the outset, the Director wrongly concluded that the Ground Water Act applied to A&B's pre-1951 ground water right. In addition, the Director turned the well-established burdens and presumptions on their head by unconstitutionally reducing the rate of diversion for A&B's decreed water right, creating new conditions for administration, and determining that A&B had not exceeded a "reasonable pumping level". The Court should correct these errors of law and set aside the agency decision.

[8] For example, the holder of the junior water right may present evidence attempting to show that the amount of water authorized will not be put to beneficial use or is not needed by the holder of the senior water right.

I. The 1951 Ground Water Act Does not Govern the Administration of Water Right 36-2080, with a Priority Date of September 9, 1948.

Early in 2008, A&B sought a declaratory ruling confirming that A&B's water right, with a priority date of September 9, 1948, is not subject to the provisions of the 1951 Idaho Ground Water Act (Idaho Code §§ 42-226 *et seq.*). This conclusion appears clear from the plain language of the GWA:

> This act ***shall not effect*** the rights to the use of ground water in this state acquired ***before its enactment***.

Idaho Code § 42-226 (emphasis added).

In spite of this plain language, the Hearing Officer erroneously concluded that the GWA applies to A&B's water right – a conclusion that was "accepted" by the Director. However, the history of the GWA, including interpretive case law demonstrates that it does not apply to pre-enactment ground water rights – such as A&B's water right. The Director's legal conclusions to the contrary should be reversed.

A. Under the Common Law, Ground Water Rights are Protected to their Historical Pumping Levels.

A decision on the application of the GWA to A&B's pre-enactment water right will have significant ramifications in these proceedings. Whereas the GWA protects a ground water user's senior diversion only to the extent it has reached the so-called "reasonable ground water pumping level," under the common law, a senior ground water right is protected to its historical pumping levels. The impact of such a decision here is plain to see: even though A&B's "historical pumping levels" have been depleted by as much as 46.4 feet, R. 3087, and even though A&B has been forced to spend millions of dollars in rectification efforts and to abandon

wells, R. 834-36, the Director refused administration, concluding that A&B had not reached a "reasonable ground water pumping level," Idaho Code § 42-226.[9]

Idaho Courts have long recognized that ground water is subject to the prior appropriation doctrine. *E.g.*, *Noh v. Stoner*, 55 Idaho 651, 652-53 (1933); *Bower v. Moorman*, 27 Idaho 162, 181 (1915) ("The first appropriator of water for a useful or beneficial purpose has the prior right thereto, and the right once vested, will be protected and upheld, unless abandoned"); *see also Silkey v. Tiegs*, 51 Idaho 344 (1931).

> [W]hen any one of the landowners in question, so far as the evidence now shows, takes water from his well, it diminishes the flow in the other wells; hence it would seem apparent that he is taking, not alone that which belongs to him, as underlying his land, but is, in some measure at least, taking either directly or indirectly that which comes from underneath the land of other owners.

Hinton v. Little, 50 Idaho 371, 374 (1931). Indeed, "any interference with a vested right to the use of water, whether from open streams, lakes … or subterranean water, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference." *Bower, supra* at 181.

In *Noh v. Stoner*, the Supreme Court held that senior ground water rights are protected to their historical pumping levels, with the burden of any interference by subsequent diversions resting on the junior appropriator:

> If [subsequent appropriators] may now compel [prior appropriators] to again sink the well, to a point below [the subsequent appropriators'], to again receive the amount of water heretofore used, it would result ultimately in a race for the bottom of the artesian belt.
> …

[9] Ironically, the Director made this determination even though he refused, and continues to refuse, to establish a "reasonable ground water pumping level." The fact that the Director has made no attempt to establish a "reasonable pumping level" makes his determination that A&B has not yet reached that level arbitrary and capricious. *American Lung Assoc. of Idaho/Nevada*, 142 Idaho at 547 (a decision is "arbitrary and capricious" if it "was done without a rational basis" and in "disregard of the facts and circumstances presented or without adequate determining principles").

> If subsequent appropriators desire to engage in such a contest ***the financial burden must rest on them and with no injury to the prior appropriators or loss of their water***.

55 Idaho at 657 (emphasis added). Under this rule, a senior appropriator "has a ***vested right*** to use the water," which "includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred … to change his method or means of diversion in order to maintain his right to use the water." *Parker v. Wallentine*, 103 Idaho 506, 512 (1982) (emphasis added). This right is more than just a casual benefit to the holder of the senior ground water right. Indeed, "under the doctrine of prior appropriation," the "right to have water available at the historic pumping level" became a "vested" part of the water right. *Id.* This rule applies to all ground water rights not subject to the GWA. *Id*. at 513, n.11.

Under the *Noh* rule, the State was able to balance the interests of the ground water users and "effectuate the policy of maximum development of the water resources of this state." *Parker*, 103 Idaho at 514.

> The principles set forth in *Bower* and *Noh* balance the competing interest of the parties involved and the public and serve to ***effectuate the policy of maximum development of the water resources of this state***. Under these principles, we hold that Wallentine has a right to divert any surplus subterranean water provided and so long as his diversion of such waters does not deprive Parker of his use of the water. Parker will not be deprived of any right to his use if water can be obtained for Parker by changing the method or means of diversion. ***The expense of changing the method or means of diversion, however, must be paid by the subsequent appropriator, Wallentine, so that Parker will not suffer any monetary loss***. Thus, upon a proper showing by Wallentine that there is adequate water for both he and Parker, it is within the inherent equitable powers of the court upon a proper showing and in accordance with the views herein expressed to enter a decree which fully protects Parker and yet allows for the ***maximum development of the waters resources of this state***.

Id. (emphasis added).

B. Under the GWA, Ground Water Users are No Longer Protected to Their Historic Pumping Levels, but to "Reasonable Ground Water Pumping Levels."

Passage of the 1951 GWA, as amended in 1953, marked a sweeping change to the method of administering ground water rights in the state of Idaho. No longer would water rights that are subject to the GWA be protected to their historic pumping levels. Instead, the financial burden shifted to the holder of the senior ground water right.

> A necessary concomitant of this statutory matrix is that the senior appropriators are not entitled to relief if the junior appropriators, by pumping from their wells, force seniors to lower their pumps from historic levels to reasonable pumping levels.

Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 585 (1973).

C. By Its Plain Terms, the GWA Does Not Apply to Pre-1951 Ground Water Rights.

The GWA confirms that "This Act ***shall not affect*** the rights to the use of ground water in this state ***acquired before its enactment***." Idaho Code § 42-226 (emphasis added). Since the interpretation of any statute must begin with the plain meaning of the statute, *State v. United States*, 134 Idaho 940, 944 (2000), and since the language is clear, the Court should apply the statute without engaging in statutory construction, *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732 (1997).

In fact, the Supreme Court already considered this language and held that the GWA, as originally drafted and amended, "makes it clear that ***this statute does not affect the use of ground water acquired before the enactment of the statute***." *Musser v. Higginson*, 125 Idaho 392, 396 (1994) (emphasis added). [10] In *Musser*, the Director refused to honor a call by a senior surface water user, asserting that there was then no method for conjunctively administering water

[10] The Hearing Officer overlooked the plain language of *Musser*, finding that it was inconsistent with *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575 (1973). However, the Court's decision in *Baker* did not discuss the issue here and cannot be interpreted to expand the scope of the GWA to cover pre-enactment water rights. *Infra* Part I.D.6.

within a water district unless a "formal hydrologic determination" is made "that such conjunctive management is appropriate." *Id*. at 394. A writ of mandate was issued, ordering the Director to administer the water rights and the Director appealed. I*d*. On appeal the Director raised numerous defenses to the writ including that a Department "'policy' … prevented him from taking action." *Id*. at 396. According to the Director, section 42-226 of the GWA required "a decision … as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource." *Id*. The Court ***rejected*** the Director's argument and held that the GWA does not apply to pre-enactment (i.e. pre-1951) water rights. I*d.*[11]

Based on the plain language of the statute, A&B's water right 36-2080 is not affected by the GWA and the Director's application of the GWA should be reversed.

D. The History of the GWA and Case Law Confirms that the GWA Does Not Apply to Water Right 36-2080.

In addition to its plain language, the history of the GWA and applicable case law verifies that it does not apply to A&B's 1948 water right.

1. As Originally Drafted, the GWA "Validated and Confirmed" all Pre-existing Ground Water Rights.

The Idaho Legislature passed the GWA in 1951. In its original form, section 42-226 provided that "all rights to use of ground water in this state however acquired before the effective date of this Act are hereby in ***all respects validated and confirmed***." 1951 Idaho Sess. Laws, ch. 200, §1 (emphasis added).[12]

[11] Since the GWA does not apply to pre-enactment water rights, the *Musser* Court further stated that "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." 125 Idaho at 396.

[12] The Hearing Officer found that the GWA "did not expressly delineate pre-existing ground water irrigation rights as excepted." R. 1634. However, the plain language stated that all pre-enactment ground water rights were "validated and confirmed" "in all respects."

Statutory interpretation must begin with the plain language of the statute. *State*, 134 Idaho at 944. To "validate" means to "ratify," "to confirm the validity of," "to support or corroborate on a sound or authoritative basis," and "***to recognize, establish, or illustrate the worthiness or legitimacy of***."[13] (Emphasis added). To "confirm" means "to give approval to," "***to make firm or firmer***," and "to give new assurance of the validity of: ***remove doubt about by authoritative act or indisputable fact***." *Id*. (emphasis added). In other words, as originally drafted, the GWA ratified, corroborated, approved and removed any doubt about the nature of *all existing* ground water rights in *all respects*. This language is clear and without limitation to any legal rights vested in the owners of pre-enactment ground water rights. In essence, the GWA "does not affect the use of ground water acquired before the enactment of the statute." *Musser*, 125 Idaho at 396. There is simply no other valid interpretation of this "validated and confirmed" provision. *Parker*, 103 Idaho at 510-11 ("The most fundamental premise underlying judicial review of the legislature's enactments is that, unless the result is palpably absurd, *the courts must assume that the legislature meant what it said.*") (emphasis added).

2. The 1953 Amendments to the GWA Did Not Change the GWA's Scope.

In 1953, the GWA was amended to confirm that the priority doctrine ("first in time is first in right") applies to ground water rights and added the "reasonable ground water pumping levels" provision. 1953 Idaho Sess. Laws., ch. 182, § 1. The 1953 amendment carried over the "validated and confirmed" language – making it clear that the GWA did not apply to any ground water rights acquired prior to amendment.

The 1953 amendments also included a new section, 27, for which the Legislature provided the following:

[13] All definitions were retrieved from the Merriam-Webster Dictionary website (www.m-w.com) on December 11, 2009.

> Section 27. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water may be so commenced and such rights may be acquired and perfected under Chapter 20 of Title 42, Idaho Code, ***unaffected by this act or by Chapter 200, Laws of 1951 [the GWA]***.

1953 Idaho Sess. Laws, ch. 182, §12. Again, the Legislature expressed its intent to exclude all ground water rights for which the statutory appropriation process had been started, from coverage under the GWA. It would be nonsensical to interpret the GWA as excluding those rights, but, at the same time including all those for whom the appropriation process had been completed prior to enactment.[14]

3. The 1987 Amendments to the GWA Confirm that the GWA "Does Not Affect the Use of Ground Water Acquired Before the Enactment of the Statute."[15]

In 1987, the Legislature amended section 42-226 to make, among other things, grammatical changes to the section. 1987 Idaho Sess. Law, ch. 347. The most significant grammatical change included a replacement of the "validated and confirmed" language with the following statement of legislative intent regarding pre-enactment water rights:

> This Act ***shall not affect*** the rights to the use of ground water in this state acquired ***before its enactment***.

Id. (emphasis added).

On at least three separate occasions, the Legislature considered the scope of the GWA as it relates to pre-enactment ground water rights. On each occasion, the Legislature, in plain language, confirmed that all pre-enactment ground water rights would be "validated and confirmed" (i.e. ratified, corroborated and approved), that all pre-enactment ground water rights would be "unaffected" by the GWA and, finally, that the GWA "shall not affect" pre-enactment

[14] This section, though uncodified, has never been repealed or amended.
[15] There were other amendments to the GWA throughout the years. However, until 1987, the "validated and confirmed" language remained in the GWA. Those other amendments did not affect the provisions relevant to these proceedings and will not be discussed herein.

ground water rights. In short, as originally drafted and amended, it is clear that the GWA "does not affect the use of ground water acquired before the enactment of the statute." *Musser, supra*.

4. Absent "Clear Legislative Intent," the GWA Cannot be Applied Retroactively.

"No part of these compiled laws is retroactive, unless expressly so declared." Idaho Code § 73-101; *see also, e.g., Gailey v. Jerome Cty.*, 113 Idaho 430, 433 (1987) ("In the absence of an express declaration of legislative intent that a statute apply retroactively, it will not be so applied"); *Parker v. Wallentine*, 103 Idaho at 511 (statutes "are not to be applied retroactively in the absence of clear legislative expression to that effect"); *City of Garden City v. City of Boise*, 104 Idaho 512, 515 (1983) (a statute cannot be retroactively applied absent a "clear legislative intent to that effect"). Since there is no "expressly … declared" statement that the GWA applies retroactively, it cannot be used to abrogate the common law protections afforded to pre-enactment ground water rights like A&B's water right 36-2080.

5. To the Extent that Section 42-229 is Inconsistent with Section 42-226, the Specific Provisions of Section 42-226 Must Prevail.

According to the Hearing Officer, "Section [42]-229 provides … a clear legislative expression" that the GWA is to be applied retroactively. R. 1634. That section (section 4 of the original Act) provides:

> But the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act.[16]

The Hearing Officer's conclusion is in error for at least the following reasons. First, this conclusion ignores the fact that the GWA "shall not affect" any pre-enactment ground water rights – each of which were "validated and confirmed" by the original enactment. *See supra*. Nor does this interpretation consider that in 1953, the legislature again confirmed that all pre-

[16] Section 4 remains essentially unchanged to this day. *See* Idaho Code § 42-229.

enactment water rights were "unaffected" by the GWA. *See supra*. Any attempt to construe section 42-229 to expand the GWA cannot be tolerated. *Cf. State v. Doe*, 147 Idaho 326, 208 P.3d 730, 733 (2009) ("This Court harmoniously construes statutes relating to the same subject whenever possible"); *Roeder Holdings LLC v. Board of Equalization of Ada Cty.*, 136 Idaho 809, 813 (2001) ("In the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature or exercise its sublegislative powers to modify, alter, enlarge or diminish provisions of a legislative act that is being administered").

Second, it "is a basic tenet of statutory construction that the more specific statute or section addressing the issue controls over the statute that is more general." *Wheeler v. Idaho Dept. of Health & Welfare*, 147 Idaho 257, 207 P.3d 988, 995 (2009). In *Wheeler*, the Court found that a general statute exempting property interests from suspension was overridden by a specific statute providing that driver's licenses are subject to suspension. *Id*.

Section 42-229 is a general provision addressing the "administration of ***all*** rights." (Emphasis added). To the contrary, the applicable provision of section 42-226 speaks only "to the use of ground water in the state ***acquired before its enactment***." (Emphasis added). Under the law, this specific provision (section 42-226) "controls over the statute that is more general" (section 42-229). *Wheeler, supra*. Any other interpretation would effectively write the specific provisions of section 42-226 out of the GWA and cannot be tolerated. *Walker v. Nationwide Financial Corp. of Idaho*, 102 Idaho 266, 268 (1981) ("it is incumbent upon this Court to give a statute an interpretation that will not in effect nullify it and it is not to be presumed that the legislature performed an idle act of enacting a superfluous statute") (internal citations omitted).

A finding that section 42-229 is retroactive is also inconsistent with *Parker*, *supra*. Although section 42-229 was included in the original 1951 enactment, the "reasonable ground water pumping level" provision was not included until two years later, in the 1953 amendments. *See supra*. According to the Hearing Officer, even though it was enacted *before* the reasonable ground water pumping level provision, "Section [42]-229 provides … a clear legislative expression" that the GWA is to be applied retroactively. R. 1634. This exact notion was rejected in *Parker*. As originally enacted, the GWA exempted domestic wells. In 1978, section 42-227 of the GWA was amended to provide state that domestic rights were only exempt from the permitting requirements of section 42-229 and were still subject to administration under the GWA. 103 Idaho at 510, n.4. In *Parker*, the junior water user argued that the 1978 amendment effectively rendered all domestic ground water rights subject to the reasonable ground water pumping level provisions of the GWA – even those acquired prior to the 1978 amendment. *Id*. at 510. He asserted that the 1978 amendment "eliminates the broad exemption for domestic wells" and "should be applied retroactively to thereby extinguish any right [the senior water user] had." *Id*. at 511, n.7. The Court quoted section 42-229, *id*. at 509, and held that "nothing in the 1978 amendment or the circumstances of its enactment indicates that the legislature intended this amendment to have retroactive effect," *id*. at 511, n.7. The same is true here. There is "nothing in the [1953] amendment [incorporating the "reasonable ground water pumping level" provision] or the circumstances of its enactment" to indicate indication "that the Legislature intended this amendment to have retroactive effect."

6. Case Law Confirms that Pre-Enactment Ground Water Rights are <u>Not</u> Subject to the GWA.

There are only a few relevant cases addressing the applicability of the GWA to pre-enactment water rights. *See Musser v. Higginson*, 125 Idaho 392; *Parker v. Wallentine*, 103

Idaho 506. The Hearing Officer discounted these cases, however, and relied primarily on the Supreme Court's decision in *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, even though that decision did not discuss the scope of the GWA.

The first case was *Parker, supra*. In that case, the Court addressed whether or not a domestic ground water right that had been drilled prior to 1978 was subject to the "reasonable pumping levels" provision of section 42-226.[17] 103 Idaho at 510, n.4. The Court concluded that pre-1978 domestic water rights were not subject to "reasonable pumping levels" and, in so doing, confirmed that the *Noh* rule balanced the interests of the water users and effectuated "the policy of maximum development of the water resources of this state." *Id*. at 514. The Court concluded that the *Noh* rule applies to all ground water rights not subject to the GWA. *Id*. at 510, n.11.

In *Musser*, discussed *supra*, the Supreme Court held that "both the original version and the current statute make it clear that ***this statute does not affect the use of ground water acquired before the enactment of the statute***." 125 Idaho at 396 (emphasis added). Following *Musser*, the SRBA District Court, citing *Musser*, recognized that:

> [T]he ***groundwater management statutes do not apply to water rights prior to their enactment in 1951***. *Musser*, 125 Idaho at 396 (statutes do not affect rights to the use of groundwater acquired before enactment of the statute).

Order on Cross Motions for Summary Judgment at 27 (Twin Falls County Dist. Ct., Fifth Jud. Dist., In Re SRBA: Subcase No. 91-00005, July 2, 2001) (emphasis added). The holdings in these decisions are consistent with the Legislature's intent, reinforced at least three times, to exempt pre-enactment ground water rights. *See, supra*.

[17] Prior to 1978, domestic ground water rights were exempted from the GWA. In 1978, the legislature amended the GWA to state that domestic ground water rights were only exempt from the permitting requirements of section 42-229 but not the "reasonable pumping levels" of section 42-226.

Notwithstanding this case law, the Hearing Officer relied primarily on *Baker*. That decision, however, is not on point and, in fact, did not even address the scope of the GWA. In *Baker*, the issue was stated as follows:

> This Court must for the first time, interpret our [GWA] as it relates to withdrawals of water from an underground aquifer in excess of the annual recharge rate. We are also called upon to construe our [GWA's] policies of promoting "full economic development" of ground water resources and maintaining "reasonable pumping levels."

95 Idaho at 576. Importantly, the Court did not address the "validated and confirmed" provision of then-section 42-226. It did not consider the "unaffected" language of the 1953 enactment. In fact, it does not appear that the scope of the GWA was ever raised before the district court or Supreme Court. As such, any attempt to extrapolate a conclusion that the *Baker* Court expanded the scope of the GWA to cover pre-enactment ground water rights – without any regard for the "validated and confirmed" provision – is in error.[18]

In *Baker*, the Court considered the affect of the GWA on ground water rights where the total diversions from an aquifer exceeded the available water supply. 95 Idaho at 576-78. As water was diverted by the water users, the water level dropped by 20 feet per year. *Id*. The District Court set an annual discharge rate that would be consistent with the average annual natural recharge rate and enjoined all junior priority diversions in excess of that rate. *Id*. at 578.

The Court addressed the assertion that the GWA "superseded Idaho's common law rules relating to ground water," *id*., and analyzed, in detail, the history of water law in Idaho, *id*. at 578-83. In addressing *Noh*, and the resulting "historical pumping level" protections afforded to pre-GWA ground water rights, the Court found that the *Noh* doctrine was "harsh" and

[18] It is true that one senior priority water right had a priority date of 1948 – prior to the enactment of the GWA. However, that is of no consequence to the Court's decision, since the Court focused its efforts "on approximately 20 irrigation wells developed during the late 1950's and early 1960's," 95 Idaho at 576, after the enactment of the GWA. Moreover, the senior right was fully protected in that case as the Court upheld the limitation of pumping under junior rights that were found to have been "mining" the aquifer.

"inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest … [and] is further inconsistent with the [GWA]." *Id*. at 583.

The Hearing Officer's reliance on this language and conclusion that *Noh* was overruled, R. 1632-34, is in error. First, the *Baker* Court did not overrule *Noh*. It simply held that the *Noh* doctrine was "inconsistent" with the GWA. 95 Idaho at 583. Subsequently, the Court in *Parker* confirmed that the *Noh* rule was consistent with the Constitution and applied to ground water rights that are not subject to the GWA. 103 Idaho at 514.

Second, the *Baker* Court did not consider whether the GWA applied retroactively. Rather, the Court merely considered whether the GWA superseded the common law *as it related to ground water rights covered by the GWA*. 95 Idaho at 578. The Court was not asked to address the scope of the GWA as it relates to pre-enactment ground water rights. A&B does not ask this Court to determine whether the *Noh* rule applies to *all* ground water rights. Indeed, the *Baker* Court focused its decision on "approximately 20 irrigations wells developed during the late 1950's and early 1960's", and ruled that the common law did not apply to those post-GWA water rights. *Id*. at 576, 584. Rather, the question before this Court is whether the GWA applies to pre-enactment water rights where the Legislature specifically "validated and confirmed" those ground water rights and stated that they would be "unaffected" by the GWA. *Supra*; Idaho Code § 42-226 ("This act shall not affect the rights to the use of ground water in this state acquired before its enactment"); *see also Parker, supra*; *Musser, supra*. The Hearing Officer's reliance on *Baker* to answer a question that was never asked is misplaced.

Likewise, since the *Baker* decision did not address the applicability of the GWA to pre-enactment ground water rights, the Hearing Officer's conclusion that *Parker* and *Musser* are inconsistent with *Baker* is wrong. R. 1634-35. *Baker* simply did not address the same questions

as those cases. Since the plain language of the GWA exempts pre-enactment ground water rights, as recognized by *Parker* and *Musser*, the Director's and Hearing Officer's divergent decisions are contrary to law and should be reversed.[19]

II. The Director Failed to Apply the Proper Legal Presumptions and Honor A&B's Decreed Water Right.

In addition to the Director's error in applying the GWA to A&B's senior water right, the Director misapplied the proper legal presumptions in evaluating A&B's delivery call. The standard of review and legal presumption afforded senior water rights in administration was addressed in *AFRD #2*:

> ***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***. … 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***.

143 Idaho at 877-78 (emphasis added).

A&B's water right 36-2080 was decreed by the SRBA Court on May 7, 2003. The decree establishes a presumption that A&B is entitled to beneficially use 1,100 cfs and 250,417.2

[19] The Court should be aware of another decision addressing the applicability of the GWA to pre-enactment water rights. On July 13, 2009, District Judge Duff McKee issued a *Memorandum Decision* in anadministrative appeal *Moyle v. IDWR*, Case No. CV OT 08-14978 (Dist. Ct. Ada Cty.). In that opinion, at pages 9-10, the court ruled that "the court has no jurisdiction to hear this administrative appeal," based upon the Supreme Court's recent ruling in *Erickson v. Idaho Bd. Of Prof. Engineers*, 142 Idaho 852 (2009). However, notwithstanding its lack of jurisdiction, the Court issued an unlawful "advisory opinion" and "ruled on the merits in the case." *Moyle* at 11; *see Preiser v. Newark*, 422 U.S. 395, 401(1975) (a court "has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them'"). In that advisory opinion, the court found that the GWA does apply to pre-enactment ground water rights. In doing so, the court made numerous legal errors. For example, the court held that *Baker* overruled *Noh*. *Id*. at 7. This is wrong. *See Parker, supra*. The court held that the GWA only "recognized" pre-enactment ground water rights. *Moyle* at 6. This is wrong. *See, supra* (the GWA, as originally enacted "validated and confirmed" pre-enactment ground water rights). In addition, unlike here, *see infra*, "there was no evidence of actual interference with the water rights of Moyle." *Moyle* at 7.

acre-feet annually for the 62,604.3 irrigated acres on Unit B (i.e. a diversion rate of 0.88 miner's inches per acre). Ex.139. Under Idaho law, if the water is beneficially used the senior is entitled to the full amount of its water right. *The Cottonwood Water & Light Co. v. St. Michael's Monastery*, 29 Idaho 761, 769 (1916) ("The defendant and its predecessor were the prior appropriators of said water, hence under the law ***they are entitled to the full amount appropriated***.") (emphasis added).

In order to administer water rights such as A&B's pending the adjudication, the State of Idaho filed motions for interim administration with the SRBA Court pursuant to Idaho Code § 42-1417. The SRBA Court granted the State's motions to permit distribution of water pursuant to the water distribution statutes and "in accordance with the partial decree(s) for water rights acquired under state law." Idaho Code § 42-1417(1)(a) (emphasis added). Thereafter the Director created water districts across the ESPA to implement administration. R. 1109-10.

As required by the CMR and *AFRD #2*, A&B filed a motion to proceed with its delivery call on March 16, 2007 which included: (1) a description of water right 36-2080 as decreed; and (2) a statement of material injury under oath. R. 830-841.[20] The request for administration was further supported by evidence at hearing. A&B's Manager Dan Temple testified that A&B is unable to divert the decreed diversion rate for all project lands. Tr. Vol. III, p. 558, lns. 15-25; p. 559, lns. 1-8 & pp. 635-37. A&B's landowners also testified as to the injury to the water right and the consequent effects on their farming operations. Tr. Vol. III, p. 814-15, 817-21 (Eames); Tr. Vol. IV, p. 889-894 (Adamms); Tr. Vol. IV, p. 956-966 (Kostka); Tr. Vol. IV, p. 1017-1020 (Mohlman).

[20] The *Motion to Proceed* was verified under oath by A&B's manager, Dan Temple. The *Motion* identified the falling ground water levels on the A&B project, the efforts expended by A&B to pump water from those levels, and the fact A&B was unable to divert a minimum of 0.75 miner's inch per acre for all of the lands served by its senior water right. R 830-841.

Based on the law, A&B is "entitled" to its decreed diversion rate and the burden is on junior right holders to show a defense to a call for the amount of water decreed. *AFRD #2,* 143 at 878-79. The Director had no authority to force A&B "to demonstrate an entitlement to the water in the first place." *AFRD #2, supra*. Under Idaho law, A&B is afforded a presumption that it can use the water authorized under its decree, subject to "post-adjudication" factors (i.e. waste, forfeiture, abandonment, etc.) that would warrant distributing less than the decreed diversion rate for water right 36-2080. *See AFRD #2, Id.* at 878-79. No such "post-adjudication" factors were proven by junior ground water users in this case.

Rather than honor this presumption, however, the Director denied A&B's delivery call by misapplying the appropriate legal standard and creating new injury standards not provided for by Idaho law. As described below, the Director erroneously denied the call by: 1) re-adjudicating and reducing A&B's decreed diversion rate; 2) creating a "failure of the project" standard for administration; and 3) using a "minimum amount needed" for crop maturity standard. Accordingly, this decision should be reversed.

A. The Director Unlawfully Reduced A&B's Decreed Diversion Rate Per Acre From 0.88 to 0.75 Miner's Inches Per Acre.

In addressing whether A&B's diversion rate is 0.75 miner's inches, as determined by the Director, or 0.88 miner's inches, as decreed by the SRBA Court, the Hearing Officer correctly concluded: "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. 3102. The record demonstrates that prior to depletions by junior ground water rights, A&B was able to divert more than 0.75 miner's inches per acre from nearly all of its wells for as many as thirty years, R. 3103, with some wells delivering more than 0.88 miner's inches per acre, *id.* 3108. *See* Ex. 200 at 3-8.

The Hearing Officer properly recognized that 0.75 miner's inches is a *rectification* criteria used internally by the District – the point at which A&B identifies a particular well as being a candidate for rectification efforts such as deepening or improving the pump system. R. 3101. When a well produces less than the minimum of 0.75 miner's inch per acre during allotment, A&B places the well on a "rectification" list to make improvements to increase water production. *See* Exs. 206A-M; Tr. Vol. III, pp. 550-51. The rate is not related to A&B's decreed water right and does not reflect the physical capacities of A&B's wells or its delivery systems.

Despite recognizing the above facts, the Hearing Officer and Director concluded that A&B was not entitled to its decreed diversion rate because 0.75 miner's inches was "adequate" and "consistent with the policy of rectification."[21] *Id.* 3110. Under this finding the Director failed to acknowledge the facts and failed to apply the proper presumption to A&B's decreed water right and its diversion rate of 0.88 miner's inches per acre.

First, A&B's individual well systems can produce more than 0.75 miner's inch per acre. A&B's manager, Dan Temple, explained that the diversion capabilities of individual well systems vary across the project:

> Q. [BY MR. THOMPSON]: So that is what they would be limited to on a delivery rate basis during allotment?
>
> A. On allotment at anytime when user demand exceeded our pumping capabilities of that well system.
>
> Q. Does that vary depending upon the well system?
>
> A. Yes. You can look down through there, they're all independent. It varies substantially what those capabilities are from that well system.

Tr. Vol. III, p. 519, lns. 13-23; *see also* Ex. 133 (the A&B 2006 and 2007 Annual Pump Reports, A&B 2765-2798). Mr. Temple further testified that A&B is not physically limited to only

[21] The Director adopted this finding in his *Final Order*. R. 3322.

delivering 0.75 miner's inch per acre across the project. *See* Tr. Vol. III, p. 540, lns. 16-25, p. 541, lns. 1-4.[22]

Mr. Temple's testimony was confirmed by Department staff members, such as Sean Vincent, who testified that "I have ***no doubt*** that they have ***greater capacity than***" 0.75 miner's inches. Tr. Vol. IX, p. 1843, lns. 12-25 (emphasis added). Tim Luke testified that "I don't disagree with [sic] that individual wells can provide more than three-quarters." Tr. Vol. VI, p. 1264, lns. 14-25, p. 1265, lns. 1-7. This testimony is undisputed. The Hearing Officer agreed. R. 3103, 3108 (recognizing that many of A&B's wells produced more than 0.75 miner's inches for more than 30 years and that some wells could produce more than 0.88 miner's inches). The problem that A&B has faced is that diversions under junior ground water rights have interfered with water availability for use under A&B's senior water right.

Second, A&B's manager and landowners confirmed that they could beneficially use the decreed diversion rate of 0.88 miner's inches per acre. *See, e.g.*, Tr. Vol. IV, pp. 815-16 (Mr. Eames testifying that he can beneficially use more than 0.75 miner's inches per acre and that the delivery rate is critical for his irrigation operations and water-sensitive crops); Tr. Vol. V, pp. 888-89 & 893, lns. 2-13 (Mr. Adamms testifying that he needs the decreed rate of delivery and can beneficially use even more than what is decreed under A&B's water right #36-2080); Tr. Vol. V, p. 956; lns. 9-14, p. 957, lns. 5-13; p. 960, lns. 13-25; p. 961, lns. 1-6, 13-16 (Mr. Kostka testifying that he could use the decreed rate of delivery per acre). Mr. Temple also explained that when A&B rectifies a well system, the District seeks to provide between .85 and .90 miner's inch per acre because "that is what they [A&B's landowners] need to meet their crop requirements." Tr. Vol. III, p. 552, ln. 20 – p. 553, ln. 9.

[22] The Director's January 29, 2008 *Order* erroneously found that A&B was physically limited to only delivering 0.75 miner's inch per acre at each well. R. 1147.

Despite the evidence and the SRBA decree, the Director refused to analyze injury to A&B's water right with the proper legal presumption. Instead, the Director concluded that a reduced diversion rate of 0.75 miner's inches was "adequate" and refused to deliver more water to A&B.[23] Such a conclusion flies in the face of the decreed diversion rate and Idaho law presuming a water user's entitlement to that amount. *See The Cottonwood Light & Water Co.*, 29 Idaho at 769; *AFRD #2*, 143 Idaho at 878. In addition, the Director's analysis fails to distribute water in accordance with A&B's partial decree as required by the SRBA Court's order authorizing interim administration. *See* Idaho Code § 42-1417(1)(a). The Director unconstitutionally flipped the burden onto A&B by not applying the proper presumption to A&B's decree.

The Idaho Supreme Court rejected a similar decision where the junior claimed a senior did not "need" his water right. In *Stevenson v. Steele*, 93 Idaho 4 (1969), the Court addressed a challenge to a District Court order enjoining ground water diversions under a junior water right after finding that the junior diversions impaired, and would eventually eliminate, the ability to divert under senior water rights to Warm Springs Creek. 93 Idaho at 7.[24] According to the Court:

[23] The Director also effectively reduced A&B's diversion rate finding that what was being diverted under depleted water supply conditions was "near the maximum authorized rate of diversion" as compared to the decree. R. 1147-48. There is no "near the maximum authorized rate of diversion" standard in Idaho's water distribution statutes or the CMR. By failing to recognize that A&B is entitled to the amounts identified on its water right decree, so long as A&B can beneficially use that water, the Director wrongly re-adjudicated A&B's water right 36-2080 in a manner expressly prohibited by the Idaho Supreme Court. *See AFRD #2*, 143 Idaho at 878-79

[24] The *Stevenson* case began as a challenge to an IDWR (then Department of Reclamation) order that required the holder of the junior ground water right to turn 30 inches of water into Warm Springs to mitigate for impacts on senior water rights. 93 Idaho at 6. The holder of the junior water right interpreted the order as requiring the mitigation only during the irrigation season and stopped mitigating on October 1, resulting in Warm Springs being "dry from October 1 until various dates in December and January." *Id*. A subsequent order from IDWR required mitigation at all times necessary to "maintain a constant flow of 30 miner's inches." *Id*. The District Court reviewed the case *de novo* and, upon reviewing the evidence, determined that the junior water right would eventually dry up the source and "permanently enjoined appellants from operating either of their wells at any time in the future and from interfering with respondents' rights to Warm Springs." *Id*. at 7.

> Most of appellants' argument on appeal is devoted to the contention that respondents really have no need for winter water for watering their livestock and that therefore appellants should not be compelled to pump water into Warm Springs during the winter months when its flow has not yet returned because of appellants' summer pumping. … [T]he contention that respondents have not used and do not need the water from Warm Springs runs contrary to the court's findings of fact that "the normal flow of Warm Springs throughout the years … has been used for … domestic purposes" and that "for more than 50 years the water of Warm Springs Creek has been used by (respondents) and their predecessors during the winter months and during the non-irrigation season for livestock purposes."

Id. at 13.

Here, similar to the claim in *Stevenson*, the Director wrongly concluded that A&B has no need for its decreed diversion rate (i.e. 0.88 miner's inches per acre). R. 3110. This conclusion, however, "runs contrary" to the decree issued by the SRBA Court, the fact that more than 0.75 miner's inches was available for nearly all of A&B's wells for much of 30 years, that A&B has sufficient capacity to divert the decreed diversion rate, and finally, that A&B's landowners can beneficially use the decreed diversion rate. Since the Director did not find that A&B was "wasting" the water under its decreed water right, and the juniors proved no applicable defenses, the Director had a duty to deliver the decreed amount. By not honoring the decreed elements of A&B's senior water right or applying the proper presumption, the Director unconstitutionally applied the CMR. The Court should correct this error of law.

B. The Director Wrongly Used a "Failure of the Project" Standard.

The Director also wrongly demanded that A&B demonstrate a "failure of the project" in order to find material injury to its senior water right. In other words, the Director "excused" injury to part of A&B's water right on the basis that the entire irrigation project did not fail. The Hearing Officer described this new standard as follows:

> **6. Consideration of the system as a whole must also account for the effect upon individual systems when the number of short systems would constitute a failure of the project.**
>
> * * *
>
> **10. The portion of short wells in the project is not sufficient to show a failure of the project.** There is evidence that in 2007 there were 5,000 acres in Unit B that were being served by well systems that delivered less than 0.75 miner's inches per acre. The limited amount of this acreage is a consequence of costly rectification efforts. Temple testimony, pages 666-67. The wells that are short in the production of water that are unlikely to be susceptible to successful remediation are limited to the southern portion of the project. They do not serve a sufficient portion of the project to deem their failure a failure of the project as a whole considering the terms of the license and partial decree.

R. 3095, 3097 (underline added).

Even assuming a reduced diversion rate of 0.75 miner's inches per acre is the standard for injury to A&B's senior water right, the Director refused to find injury because he deemed the portion of the project receiving less than that amount did not result in "failure of the project" as a whole. This is not the injury standard for water right administration in Idaho.[25]

Under the water distribution statutes and the CMR, the Director and watermaster are *required* to distribute water to A&B's *decreed* water right 36-2080. *See* Idaho Code §§ 42-602, 607; CMR 40.01. The Director and watermaster have a "clear legal duty" to distribute water to senior water rights, pursuant to the terms of a decree. *Musser*, 125 Idaho at 395; *State v. Nelson*, 131 Idaho 12, 16 (1998). Since A&B's landowners can beneficially use the rate of diversion provided by the decree (0.88 miner's inch per acre) and have demonstrated a need for that water, they are entitled to that amount of water for purposes of administration.

A&B and its individual landowners do not have to suffer "failure of the project" in order to demonstrate material injury. Rather, material injury occurs whenever there has been a

[25] In the *Clarification Order*, the Hearing Officer attempted to characterize the "failure of the project" standard as merely a "finding of fact, not a measure of material injury." He stated that "material injury may occur before a total project failure." R. 3262. Despite this ruling, the Director continued to deny A&B's call based on the Hearing Officer's finding that there has not been a "failure of the project."

"hindrance to or impact upon the exercise of a water right." CMR 10.14. At most, "failure of the project" demonstrates the extent of material injury, which at that time would be too late for water right administration anyway. *See AFRD#2*, 143 Idaho at 874 ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.").

It is illogical to require an irrigation project to "fail" before commencing water right administration to prevent interference by junior water users. Once the project fails, administration could not prevent injury to the water right. The Director's arbitrary decision is further highlighted by the fact that he would not even recognize injury to the portion of A&B's project receiving less than 0.75 miner's inches per acre. In other words, A&B's water right would never be injured unless there was a "failure of the project" as a whole.

A&B's water right is materially injured because diversions under junior priority water rights in the ESPA are causing a "hindrance to or impact upon" A&B's diversion and use of water under its senior water right. Ground water levels have declined significantly in the western portion of the ESPA, including the area around A&B.[26] Ex. 200 at 3-47, at 5-6; *Dan Temple Testimony*, Tr. Vol. III, p. 529, ln. 15 – p. 530, ln. 25; *Ralston Testimony*, Tr. Vol. I, p. 127, lns. 14-20. These groundwater level declines are caused, at least in part, by pumping under junior priority water rights. Ex. 200 at 5-3 to 5-4. As a result, A&B's landowners are left without a sufficient water supply pursuant to their senior water right, Tr. Vol. III, pp. 536-37, and A&B has been forced to abandon wells, increase horsepower, drill wells deeper, drill additional wells, replace pump bowls and add pumping columns in order to continue diverting under its senior ground water right, *id.*, pp. 537-39 & 555-56. As Dan Temple explained at hearing:

[26] The ESPA is a common ground water supply. *See* CMR 50; Ex. 200 at 5-1.

> For the unit B the water supply problems are the declining pump discharges caused by the decline in the aquifer levels. That is creating our reduced production capabilities and causing the problems with the shortages to the water users.

Tr. Vol. III, p. 531, lns. 12-20. [27]

Attempts to rectify poorly producing wells have cost A&B's landowners significant resources. From 1998 to 2007, A&B spent an average of $122,626 per year for well repair and maintenance. R. 1395. In addition to these expenses, between 1995 and 2006, A&B spent nearly $2.5 million, or $206,000 per year, on well rectification efforts. *Id.* From 2003 through 2008, A&B spent nearly $3.5 million. Tr. Vol. III, p. 569, lns. 7-11. Finally, of the $25/acre increased assessment for the 2009 irrigation season, $23 (92%) was dedicated to A&B's well rectification program. *Id.*, pp. 569-70.[28]

A&B's landowners and farming operations have also suffered as a result of declining ground water levels and reduced water supplies. *See Eames Testimony*; Tr. Vol. III, p. 814-15, 817-21; *Adamms Testimony*; Tr. Vol. IV, p. 889-894; *Kostka Testimony*; Tr. Vol. IV, p. 956-966; *Mohlman Testimony*; Tr. Vol. IV, p. 1017-1020. At hearing each landowner testified that they have historically and can now beneficially use at least 0.88 miner's inches per acre. Tr. Vol. IV, pp. 815-16 (Mr. Eames testifying that he can beneficially use more than 0.75 miner's inches per acre and that the delivery rate is critical for his irrigation operations and water-sensitive crops); Tr. Vol. V, pp. 888-89 & 893, lns. 2-13 (Mr. Adamms testifying that he needs the decreed rate of delivery and can beneficially use even more than what is decreed under A&B's water right #36-

[27] In certain areas, depletions have been so severe that A&B has been forced to abandon wells and temporarily convert those lands to a surface water supply. Tr. Vol. III, p. 565, ln. 11 – p. 566, ln. 10; *see also* Ex. 217.

[28] The burden of rectification, and increased assessments, falls directly on the shoulders of the landowners. As A&B landowner Mr. Eames testified at hearing:

> Q. [BY MR. THOMPSON]: Do you have any particular concerns for 2009?
> A. Well, one is our assessment is going to increase $25 per acre. So up to $95 for our O&M costs. So I'm going to have that increased cost for my water input. I got to figure out ways to cover that cost.

Tr. Vol. V, p. 895, lns. 10-16.

2080); Tr. Vol. V, p. 956; lns. 9-14, p. 957, lns. 5-13; p. 960, lns. 13-25; p. 961, lns. 1-6, 13-16 (Mr. Kostka confirmed he could use the decreed rate of delivery per acre, and testified that reduced deliveries have affected his irrigation operations and even forced him to change cropping patterns). Importantly, when A&B rectifies a well system, the District seeks to provide between .85 and .90 miner's inch per acre because "that is what they [A&B's landowners] need to meet their crop requirements." Tr. Vol. III, p. 552, ln. 20 – p. 553, ln. 9.[29]

The overwhelming evidence and testimony in the record shows that diversions by junior ground water rights are interfering with A&B's ability to divert its decreed diversion rate – even though A&B's landowners can beneficially use that amount of water. As such, the Director and watermaster are required 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 with the district." CM Rule 40.01.a.

By adopting and applying a 0.75 miner's inches per acre benchmark, the Director's new standard excuses injury to A&B's water right because the injury suffered is not "sufficient" when compared to the "project as a whole". R. 3097. The Director used the fact that A&B is a large irrigation project (approximately 66,000 irrigated acres in Unit B) against A&B – holding that since only "5,000 acres" were served by well systems producing less than 0.75 miner's inch per acre no material injury has occurred. *Id.*[30] At a minimum, the Director should have found injury to those parts of A&B's water right that would not supply his new minimum rate. Regardless, this false benchmark merely excuses the injury suffered and forces A&B to "self-

[29] In addition to the landowners' testimony, A&B's expert witnesses analyzed the diversions from individual wells across the A&B project area over time, and the impacts on those wells due to declining ground water levels. *See* Ex. 200 at 3-3 to 3-12. This irrigation diversion requirements analysis supports the landowners' testimony that they can beneficially use the amount of water stated on A&B's decree. *Id.* at 4-6 to 4-8.

[30] Injury to A&B's water right cannot be condoned in any proportion. It does not matter how many of the acres served by A&B's right are impacted – be it 50,000 acres, 5,000 acres, or 50 acres. If diversions under junior priority ground water rights are interfering with A&B's *decreed* senior right, A&B is entitled to administration in order to protect its senior water right. CMR 10.14. That is the very purpose of the prior appropriation doctrine."

mitigate" or accept material injury. [31] Since the Director applied an incorrect legal standard in reviewing A&B's delivery call, the decision should be set aside.

C. The Director Wrongly Used a "Minimum Amount" of Water Needed for Crop Maturity Standard.

The Director's "minimum amount needed" for crop maturity standard is not supported by Idaho law and also ignores A&B's decreed water right. As stated in the *Recommended Order*:

> **4. Crops may be grown to full maturity on less water than demanded by A&B in this delivery call.** Evidence from irrigators outside A&B is informative to the extent that it indicates that full crops can be produced on less water than demanded by A&B in this delivery call proceeding. In fact full maturity crops are grown on Unit B with less than the 0.75 amount. This may result in increased costs in power to the irrigators who may be required to run their pumps longer and increased labor to manage the water, but careful management by A&B and its irrigators has resulted in the production of crops to full maturity with less water than demanded by A&B.
>
> * * *
>
> [A&B] is not entitled to curtail junior pumpers to reach that full amount if the full amount is not necessary to develop crops to maturity. . . The question is whether irrigators' crop needs in Unit B can be met with less than the full amount of the water right.
>
> * * *
>
> **6. The Director's determination is supported by substantial evidence.** Several factors support the Director's determination. It is consistent with the Motion to Proceed which indicates 0.75 to be a minimum need. A minimum is not a desirable amount, but it is adequate. The 0.75 is consistent with the policy of rectification adopted by A&B. It is unlikely rectification would be prompted at a level below the amount necessary for crop production. More is sought, and more is better, but 0.75 meets crop needs. There is persuasive evidence that 0.75 is above the amount nearby irrigators with similar needs consider adequate.

R. 3107, 3110.[32]

[31] Whereas various A&B landowners farm different parcels across the A&B project, the fact that they may receive more water on some well systems and less on others does not justify the injury to A&B's water right or the impacts to their individual farms, or portions thereof. The *Recommended Order's* example of Tim Adamms' operation impermissibly justifies water shortage on part of his farm (20 acres in 2007) just because he farms 1,650 acres in total. Regardless of the affected acres, it is clear that Mr. Adamms was affected by water shortage and injury to A&B's water right. Although he farms 1,650 acres, impact to any one of those acres affects Mr. Adamms farming operation and his annual bottom line, as it does with any of A&B's landowners.

The Director and watermaster are statutorily mandated to distribute water to "water rights" based upon priority. *See* Idaho Code §§ 42-602, 607; CMR 40.01. The CMR do not authorize the Director to delve into and micromanage farming practices. The fact that a crop has been or can be grown with 0.75 miner's inches per acre (obviously depending upon crop type, climatic conditions, and other factors) does not define a new standard to replace that provided by a water user's *decree*.

Indeed, a license or decree is binding upon the Director and watermaster and sets the "standard" to be used in administration. *See* Idaho Code §§ 42-220 ("Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein"); 42-1420(1) ("The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system") (emphasis added). If a water right holder can beneficially use the amount of water in his decree, the Director and watermaster are obligated to deliver that amount and juniors are prohibited from interfering with that use, i.e. injuring the senior's right.[33]

Absent "waste" or some other constitutionally permissible defense, none of which were proven in this case, A&B is entitled to deliver the decreed quantity of water to its landowners and have that right protected from injury by junior pumping. Importantly, A&B's landowner witnesses all testified that they require and can beneficially use the amount of water provided in A&B's decree (0.88 miner's inch per acre).[34] R. 2939-44.

---

[32] The above findings further ignore A&B's decreed water right and constitute an unlawful re-adjudication prohibited by Idaho law.

[33] Even if a senior's crop can "mature" under an amount of water less than decreed, that does not mean the decreed amount cannot be beneficially used. Indeed, if a senior cannot beneficially use the water decreed, such use would constitute unlawful "waste". Pursuant to the findings in the January 29, 2008 *Order* and the *Recommended Order*, it is clear that A&B and its landowners do not "waste" water. Just the opposite, A&B is a highly efficient water delivery organization that delivers water to its landowners on-demand. R. 3098-3100.

[34] This is even less than the 1 miner's inch per acre standard rate of diversion provided by Idaho law for new water right applications. Idaho Code § 42-202(6).

Furthermore, a water user's "minimum need" is not a valid basis for the Director and watermaster to distribute water. A landowner's "minimum need" will certainly change with cropping patterns, weather, precipitation, and other factors. A&B delivers water to its landowners and must be prepared to deliver what is requested, up to the decreed amounts on its water right. A&B cannot dictate what its landowners grow or how much water a particular landowner needs throughout the irrigation season.

Under Idaho law a water user is not held to such a standard for purposes of water right appropriation or administration:

> So far as I am aware, ***it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs***, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. ***Economy of use is not synonymous with minimum use.*** Better four prosperous farmers than five who are unsuccessful because of the uncertainty in the water supply, and better four farms uniformly fruitful than five upon which failure is ever imminent, and to which it is bound to come on the average one year in five.

Caldwell v. Twin Falls Salmon River Land & Water Co., 225 F. 584, 596 (D. Idaho 1915) (emphasis added).

It is the individual farmer, *not the Director*, who is best acquainted with the land and is in the best position to know how much water is needed. *See Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383 (1930).

> The water user is acquainted with his land and his crops and should be in better position to determine when water should be applied than any other person. Various provisions of our statutes recognize his right to demand water. The respondents are entitled to apply water to their lands for the purpose of irrigation as early as it may be beneficially applied.

Id. at 395.

The SRBA District Court has also acknowledged that the Department cannot limit what an individual farmer grows, or the amount of water he can beneficially use under his water right. *See Order on Challenge "Facility Volume" Decision* at 17 (Twin Falls Dist. Ct., Fifth Jud. Dist., In Re SRBA: Subcase No. 36-2708 *et al*., Dec. 29, 1999) (the Department has no authority to "limit 'the extent of beneficial use of the water right' in the sense of limiting how much (of a crop) can be produced from that right").[35] The Director cannot limit or reduce the decreed amount if the water can be beneficially used. Moreover, the Director cannot limit the use of water under a decreed senior water right for the purpose of allowing junior priority water rights to pump their full rights instead. *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908) ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to another person. Vested rights cannot thus be taken away.").

Therefore, the Director's "minimum needed" for crop maturity standard is not supported by the facts or law and should be reversed. Idaho water law does not hold a senior water user to the "bare minimum" for purposes of administration, particularly where junior users are not held to the same standard. While A&B's landowners are in the best position to determine how much water is needed and when, they have a right to use up to their decreed diversion rate and the Director and watermaster are bound to deliver that amount in administration.

In summary, the Director's refusal to find material injury to A&B's senior water right was based upon flawed legal standards and is not supported by substantial evidence in the record. Since A&B's landowners all provided testimony that they need and can beneficially use the

[35] The "minimum needed" standard is akin to the riparian doctrine that was rejected in Idaho over a century ago. *See* IDAHO CONST. art. XV, § 3; Idaho Code § 42-106; *Baker*, 95 Idaho at 583. Rather than only allow A&B a "minimum needed", or what the Director deems is "reasonable", Idaho's prior appropriation doctrine requires the Director and watermaster to distribute water to A&B, according to its decree, and according to the priority stated. A "minimum needed" standard renders a water right meaningless, provided there is sufficient water for all users, junior and senior, to meet their "minimum needs".

decreed diversion rate under A&B's decreed water right, the Director's use of a "failure of the project" and "minimum needed" for crop maturity standard to find no-injury was erroneous and should be set aside.

III. The Director Failed to Properly Analyze A&B's Water Diversions From its 177 Separate Wells (Points of Diversion) to Determine Injury to A&B's Water Right.

The Director also failed to properly analyze injury to A&B's senior water right according to the elements of the water right, notably the 177 individual points of diversion or wells. The Director failed to recognize that A&B pumps water from individual wells that comprise over 130 separate well systems. *Dan Temple Testimony*; Vol. III, p. 467, lns. 3-7; p. 473, ln. 14 – p. 474, ln. 7; R. 3092-93. The failure to analyze water use at the individual wells and well systems results in a flawed injury analysis for A&B's senior water right and wrongly assumes that A&B can pump water and deliver it anywhere on the project.

In the January 29, 2008 *Order*, the Director ignored the actual physical layout of the A&B project and wrongly assumed that A&B's "total water supply" could be *equally delivered* to all acres on the project. R. 1147.[36] Contrary to the Director's assumption, the Hearing Officer considered the facts and evidence presented at hearing and recognized that water use under A&B's water right cannot be "averaged" and applied to each and every acre throughout the project area:

> **6. Consideration of the system as a whole must also account for the effect upon individual systems when the number of short systems would constitute a failure of the project**. 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 adjudicated is not satisfied by showing that the combined total 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. It is proper to consider the entire system, but that consideration must account for the fact that water from one pump is not

[36] The Director erroneously concluded that A&B could divert "0.77 miner's inch per acre" at all wells and therefore deliver "0.74 miner's inch per acre" to each acre on the project. R. 1119.

> accessible to the entire acreage. Pumping water from wells in excess of what can be beneficially used on the property to which the water can be delivered would be waste, so counting excess water that cannot be utilized towards the water right would be improper. The theoretical right to apply 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.
>
> * * *
>
> 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, 3096 (underline added).

The Department's witness Tim Luke also testified that water cannot be pumped from any well and delivered to any acre on the A&B project, Tr. Vol. VI, p. 1209, ln. 20 – p. 1210, ln. 4, and that the Director's "average" diversion rate was *not applicable to all wells* on the project, *id.* Tr. Vol. VI, p. 1246, lns. 3-7, p. 1247, lns. 14-23. Finally, Mr. Temple testified that not all wells produce the same amount of water on a per acre basis, particularly during the peak of the irrigation season when the District is on "allotment". Tr. Vol. III, p. 517-21.

The Department failed to conduct a well-by-well analysis and disregarded A&B's individual decreed points of diversion. *Luke Testimony*, Tr. Vol. VI, p. 1847, lns. 18-23; *Vincent Testimony*, Tr. Vol. IX, p. 1841, lns. 16-21.[37] Although A&B provided information to the Department regarding the number of acres served by each well system, the delivery rate, and the monthly volume pumped, the Department failed to perform a well specific analysis, *Luke Testimony*, p. 1252, lns. 2-17, even though such an analysis would be more representative of actual water use on the project, *id.*, p. 1252, lns. 13-17.

[37] The Director and his staff made no attempt to analyze A&B's actual diversions and water use compared to the amounts stated on its decreed water right 36-2080. *See Tim Luke Testimony*, Tr. Vol. VI, p. 1265, lns. 14-20 ("Q. And isn't true that you did not compare the water supply referenced in this paragraph to the diversion rate provided by the water right. A. That's correct. It's not in this particular finding. It doesn't make that comparison."); *Sean Vincent Testimony*, Tr. Vol. IX, p. 1844, lns. 12-19 ("Q. But the comparison is not to the diversion rate provided by the water right; is that correct? A. That's correct.").

With respect to the "Item G lands", or those lands that were not receiving a minimum of 0.75 miner's inch per acre, A&B's staff and experts confirmed the number of acres actually irrigated corresponded well with the acres submitted to IDWR. Ex. 200 at 4-31. Despite having this information, the Director failed to analyze the actual diversion and water use, and failed to consider this information for purposes of his *Final Order*.

A&B's landowners testified about the separate well systems on the project and how water delivery varies between those systems serving particular farms. *See* Exs. 229A, 230A, 231A (water delivery criteria lists for landowners); *see also, Eames Testimony*, Tr. Vol., p. 815, lns. 2-24; p. 817, lns. 13-15; *Adamms Testimony*, Tr. Vol. V, p. 894, lns. 2-7; *Kostka Testimony*, Tr. Vol. V, p. 947, lns. 17 – p. 948, lns. 11.

The Hearing Officer acknowledged the reality of the project and the fact A&B cannot deliver water from any well to any acre. R. 3095 ("[C]onsideration must account for the fact that water from one pump is not accessible to the entire acreage. … The theoretical right to apply 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").[38]

Although the Director adopted the Hearing Officer's conclusions on this point, R. 3322, he failed to correct his original analysis that assumed A&B's "total water supply" could be *equally delivered* to all acres on the project. Consequently, the Director erred by refusing to analyze the actual water availability and use at A&B's individual decreed points of diversion.

[38] While the Hearing Officer did state that "it is likely that a greater level of interconnection can be achieved than has been accomplished," he concluded that there is insufficient evidence to make any determination on this issue. R. 3095-96. Furthermore, "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.

IV. A&B Does Not Have to Interconnect its Separate Points of Diversion (Wells) as a Condition to Seeking Administration of Junior Priority Ground Water Rights.

Notwithstanding the actual layout of the A&B project and the individual decreed points of diversion, the Director further concluded "there is an obligation of A&B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from juniors." R. 3096. The Director ignored all of the decreed points of diversion to arrive at this finding and the implication that A&B should "interconnect" its irrigation system. In other words, the Director created a new "condition" to administration in order to deliver water to A&B's senior water right. Such a condition violates Idaho law and contradicts the evidence in the record.

First, A&B's decree for water right 36-2080 did not "condition" or limit A&B's ability to seek administration of junior priority water rights in any way, including requiring A&B to interconnect some or all of its individual points of diversion. A&B's water right was licensed and partially decreed with individual wells serving different farm units across the project. As reflected in the *Recommended Order*, that is how the project was actually designed and constructed by BOR. R. 3092-93. Both the license and decree are binding upon IDWR and the Director. Idaho Code §§ 42-220, 42-1420. The Director cannot license a water right, recommend it to the SRBA Court, and then refuse to distribute water to the right after it is decreed just because the right has multiple points of diversion which are not interconnected. Although IDWR determined that A&B's individual wells were "reasonable" points of diversion in licensing and recommending the water right for decree, the Director's decision concludes just the opposite without any justification.

Moreover, there is nothing in Idaho's water distribution statutes or the CMR that require a senior water right holder to "interconnect" separate points of diversion prior to administration within an organized water district. *See* Idaho Code §§ 42-602, 607; CMR 40.

In addition, attempting to move water from well systems, or increase the lands served by a particular well would only reduce the amount of water provided to all landowners served by those wells during allotment. *See Dan Temple Testimony,* Tr. Vol. 4, p. 703, ln. 16 – p. 704, ln. 7. In essence, such an action would force A&B to "injure" it own landowners by taking water away from some and giving it to others.

The Director's new condition would also force A&B to pump more water at some wells without considering the detriment to A&B. Such a decision is analogous to forcing a water right holder to change its point of diversion, or accept an exchange of water, to the detriment of other water right holders. In *Daniels v. Adair*, 38 Idaho 130 (1923), the Idaho Supreme Court rejected such a result:

> It may be that under certain circumstances, where a clear case is made, an exchange of water may be brought about, but under no circumstances can it be done where the exchange would result to the detriment of prior users or result in depriving such prior users of a property right.

38 Idaho at 135; *see also, Reno v. Richards*, 32 Idaho 1, 5 (1918).

In this case the Director has no authority to force A&B to change its pumping operations and "interconnect" its points of diversion to its detriment. Moreover, forcing A&B to change pumping at its wells will not produce "more" water since providing more water to some landowners would require A&B to take it away from others. Requiring "interconnection" of A&B's decreed points of diversion prior to administration is erroneous, would injure A&B's landowners, and fails to address the problem of declining ground water levels suffered throughout the A&B project. Such a requirement unlawfully disregards the "presumption" A&B

is afforded for its decreed senior groundwater right and impermissibly shifts the burden to A&B to prove certain conditions or take additional measures in order to receive water under its senior water right. *See AFRD#2*, 143 Idaho at 878.

Importantly, the Director makes these demands even though there is nothing in the record addressing the practicality of interconnection in the project. R. 3092, 95-96 ("The practicality of greater interconnection of wells early in the project is not shown in the record. . . . **7. The ability to interconnect the entire system has not been shown, but the ability to interconnect greater portions of the system remains a question.** . . . The evidence does not demonstrate a level of certainty that partial interconnection could be implemented.") (emphasis in original).

There is nothing in the record that would demonstrate how a full or even "partial" interconnection would be helpful, feasible or even possible. Just the opposite, Dan Temple, in reference to a study commissioned by the Idaho Water Resource Board, testified that a physical interconnection of the A&B project would likely cost approximately $360 million.[39] Tr. Vol. III, p. 481, ln. 19 – p. 482, ln. 24. With respect to the "partial interconnection" rendering offered at the hearing (Exs. 416, 427-9), Dan Temple explained to move only 0.02 cfs (the amount of water for the size of a garden hose) was not practical on a large irrigation project such as A&B's.[40] Vol. IV, p. 715, p. 719, lns. 5-18.

Clearly, the finding that interconnection would offset shortages is unsupportable in this case. There is no legal basis to condition administration to A&B's senior ground water right by

[39] Contrary to the Hearing Officer's statement, those costs are not "speculative". R. 3096. The study commissioned by the IWRB, and certainly familiar to the Director, was completed and presented by MWH in July 2008. *See A&B Irrigation District Ground Water-to-Surface Water Conversion Project Study* (found at http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/ESPA/LDP/espa-presentations.htm). The study estimates probable project costs at $360 million. *See* MWH Report at 13.

[40] It would be impractical and absurd to require a large irrigation project to move water several miles to only irrigate 1 acre (0.02 cfs).

requiring interconnection of the individual points of diversion. Since the Director's decision on this issue has no legal or factual support, it should be set aside.

V. The Director Wrongly Concluded that A&B Has Not Exceeded a "Reasonable Ground Water Pumping Level".

Assuming for the sake of argument that the GWA applies to A&B's senior water right, the Director wrongly concluded that A&B has not been forced to exceed a "reasonable ground water pumping level" protected by the GWA. The Department has admittedly failed to establish an objective "reasonable pumping level" in the ESPA. Therefore, no "reasonable pumping level" has been identified from which this reviewing Court could judge the Director's conclusion. Accordingly, the Director's finding violates Idaho's APA since it is not supported by "substantial evidence" and the Director has failed to provide a "reasoned statement" to support this finding. *See Galli*, 146 Idaho at 159; *see also*, I.C. § 67-5248(1)(a).

In the Director's original January 29, 2008 *Order*, he concluded that "[t]here is no indication that ground water levels in the ESPA exceed reasonable pumping levels required to be protected under the provisions of Idaho Code § 42-226." R. 1109. However, no objective pumping level was disclosed by the Director in this order, and at hearing no witness could provide any factual basis to support it. *See* Tr. Vol. IX, pp. 18345-47. A&B was therefore prejudiced by bring precluded from discovering any factual basis for that finding in the contested case proceeding. Despite the lack of evidence the Director reiterated this finding in the *Final Order*. R. 3322.

The Hearing Officer acknowledged that a "standard" is needed and he even urged IDWR to set a "reasonable pumping level". R. 3113-14. Despite admitting no objective standard had been set for the ESPA, he too concluded that "A&B has not been required to exceed reasonable

pumping levels." R. 3113. Again, there was no evidence or an objective "reasonable pumping level" by which to judge this conclusion.

The evidence in the record supports the opposite conclusion and demonstrates that A&B has exceeded a reasonable ground water pumping level, particularly in those areas where wells have been abandoned. Water levels across A&B continue to decline. R. 3087 (recognizing an overall decline of 8.5 to 46.4 feet with an average decline of 12.6 feet from 1999 to 2006); Ex. 200 at 3-3 to 3-4. These continued declines have resulted in millions of dollars being been spent in an attempt to increase the water supply. *Supra*. The Hearing Officer specifically recognized that rectification is "impossible" in some wells and that deepening the wells in the southwest area is unlikely to produce more water. R. 3091, 3113. As to the abandoned wells, Dan Temple testified that the District drilled one well over 700 feet and still the well produced no additional water. Tr. Vol. III, p. 566; *see also*, Ex. 200 at 3-10, 3-12, Ex. 208. Accordingly, there is no question that a "reasonable pumping level" has been exceeded where a well is drilled to the point in the aquifer that produces no more water.

That the Director has set "reasonable pumping levels" in other cases further supports the argument that his decision in A&B's case violates the Idaho APA and is not supported by "substantial evidence". For example, in his final order issued *In the Matter of Applications to Appropriate Water Nos. 84-12239 in the Name of J.R. Cascade, Inc.* (dated October 22, 2009), Director Spackman found that "the bottom depth of 190 feet in the Moore well plus sufficient water depth to provide submergence for Moore's pump intakes at Moore's maximum diversion is the reasonable pumping level". [41] *Order* at 8. Accordingly, water users in that case were provided with an objective standard with which to judge the Director's finding.

[41] The decision can be found at IDWR's website at www.idwr.idaho.gov/WaterManagement/Orders.default.htm.

In this case A&B has been provided with no such objective standard, and apparently the basis for his conclusion that A&B has not exceeded a "reasonable pumping level" exists only in the Director's mind, not in any "substantial evidence" in the record. As opposed to having a defined ground water level to protect its water right and landowners, A&B is left to forever guess at what level its pumping will be protected from interference by junior water users. Until such a level is set, A&B and other water users must engage in a "race to the bottom" of the aquifer. For purposes of this appeal, the Director's failure to identify a defined pumping level is fatal to his decision. Otherwise, how would a reviewing Court ever find fault with the Director's decision if he alone is privy to the reasonable pumping level for the ESPA?

Based upon the lack of evidence in the record, and the failure to provide an objective standard, the Director wrongly found that A&B had not exceeded a "reasonable pumping level" in this case. The Director's decision should be set aside accordingly.

VI. The Director Ignored the Evidence of Continued Water Level Declines and Water Supply Conditions in Refusing to Designate the ESPA as a Ground Water Management Area.

The Director's failure to designate the ESPA as a GWMA is arbitrary and capricious. Importantly, the Director's sole justification for this erroneous decision is that "water districts created pursuant to chapter 6, title 42, Idaho Code, are in place across all of the ESPA." R. 1151. According to the Director, water districts perform the same functions and have the same benefits as a GWMA. *Id.* The Director performed no factual analysis of the water supply in the aquifer, relying instead on a misinterpretation of the statutes.[42]

[42] Furthermore, pursuant to the Director's May 1, 1995 *Pre-Hearing Conference Order* in this matter, the Director ordered:

> 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.

R. 676.

No such plan was ever developed or adopted by the Department. Although water districts have been

The Director's reliance upon the existence of water districts, which only administer water rights, fails to recognize the state of the ESPA and the purpose of Idaho Code § 42-233b, which is aimed at protecting the water resource. Under Idaho law, each "water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators." Idaho Code § 42-604. The watermaster and the Director have a clear legal duty to distribute water "in accordance with the prior appropriation doctrine." Idaho Code §§ 42-602, 607. A water district is not created for the purpose of protecting the water supply in an aquifer, it is created to distribute water pursuant to established water rights.

Tim Luke, IDWR's Section Manager for the Water Distribution section, recognized the statutory limitations on water districts:

> Q. [BY MR. THOMPSON]: But the watermaster doesn't have the authority to go out and create a water management plan for an aquifer within a water district, does he?
>
> A. I don't think so, no.
>
> Q. He's just concerning with administering the rights?
>
> A. Right.

Tr. Vol. VI, p. 1339, ln. 24 – p. 1340, ln. 6.

A GWMA, on the other hand, is designated when a ground water basin, or part thereof, "may be approaching the conditions of a critical ground water area." Idaho Code § 42-233b. When a GWMA is created, the Director may approve a "ground water management plan" which shall "provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water." *Id.* Unlike a

---

created to provide for water right administration, the Department has yet to adopt a "management plan" to protect the water supply in the ESPA. This is despite the evidence of a continuing decline in ground water levels across the aquifer.

water district, a GWMA designation is aimed at protecting the water resource and managing the effects of ground water withdrawals.

The Director cannot render the GWMA statute null and void just because a water district exists to cover part of the ESPA. *See State v. Ewell*, 147 Idaho 31, 205 P.3d 680, 684 (Ct. App. 2009). The Director must give effect to all words and provisions of a statute so that none will be void, superfluous, or redundant. *See Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 208 P.3d 289, 292 (2009). Accordingly, the Director must give effect to the GWMA statute as written and not brush aside his responsibility under the law by misconstruing it with the water district statutes. *See Farber*, 208 P.3d at 292, *see also*, *State v. Doe*, 147 Idaho 326, 208 P.3d 730, 732 (Ct. App. 2009) (Court must consider all sections of all applicable statutes together to determine the intent of the legislature).

The factual conditions of an aquifer that require a GWMA designation are not dependent upon whether or not a water district exists to administer water rights to the aquifer. At hearing, IDWR's witnesses recognized the continuing declines in ground water levels throughout the ESPA, including the area around A&B, and further recognized the fact the ESPA is not in a state of equilibrium. Dr. Ralston, who prepared a report for IDWR on the hydrogeology around A&B, confirmed that ground water levels were declining. Tr. Vol. I, p. 127, lns. 14-20. Dr. Wylie also testified as to the declines in water levels at A&B, and the likelihood those water levels would continue to decline in the future:

> Q. [BY MR. SIMPSON] Correct. Now, Dr. Wylie, were you a part of the mass measurement that occurred comparing 2005 aquifer levels to 2008 aquifer levels?
>
> A. The measurement? Oh, 2008?
>
> Q. You understand that there are –

A. I understand that there was a mass measurement. I did not get to go out and measure wells.

Q. Did you review those results?

A. I have seen those results. I wouldn't say that I reviewed them.

Q. Okay. Do you recall, as you sit here, whether those results identified a continual decline in the areas around A&B?

A. They do show a continued decline.

Q. And they also show a continued decline in areas west of A&B?

A. Yes.

Q. And would those continued declines be consistent with figures 7, 8, and 9 that you testified to this morning regarding the declining slope of aquifer levels in areas around A&B?

A. Yes.

…

Q. (BY MR. SIMPSON): So absent the CAMP process that you identified, would it be your expectations that the declines will continue?

A. Yes. Without something happening surface water users are going to continue to get more efficient, climate change is going to continue to happen, and all of those things are going to impact the aquifer.

Q. And if domestic well production continues and if there are new wells on the aquifer being drilled, would those continue to impact ground water levels?

A. Yeah. Any – any use that increases the consumptive use of the aquifer water is going to have an impact.

Tr. Vol. VII, p. 1420, lns. 7-25, p. 1421, lns. 1-5, 17-25, p. 1422, lns. 1-6.

A&B's Expert Report also shows a statistically significant trend for declining ground water levels throughout other areas of the ESPA. *See* Ex. 200 at 5-3 to 5-5, Figures 5-7 & 5-8. Declining ground water levels have not only affected A&B, but they have also forced other water

right holders to deepen their wells (about 160 private wells deepened after 1970 in the vicinity of A&B). Ex. 200 at 3-18.

Declining ground water levels have resulted in declining reach gains and tributary spring flows to the Snake River as well. Ex. 200 at 5-5 to 5-6. Increased ground water pumping and decreased incidental recharge have contributed to declining ground water levels and reduced water supplies for existing water right holders like A&B.

At a minimum, the southwestern portion of the ESPA qualifies for designation as a "ground water management area" since the rate of aquifer recharge (from all natural sources) is not sufficient to meet the rate of aquifer discharge (from all combined discharges). *See* Ex. 200 at 5-9 to 5-11. Notably, Dr. Wylie confirmed that the condition of a GWMA exists around A&B, since more water is discharged and is leaving the aquifer than is entering it in that area. *Wylie Testimony*, Tr. Vol. VII, p. 1520, ln. 18 – p. 1521, ln. 19. This was confirmed by the Hearing Officer. R. 3087 ("Indications are that there is less water coming into A&B than there is leaving the area around A&B").

By refusing to consider the existing water supplies and the evidence concerning the state of ground water levels across the ESPA, the Director erred in denying A&B's petition requesting designation of a GWMA. By simply relying upon a misinterpretation of the statutes, and his claim that water districts can replace GWMAs, the Director ignored the facts concerning the state of the aquifer around A&B and did not conduct any factual analysis to support denying A&B's request for that designation. The Director's decision is not supported by "substantial evidence" in the record, is arbitrary and capricious, and therefore should be set aside.

VII. Conclusions in the Director's *Final Order* Violate I.C. § 67-5248(1)(a).

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

> (1) An order must be in writing and shall include:
>
> (a) a reasoned statement in support of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.
>
> (b) Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.

Idaho Code § 67-5248 (emphasis added).

In the *Final Order* the Director concluded that the "record does not support the relief requested by A&B in its Exceptions Brief." R. 3322. This vague statement does not satisfy the requirements of Idaho's APA since the Director provided no "reasoned statement" in support of this decision. A&B provided specific reference to the record in requesting relief in its exceptions to the *Recommended Order* filed with the Director. R. 3284-3317. The Director denied the relief requested but did not explain why.[43] This type of order does not comply with Idaho law.

In addition, the Director concluded that the interpretations of the Hearing Officer of the "State Constitution, Idaho statutes and the Conjunctive Management Rules" made in other delivery calls would not be considered in this proceeding. R. 3322. Although the Director adopted the Hearing Officer's interpretations in those cases, and the Hearing Officer adopted them by reference in his *Recommended Order* in this case, the Director refused to adopt those legal conclusions without any supporting reason. Importantly, none of the laws interpreted changed from the issuance of the various orders. Again, the Director provided no "reasoned

[43] The Director's rush to issue a *Final Order* prior to his retirement likely explains the lack of a complete review of A&B's exceptions and the failure to provide "reasoned statements" in support of his conclusions. The Director only reviewed A&B's exceptions brief for three days prior to issuing the *Final Order*.

statement" in support of that decision, other than those legal interpretations were made in other contested cases. In other words, the Director failed to justify why his interpretation of the law changed in less than a year from his decisions in the other cases. Without a reasoned statement to justify his conclusion, the Director's conclusion fails as a matter of law.

CONCLUSION

The Director's *Final Order* is contrary to the law and is not supported by "substantial evidence." Indeed, it is "arbitrary and capricious." In his *Final Order*, the Director applied the wrong law (the 1951 GWA), ignored the presumptions associated with A&B's decreed water right, shifted the burden onto A&B and allowed the junior ground water rights to continue depleting the aquifer. The Director overlooked the 46.4 foot drop in aquifer levels, the millions of dollars spent in rectification efforts and the abandoned wells and found that A&B is not being materially injured. This conclusion does not comport with the "substantial evidence" in the record. Finally, the Director has evaded his statutory obligation to protect the aquifer by refusing to establish a reasonable pumping level and refusing to designate a GWMA. Accordingly, the *Final Order* should be set aside.

DATED this 30th day of December, 2009.

BARKER ROSHOLT & SIMPSON LLP

_____

Travis L. Thompson
Paul L. Arrington

Attorneys for Petitioner A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of December, 2009, I served true and correct copies of the foregoing A&B Irrigation District's *Opening Brief on Appeal* upon the following by the method indicated:

Deputy Clerk
Minidoka County District Court
715 G Street
P.O. Box 368
Rupert, Idaho 83350
Fax: (208) 436-5272

_____ U.S. Mail, Postage Prepaid
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile
_____ Email

Phillip J. Rassier
Chris Bromley
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
phil.rassier@idwr.idaho.gov
chris.bromley@idwr.idaho.gov

_____ U.S. Mail, Postage Prepaid
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile
_____ Email

Jerry R. Rigby
Rigby Andrus & Andrus Chtd.
25 N 2nd East
Rexburg, ID 83440
jrigby@rex-law.com

_____ U.S. Mail, Postage Prepaid
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile
_____ Email

Randall C. Budge
Candice M. McHugh
Racine Olson
P.O. Box 1391
201 E Center Street
Pocatello, ID 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net

_____ U.S. Mail, Postage Prepaid
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile
_____ Email

Sarah A. Klahn
White & Jankowski LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
sarahk@white-jankowski.com

_____ U.S. Mail, Postage Prepaid
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile
_____ Email

A. Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, ID 83201
dtranmer@pocatello.us

_____ U.S. Mail, Postage Prepaid
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile
_____ Email

_____
Paul L. Arrington

statement" in support of that decision, other than those legal interpretations were made in other contested cases. In other words, the Director failed to justify why his interpretation of the law changed in less than a year from his decisions in the other cases. Without a reasoned statement to justify his conclusion, the Director's conclusion fails as a matter of law.

CONCLUSION

The Director's *Final Order* is contrary to the law and is not supported by "substantial evidence." Indeed, it is "arbitrary and capricious." In his *Final Order*, the Director applied the wrong law (the 1951 GWA), ignored the presumptions associated with A&B's decreed water right, shifted the burden onto A&B and allowed the junior ground water rights to continue depleting the aquifer. The Director overlooked the 46.4 foot drop in aquifer levels, the millions of dollars spent in rectification efforts and the abandoned wells and found that A&B is not being materially injured. This conclusion does not comport with the "substantial evidence" in the record. Finally, the Director has evaded his statutory obligation to protect the aquifer by refusing to establish a reasonable pumping level and refusing to designate a GWMA. Accordingly, the *Final Order* should be set aside.

DATED this 30th day of December, 2009.

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson
Paul L. Arrington

Attorneys for Petitioner A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of December, 2009, I served true and correct copies of the foregoing A&B Irrigation District's *Opening Brief on Appeal* upon the following by the method indicated:

Deputy Clerk Minidoka County District Court 715 G Street P.O. Box 368 Rupert, Idaho 83350 Fax: (208) 436-5272	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Phillip J. Rassier Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 phil.rassier@idwr.idaho.gov chris.bromley@idwr.idaho.gov	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile X Email
Jerry R. Rigby Rigby Andrus & Andrus Chtd. 25 N 2nd East Rexburg, ID 83440 jrigby@rex-law.com	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile X Email
Randall C. Budge Candice M. McHugh Racine Olson P.O. Box 1391 201 E Center Street Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile X Email
Sarah A. Klahn White & Jankowski LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile X Email
A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile X Email

Paul L. Arrington