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

RESPONDENT IDAHO GROUND WATER APPROPRIATORS' RESPONSE BRIEF

On appeal from the Idaho Department of Water Resources

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TABLE OF CONTENTS

CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from the *Final Order Regarding the A&B Irrigation District Delivery Call* ("Final Order") issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") on June 30, 2009. The Final Order denied A&B's delivery call because A&B's water right no. 36-2080 had not been materially injured as analyzed under the *Rules for the Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11. On August 31, 2009, A&B filed its *Notice of Appeal and Petition for Judicial Review of Agency Action* pursuant to the Idaho Administrative Procedure Act, Title 67, Chapter 52, Idaho Code. The Idaho Ground Water Appropriators, on behalf of its members ("Ground Water Users"), participated in the administrative hearing before the agency and are respondents in this appeal.

II. COURSE OF PROCEEDINGS

On July 26, 1994, A&B Irrigation District ("A&B") filed a *Petition for Delivery Call* ("Delivery Call") with the Department, requesting that the Director take actions "necessary to insure the delivery of ground water to [A&B] as provided by its water right to . . . . protect the people of the State of Idaho of depletion of ground water resources which have caused material injury to [A&B], and to designate the Eastern Snake Plain Aquifer as a ground water management area. . . ." R. 12-14. Shortly thereafter, the parties to the proceeding stipulated to stay the contested case. R. 670. On March 16, 2007, A&B filed a *Motion to Proceed*, requesting that the stay be lifted and that the Department proceed with resolution of its Delivery Call. R. 830.

On January 29, 2008, IDWR issued an Order ("January 29 Order") denying A&B's Delivery Call and Motion to Proceed on the basis that A&B had not suffered any material injury.

R. 1105. The January 29 Order determined through application of the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 (hereinafter "CM Rules" or "Conjunctive Management Rules") that A&B had not suffered any material injury and was not short of water. *Id.*

A&B filed a petition requesting an administrative hearing to challenge the January 29 Order. R. 1182. An evidentiary hearing was conducted December 3-17, 2008, before Hearing Officer Gerald F. Schroeder. Numerous interested parties participated in the hearing, including the Ground Water Users, City of Pocatello and Upper Snake River Water Users. R. 116-17.

On March 27, 2009, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("Recommended Order"), which agreed with the January 29 Order's conclusion that A&B's water right no. 36-2080 had not suffered material injury. R. 3078. In response to A&B's subsequent petition for reconsideration, the Hearing Officer issued his *Order Granting in Part and Denying in Part A&B's Petition for Reconsideration* on May 29, 2009, correcting two procedural errors and removing the term "catastrophic loss" from his Recommended Order but otherwise denying the petition for reconsideration. R. 3231. A&B then sought clarification from the Hearing Officer regarding the term "total project failure" which the Hearing Officer clarified on June 19, 2009 in his *Response to A&B's Petition for Clarification*. R. 3262.

After A&B filed exceptions to the Recommended Order on June 26, 2009. R. 3284. The Director issued his Final Order on June 30, 2009. R. 3318. A&B now seeks judicial review.

III. STATEMENT OF FACTS

The United States Bureau of Reclamation ("USBOR") built the A&B irrigation project and began to develop the groundwater resource on the Eastern Snake Plain Aquifer ("ESPA") in the late 1940s. R. 1111. A&B's irrigation system consists of two separate and distinct water

supplies and irrigation systems. R. 1111–13. The A Unit is supplied by surface water rights delivered from the Snake River and the B Unit is a complex irrigation system supplied by groundwater rights. R. 1112. Only the B Unit 1948 priority groundwater right no. 36-2080 is the subject of the delivery call and at issue in this case. *Id.*

Despite claims of water shortage based upon an authorized maximum diversion rate of 0.88 inches per acre, an amount that has never been delivered for even one day to every acre, evidence presented by A&B's own witnesses contradicts its allegations of shortage. R. 2907 – 09. As found by the Hearing Officer, evidence in the record shows that "crops could be grown and that the lands in question were in no worse condition than the surrounding areas." R. 3104 (Recommended Order at 27). "The evidence indicates that farmers outside the A&B project are often able to raise crops to full maturity on less water than is used on the Unit B lands." R. 3106. (Recommended Order at 29). The delivery rate of 0.75 cfs is "higher than nearby surface water users." R. 3107. (Recommended Order at 30). "Crops may be grown to full maturity on less water than demanded by A&B in this delivery." *Id.* "Going back at least to 1963 it does not appear that there was a time when all well systems could produce 0.88 miner's inches per acre." R. 3108. (Recommended Order at 31.)

The cross examination of A&B farmer witnesses Adams, Eames, Kostka and Molhman clearly established no verifiable evidence of any fallowed ground or unharvested crops and in fact, established that their crop yields have increased steadily over the years and exceed the county averages. R. 2909 – 11. They have had a steady and reliable headgate delivery of 3 acre-feet per acre exceeding the crop water requirements of adjacent farmers who only use 2 acre-feet per acre. R. 2910.

Water right no. 36-2080 has been "partially decreed" in the SRBA. Ex. 139. After the

entry of the partial decree, water right no. 36-2080 at A&B's request was subject to a transfer proceeding before IDWR. The approved transfer provides for an authorized maximum rate of diversion of 1,100 cfs and allows A&B to use up to 188 authorized points of diversion. Ex. 157. Yet, A&B currently operates only 177 wells to provide irrigation water to its members to irrigate up to 66,686.2 acres under water right no. 36-2080 and A&B's beneficial use and enlargement water rights. R. 1112-13. *See January 29 Order FF 23-24 and IGWA's Proposed Findings of Fact and Conclusions of Law*, R. 2905 and 2907.

A&B throughout its history has needed to replace worn or failing pumps, motors and well equipment, deepen existing wells, drill new wells, eliminate drains and open ditches, interconnect well systems, and shift land from less productive well systems to more productive well systems. R. 1131-33 and 2907. These improvements were driven in part by the conversion from flood to sprinkler irrigation and the improved efficiencies which allowed its members to enlarge irrigation to over 4,000 expanded acres. R. 2906; Ex. 406 and 407 - Enlargement acres; Tr. Vol. III, pl. 505, L. 11- p. 504, L. 8. Although the USBOR knew at the time of the siting of the B Unit project that the southwest area would have lower well yields, the project was sited there with the expectation that eventually, portions of that part of the project would have to import supplemental surface water. The USBOR predictions were proven correct and improvements in water supply in the southwest area are less feasible due to hydrogeology problems, not junior outside groundwater pumping and A&B has converted some lands to surface water. Ralston Testimony, Tr. Vol. I., p. 47, L. 24 – p. 76, L. 2-14, Temple Testimony, Vol. III., TR. 566, L. 11 – p. 567, L. 2. The evidence is overwhelming that A&B's efforts to improve water supply in its project have and continue to be successful in maintaining reasonable and adequate water supplies, as readily admitted by A&B's manager Dan Temple. D. Temple,

Tr. Vol. IV. p. 664, L. 5-17, p. 66, L 13 – p. 668, L. 5; Ex. 414, and 427-9. The associated costs incurred to continue to operate the system successfully were normal, expected and consistent with operational expenses incurred by farmers outside the A&B system. Yet, A&B now advocates the curtailment of junior groundwater users in order to maintain A&B's historic water levels and to force junior groundwater users to pay A&B's normal and reasonable expenses associated with operating its system and maintaining its water supply. Even A&B's own consultant agrees that this is not about water shortage, but simply about costs. Luke, Tr. Vol. VI., p. 1306, L. 19-23.

The Director's Final Order concluded that A&B farmers are not water short, that there is an adequate water supply available to A&B (R. 1117, 1120), that its farmers use the same or more water to irrigate their crops as surrounding farmers (R. 3107); that any water supply issues in the southwest area are not due to junior groundwater pumping but are due to the local hydrogeology (R. 1128-1130); and that therefore there is no injury to A&B's water right (R. 1150). These findings and conclusions are set forth in detailed and reasoned statements which are based on substantial and competent evidence in the record.

ISSUES PRESENTED ON APPEAL

1. Does the Idaho Ground Water Act govern the administration of water right no. 36-2080?

2. Did the Director treat A&B's decreed water right with the proper presumptions?

3. Does the record support the Director's conclusion that A&B's water right was not materially injured?

4. Did the Director properly deny A&B's request to declare the ESPA as a Ground Water Management Area?

5. Does the Director's final order contain reasoned statements for his conclusions?

STANDARD OF REVIEW

Judicial review of the Director's Final Order is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1); *Castaneda* v. *Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998).

The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) not supported by substantial evidence on the record as a whole; or,
(e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265. In order to obtain the relief they seek, A&B must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right has been prejudiced. I.C. § 67-5279(4); *Barron* v. *IDWR,*

135 Idaho 414, 18 P.3d 219, 222 (2001). If the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Id.*[1]

A&B as the appellant also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs*, 132 Idaho 551, 976 P.2d 477 (1999). The Idaho Supreme Court has summarized the review of an agency decision as follows:

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, *the agency's factual determinations are binding on the reviewing court*, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record .... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section § 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000) (citations omitted) (emphasis added); *see also, Cooper v. Board of Professional Discipline,* 134 Idaho 449, 4 P.3d 561 (2000). If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct. App. 1996).

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[1] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding whether it be by a jury, trial judge, special master, or hearing officer - was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See ego Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.,* 123 Idaho 473,478,849 P.2d 934,939 (1993).

ARGUMENT

I. A&B'S IRRIGATION WATER RIGHT NO. 36-2080 IS SUBJECT TO THE IDAHO GROUND WATER ACT.

District Court Judge McKee in the Fourth Judicial District[2], Hearing Officer Schroeder and the Director have all found that Idaho's Ground Water Act, Idaho Code § 42-226 *et. seq.* applies to pre-act groundwater rights. Their reasoning is sound. This Court should affirm the Final Order's conclusion that the Ground Water Act applies to A&B's 1948 priority date water right.

On March 21, 2008, A&B filed its *Motion for Declaratory Ruling* requesting that the Hearing Officer declare that the Idaho Ground Water Act did not apply to its 1948 priority date irrigation water right no. 36-2080. R. 1451-55. A&B argued that the Idaho Ground Water Act was adopted in 1951 and did not apply to its 1948 priority date water right. On May 26, 2008, the Hearing Officer issued his *Order Regarding Motion for Declaratory Ruling*, denying A&B's motion. R. 1630-38. The Hearing Officer emphasized that I.C. § 42-229 of the Idaho Ground Water Act provided that "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." *Id.* at 5. (emphasis added). The Hearing Officer also noted that the only ground water rights specifically excepted from the retroactive application of the Idaho Ground Water Act were groundwater rights used for domestic purposes and for drainage or recovery purposes. *See* I.C. §§ 42-227, 42-228. The Hearing Officer further noted that his interpretation of these statutes was fully supported by the case of *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) in which the Idaho Supreme Court expressly applied the Idaho Ground Water Act to water rights with priority dates that pre-dated the Act's adoption.

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[2] *Moyle v. Idaho Dep't of Water Resources*, Case No. CV OT 08 014978, Memorandum Decision at 8-9 (4th Jud. Dist. July 13, 2009).

A. Case Law Supports the Conclusion that the Ground Water Act Applies to A&B's Water Right No. 36-2080

The Idaho Ground Water Act unambiguously provides that "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." I.C. § 42-229 (emphasis added). The only two types of groundwater rights "specifically excepted" from the Idaho Ground Water Act are groundwater rights for domestic uses and for drainage or recovery uses. *See* I.C. §§ 42-227, 42-228. These plain and unambiguous statutes clearly reveal the legislative intent that the Idaho Ground Water Act apply both retroactively and prospectively to "all" ground water rights "whenever" acquired unless those water rights are for domestic uses or for drainage or recovery uses.

On appeal, A&B requests that this Court judicially re-write I.C. § 42-229 by redacting or disregarding the phrase "all rights" and the phrase "whenever ... acquired" and thereby eliminate its retroactive effect. However, A&B's request is frivolous not only in light of the unambiguous language of these statutes but also in light of case law applying the Idaho Ground Water Act.

In *Baker v. Ore-Ida*, 95 Idaho 575, 513 P.2d 627 (1973), the Idaho Supreme Court addressed certain irrigation groundwater rights. A number of those rights had priority dates of 1948 and 1950, which pre-dated the adoption of the Idaho Ground Water Act. There was an argument over whether all of the irrigation water rights were subject to the Idaho Ground Water Act and its "reasonable pumping level" requirement. The Supreme Court prefaced its analysis by stating: "This Court must for the first time, interpret our Ground Water Act (I.C. sec. 42-226 *et seq.*) as it relates to withdrawals of water from an underground aquifer." *Baker*, 95 Idaho at 576, 513 P.2d at 628. During its extensive analysis of the development of Idaho water law, the Supreme Court overruled the 1933 case of *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933),

which had previously held that senior appropriators of groundwater were "forever" entitled to their historic pumping levels without regard to the reasonableness of those pumping levels. The Supreme Court overruled *Noh* on two alternative bases. First, the Supreme Court held that the holding in *Noh* violated the Idaho constitution because granting senior appropriators a perpetual entitlement to historic pumping levels was "inconsistent with our constitutionally enunciated policy of optimum development of water resources in the public interest." *Baker*, 95 Idaho at 583, 513 P.2d at 635. Second, the Supreme Court held that the legislative enactment of the Idaho Ground Water Act and its requirement of reasonable pumping levels were intended to eliminate "the harsh doctrine of *Noh*." *Id.* Based upon both of these alternative bases, the Supreme Court agreed that all of the irrigation water rights at issue in the case, including the 1948 and 1950 water rights, were subject to the Idaho Ground Water Act and the reasonable pumping level requirement. *Id.* at 584, 513 P.2d at 636. Consequently, the Supreme Court made it clear that the *Noh* case was overruled both judicially and legislatively and that the Idaho Ground Water Act applies to all rights pre-dating the Act.[3]

A&B attempts to avoid the holding in *Baker* by focusing its attention upon the subsequent case of *Musser v. Higginson*, 125 Idaho 392, 393, 871 P.2d 809, 810 (1994). The *Musser* case, however, did not address the issue now argued by A&B and is therefore distinguishable. In *Musser*, the Supreme Court stated in dicta: "Both the original version and the current statute [i.e. I.C. § 42-226] make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute." *Musser*, 125 Idaho at 396,

[3] In its opening brief, A&B doesn't even mention the fact that *Noh* was overruled by the Idaho Supreme Court. Although the standard in *Noh* may apply in circumstances involving single domestic wells that pre-date the domestic exception in the Ground Water Act of 1978, the standard in Noh does not apply to the 177 wells used for irrigation purposes as is the case with A&B. *See, Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655, fn 11 (1982).

871 P.2d at 813 (underline added).[4] However, the Supreme Court in *Musser* did not address the interplay of I.C. § 42-226 with I.C. § 42-229 or Article XV, Section 5 of the Idaho Constitution. Even more significantly, the question on the application of the Ground Water Act to pre-1951 water rights was not briefed nor argued on appeal in *Musser*.[5] As explained by the Hearing Officer, "[t]he issue before the Court [in *Musser*] was a claimed failure of departmental action, not an analysis of the effect of the Ground Water Act on rights established before enactment of the Act." R. 1635.

In the recent *Moyle* case, the District Court was presented with the very same arguments presented in this case. After considering all of those arguments, the District Court agreed that the Idaho Ground Water Act applied to pre-act water rights:

> Tension exists both within I.C. § 42-226, and between this section and I.C. § 42-229. The first part of the first paragraph of I.C. § 42-226 provides that acquiring water rights by appropriation to beneficial use, under the doctrine of "first in time, first in right" is to be recognized, provided that this recognition is subject to regulation by the director in the maintenance of "reasonable ground water pumping levels." However, in the last sentence of the first paragraph thereof, it is provided that, "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." Then, in I.C. § 42-229, it is provided that, " ...the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically exempted herefrom, be governed by the provisions of this act.
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[4] This passing note implies that both the 1951 Act and the 1986 Act have the same language, which they clearly do not as discussed below in Section IV.B.

[5] This is supported by the appellate briefing filed in that case and by the Supreme Court's acknowledgement that the argument was only made "at the hearing to consider whether the writ would issue." *Musser*, 125 Idaho at 396, 871 P.2d at 813. *Musser* was not a case that wrestled with applying the Ground Water Act or the reasonable pumping level requirement to pre-1951 ground water rights. In fact, the one case on point regarding the application of Idaho's Ground Water Act to pre-1951 ground water rights – *Baker v. Ore-Ida* – is not even mentioned or cited by the Supreme Court in its *Musser* decision. *Musser* is simply a case which analyzed and applied Idaho law concerning writs of mandate.

> I am persuaded by the reasoning advanced by the IDWR and in the brief of the *amicus curiae.* Simply recognizing the priority of the water right does not necessarily mean exclusion of such prior right from any administration or regulation by the department of water resources whatsoever. To so hold would emasculate the policy declaration of the first paragraph of I.C. § 42-226 and the broad sweep of I.C. § 42-229, that the administrative and regulatory provisions of the act were to apply to all rights, whenever and however acquired.
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> While the issue is not squarely addressed in prior cases, I am persuaded by the rationale expressed in *Baker* v *Ore-Ida Foods, Inc., supra.* In that case, Justice Shepard, after a careful analysis of the development of water law in Idaho, observed that one purpose of the Ground Water Act was to promote the constitutionally enunciated policy of optimum development of water rights in the public interest. To that end, he concluded that the Ground Water Act could be applied to water rights acquired prior to the enactment of the act and overruled a doctrine previously expressed in *Noh* v *Stoner, 53* Idaho 651, 26 P.2d 1112 (1933), to the effect that a senior ground water user had the unfettered right to preclude interference from a junior user. He concluded instead that the Ground Water Act was "intended to eliminate the harsh doctrine of *Noh.*

Moyle v. Idaho Dep't of Water Resources, Case No. CV OT 08 014978, Memorandum Decision at 8-9 (4th Jud. Dist. July 13, 2009). The District Court continued:

> To my mind, providing that one's prior water right may be subject to some degree of administration by the department does not abrogate the principle of right by appropriation or the doctrine of first in time, first in right. The statute clearly does provide that all ground waters are the property of the state, and that the state is obligated to supervise their appropriations and allotments. While the statute provides that rights acquired prior to the enactment of the statute are to be recognized, it also provides an overriding policy of requiring that even those prior-acquired and first-in-time water resources are to be devoted to beneficial uses and in reasonable amounts, and it does impose upon the director the duty of administration and enforcement. I conclude that the director's determinations in this regard are consistent with the historical, constitutional and statutory mandates expressed in *Baker v. Ore-Ida Foods, Inc., supra.*

Id.

B. Legislative History and I.C. § 42-226 Show that the Ground Water Act Applies

The conclusion reached by the Hearing Officer, Director, and the District Court in *Moyle* are further supported by legislative history. A brief history and analysis of the Ground Water

Act and Idaho's constitutional requirements of optimum beneficial use in the public interest supports the application of the Ground Water Act and the reasonable pumping level requirement to pre-1951 groundwater rights.

It is a fundamental law of statutory construction that statutes that relate to the same subject are to be construed together in order to give effect to the intent of the legislature. *State v. Creech*, 105 Idaho 362, 367, 670 P.2d 463, 468 (1983). In attempting to discern and implement the intent of the legislature, the court may seek edification from the statute's legislative history and contemporaneous context. *State v. Burnight,* 132 Idaho 654, 978 P.2d 214 (Ct. App. 1999).

In 1951, the Idaho Legislature enacted legislation known as the Ground Water Act. Idaho's current Ground Water Act is codified at Idaho Code §§ 42-226 through 42-239. Section 1 of the Ground Water Act as passed in 1951 reads:

> SECTION 1 GROUND WATERS ARE PUBLIC WATER. -- It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined. All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. All rights to the 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, p. 423 (approved Mar. 19, 1951) (emphasis added). This last sentence of the Ground Water Act is merely a confirmation that prior water rights are validated and confirmed, but does not provide a specific exception to pre-1951 water rights, nor except them from the administrative decisions of the Director. Section 2 of the original Ground Water Act reads:

> SECTION 2. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. - The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act; providing such wells and withdrawal devices are subject to inspection by the

> department of reclamation and the department of public health. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

1951 Idaho Sess. Laws, ch. 200, § 2, p. 424 (approved Mar., 1951) (emphasis added). Further, the 1951 Ground Water Act in Section 4 specifically addressed administration of ground water rights and stated that administration of all non-excepted water rights (i.e. domestic water rights) "whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act." 1951 Idaho Sess. Laws, ch. 200, § 4, p. 424 (emphasis added). Section 4 of the Ground Water Act is currently codified at Idaho Code § 42-229.

In 1953, the Idaho Legislature amended Section 1 of the 1951 Ground Water Act by adding the italicized language which qualified the application of the "first in time first in right" doctrine by emphasizing that it was the Legislature's intent to develop the state's ground water resources and that strict priority shall not block full economic development of the state's underground water resource.

> SECTION L GROUND WATERS ARE PUBLIC WATER. -- It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined *and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided.* All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

1953 Idaho Sess. Laws, ch. 182, § 1, p. 278 (approved Mar. 12, 1953)(italics in original).

The 1953 amendment provided two important changes: 1) it qualified the application of the "first in time first in right" doctrine as it applies to ground water rights and 2) it protected "early" ground water users but only as to a "reasonable pumping level" established by the

Department, not to their historic pumping levels. The only water rights "specifically excepted" from the Ground Water Act were domestic water rights and drainage or recovery wells. I.C. §§ 42-227 and 42-228. However, the administration of ground water rights, "whenever or however acquired or to be acquired" was still governed by the provisions of the Act, now including the reasonable pumping levels provision. I.C. § 42-229. Importantly, the use of senior water rights was not to block the full economic development of the ground water resources of the state.

In 1978, the Idaho Legislature amended Section 2 of the Ground Water Act, now I.C. § 42-227, to limit the exception on domestic wells stating that the drilling and use of wells for domestic purposes shall not be "subject to the permit requirement under section 42-229, Idaho Code."[6] Finally, in 1987, the Idaho Legislature amended section 42-233 to restrict the use of geothermal ground water resources. 1987 Idaho Sess. Laws, ch. 347, § 3, p. 741. The Legislature also added language relating to the reasonable pumping levels as it related to geothermal resources under Idaho Code § 42-226 that states:

> In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources and for geothermal resources to the extent that he determines such protection is in the public interest.

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[6] The entire amended section for domestic wells now reads:

> 42-227. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act subject to the permit requirement under section 42-229. Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of health and welfare and providing further that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use 1978 Idaho Sess. Laws, ch. 324, § 1, p. 819.

The 1987 act also amended the last sentence of Section 1 of the 1951 Ground Water Act as follows:

> ~~All~~ This act shall not affect the rights to the use of ground water in this state ~~however~~ acquired before ~~the effective date of this act are hereby in all respects validated and confirmed~~ its enactment.

1987 Idaho Sess. Laws, ch. 347, § 1, p. 743. There was no direct comment by the legislature regarding the change to this last sentence. A&B fully admits, and in fact emphasizes, that this amendment to the last sentence in section 1 of the Ground Water Act was grammatical only. Brief in Support at 9 (emphasis in original). Importantly, Idaho Code §42-229 regarding the administration of ground water rights remains unchanged and still states that administration of all rights to the use of ground water, "unless specifically excepted herefrom", are governed by the Ground Water Act. The original language of the 1951 Ground Water Act merely affirmed the existence of prior water rights, but did not "specifically except" administration of them from the provisions of the Ground Water Act, thus, the grammatical change in 1987 cannot mean anything more than that. On the other hand, the language in 1987 may be reasonably read to protect pre-1987 geothermal uses from the changes made to the "Act" in 1987. This latter interpretation has been the understanding of IDWR.[7]

[7] *In the Matter of Applications to Appropriate Water Nos. 63-32089 and 63-32090* In the Name of the City of Eagle, Final Order at 30 (2008) ("the effect of this latter amendment [to the last sentence] of I.C. § 42-226 under the 1987 act was to make the new restriction on the use of geothermal rights prospective only. Thus, all pre-1987 geothermal water rights for non-heating purposes remain unaffected by the restriction in the 1987 act.")

C. Public Policy Supports that the Ground Water Act Applies

This history of the Ground Water Act, coupled with the Supreme Court's specific application in *Baker* to historic water rights makes it obvious that the law to be applied to A&B's Delivery Call is reasonable pumping levels and not historic pumping levels. As stated by the Supreme Court in *Baker*, the Ground Water Act is:

> consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interests . . . and that the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water in order to promote full economic development of the resource. . . . Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels . . . .

Baker at 584, 513 P.2d at 636.

A broad non-specific exception from the requirements under the Ground Water Act and specifically the reasonable pumping levels provisions for A&B would effectively set the reasonable pumping level in the ESPA at a 1948 level, set unilaterally by A&B regardless of whether its pumping levels were ever reasonable, and would directly contradict Idaho constitutional and statutory law, including the holding in *Baker*.

The Legislature intended that the groundwater resources be developed and that the senior user not block that development. Idaho Code § 42-226 states that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." Idaho law seeks the "highest and greatest possible duty from the waters in the state in the interest of agriculture and for useful and beneficial purposes." *Washington Sugar Co., v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915); Art. XV, §§ 1, 3, and 7, Idaho Const.; I.C. § 42-101. Additionally, "[i]t must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources." *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 319 P2d 965

(1957). Indeed, the governmental function in enacting the entire water distribution under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources. *Nettleton* v. *Higginson,* 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977). The Idaho Supreme Court in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) ("AFRD2") upheld the facial constitutionality of the Department's Conjunctive Management Rules that incorporate these principles and the principles of reasonable use and optimum development of the water resources. *See also* IDAPA 37.03.11.20.02 and 20.03.

Guaranteeing A&B its historic pumping levels without any consideration of reasonableness would directly contradict the Ground Water Act's intent to not allow senior, historic users to block the full economic development of the state's underground water resources. A&B's argument that its ground water rights are not subject to the Ground Water Act and its reasonable pumping level requirement must be rejected.

II. THE DIRECTOR TREATED A&B'S DECREED WATER RIGHT WITH THE PROPER PRESUMPTIONS

Nothing in the Director's Order prohibits A&B from delivering or diverting the full quantity on its water right of 1,100 cfs. A&B's argument that it is entitled to 0.88 inches per acre in its project and that the Director must evaluate its water right on an acre-by-acre basis is legally and factually flawed especially when the water right itself is not so limited. Water Right No. 36-2080 is not tied to any certain wells or certain lands, at the USBOR's requested and continued insistence by A&B. Ex. 139; Luke, Tr. Vol. VII, p. 1318, L. 22 – p. 1319, L. 4. Contrary to A&B's assertion that the Director "reduced A&B's decreed diversion rate from 0.88 to 0.75 miner's inches", (A&B Opening Brief at 28) the Director presumed that A&B was entitled to 1,100 cfs under its decreed water right, "A&B in entitled to the amount of its water

right." R. 3109 (Recommended Order at 31). The Director acknowledged that A&B was allowed to divert water from any of its wells or combination thereof to irrigate any land within its project, just as their water right was developed and intended. Notwithstanding, the Hearing Officer and the Director correctly concluded that "[t]he failure to secure the full extent of the authorized water right does not by itself constitute injury." *Id.*

A&B believes that a senior user is *presumed* injured, if a *claim* of shortage is made and that the Director is *required* to find material injury, unless junior users prove otherwise. Basically, A&B advocates that conjunctive management in Idaho be reduced to "depletion equals injury" and a strict priority, shut and fasten administration. However, this argument was made by A&B as a member of the Surface Water Coalition and was rejected by the Idaho Supreme Court in the *AFRD2* case. In rejecting this argument, the Idaho Supreme Court held:

> CM Rule 42 lists factors "the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste..." IDAPA 37.03.11.42.01. Such factors include the system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion. *Id.* ...
>
> Clearly ... the Director may consider factors such as those listed above in water rights administration. ...
>
> Conjunctive administration "requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources".... That is precisely the reason for the CM Rules and the need for analysis and administration by the Director. In that same vein, determining whether waste is taking place is not a re-adjudication because clearly that too, is not a decreed element of the 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.

AFRD2, 143 Idaho at 876-78, 154 P.3d at 447-49.

Thus, the Idaho Supreme Court made it clear that the Director is authorized to consider a senior water right call in light of all factors set forth in CM Rule 42. If there is a presumption of injury and the senior simply has to claim a shortage, there is no need for the Director to make an initial determination of injury using the CM factors rendering the Supreme Court's holding meaningless. A&B's use of water under its senior priority water right is subject to "conditions of reasonable use . . . as provided in Article XV, Article A, Section 5, Idaho Constitution, Optimum Development of Water Resources in the Public Interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development is defined by Idaho law." CM Rule 20.03 Further, "[t]he Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of . . . groundwater as described in Rule 42." IDAPA 37.03.11.40.03.

Further, as part of his analysis, the Director may investigate the amount of water that is found to be "actually needed" even if it is less than the authorized maximum amount decreed in the senior water right.[8] A water right quantity is an authorized maximum amount that can be diverted if it is available, but is not a guaranteed amount. *Id.*; *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 n5, 546 P.2d 382, 390 n5 (1976)(an appropriator is authorized to use the quantity of water needed, "regardless of the amount of [the] decreed right."); *Glavin v.*

[8] The Director, when looking to his duty to administer ground water rights, is to not just look at the priority date of the senior user, rather, the Director must equally guard all the various interests involved because "[w]ater [is] essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depend[s] upon its just apportionment to, and economical use by, those making a beneficial application of the same [thus], its control shall be in the state, which, in providing for its use shall equally guard all the various interests involved." I.C. § 42-101 (underline added).

Salmon River Canal Co., 44 Idaho 583, 589, 258 P. 532, 534 (1927) (an appropriator's right to use water ceases when his needs are supplied).

Idaho case law also supports the notion that a senior cannot demand the maximum quantity of water under his water right at all times.

> It is against the public policy of this state, as well as against express enactments, for a water user to take more of the water to which he is entitled than is necessary for the beneficial use for which he has appropriated it . . . Public policy demands that, whatever be the extent of a proprietor's right to use water until his needs are supplied, his right is dependent upon his necessities, and ceases with them.

Glavin, 44 Idaho at 589, 258 p. at 538. These principles, when considered with Idaho's Ground Water Act, I.C. § 42-226 *et. seq.* mandating that the doctrine of "first in time first in right" be administered in a manner that does not block full economic development of the state's underground water resources, makes it obvious that the law in Idaho allows the Director to examine evidence that goes beyond mere depletion of the groundwater table. It is within the Director's authority and discretion to investigate how much water is needed by a calling senior water user to raise full crops and to not just blindly curtail junior users to fulfill a "paper" maximum at the senior's insistence.

In this case, the Director did not limit A&B's ability to use its water right. A&B is still allowed to divert 1,100 cfs, from a combination of any of its 188 wells, although it has chosen to only use 177 well. R. 3095 (Recommended Order at 16). Yet, the evidence showed that A&B has not pumped 1,100 cfs and delivered the maximum amount of water to every acre within its project. R. 3109 (Recommended Order at 31), D. Temple, Tr. Vol. III, p. 632, L. 10 – p. 634, L. 23, Ex. 407, 408 and 409. Further, the Director found that A&B can interconnect its well systems without a transfer and has afforded A&B all presumptions in favor of the maximum

flexibility for A&B under its senior water right. R. 3101 (Recommended Order at 23). There was no improper reduction of any aspect of A&B's water right.

The Director concluded that A&B has not suffered material injury because A&B is not water short and has an adequate supply of water to meet its farmer's irrigation needs. Further, the Director concluded that any shortages in supply that A&B may be suffering in the southwest area of its project are not due to junior groundwater pumping, but are due to the local hydrogeology. These conclusions and findings are supported by substantial and competent evidence.

III. THE RECORD SUPPORTS THE DIRECTOR'S CONCLUSION THAT A&B'S WATER RIGHT WAS NOT MATERIALLY INJURED

To prevail A&B must show that IDWR's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) not supported by substantial evidence on the record as a whole; or,
(e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3). The findings of fact of the Director (or Hearing Officer) should not be disturbed by this Court, if the evidence is of such quantity or quality that reasonable minds could make the conclusion, not that one must make the same conclusion. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See, e.g., Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.,* 125 Idaho 473, 478, 849 P.2d 934,939 (1993). The Court must not reweigh the evidence, but rather, must review the findings to see whether the Director's (and Hearing Officer's) findings and

conclusions are based on substantial competent evidence in the record and that the conclusions are reasonably reached are based thereon.

A&B argues that the Director used improper and new "standards" to conclude that A&B was not materially injured. A&B argues that the Director used a "failure of the project" standard (A&B Opening Brief at 32) or a "minimum amount" needed standard (A&B Opening Brief at 37) and that the Director is mandated to evaluate A&B's claim of injury on a well-by-well system basis (A&B Opening Brief at 41). A&B argues that the Director has no discretion to investigate the amount of water available to A&B, the amount of water actually needed, diverted and used by A&B. A&B further argues that the Director is required to evaluate A&B's water right the way A&B decides and is without discretion to administer water using his expertise.

A&B has not met, nor can it meet the threshold to overturn the Director's Final Order which incorporates his January 29 Order and the Recommended Order of the Hearing Officer. As the following discussion shows, the Director understood that it was his responsibility, to properly distribute the waters of the state when applying the CM Rules to determine whether A&B was suffering from water shortages caused by junior users. As part of that analysis, the Director requested that A&B supply him information. A&B provided the Director information and the Director analyzed whether or not A&B was suffering material injury. A hearing was later held and all parties had an opportunity to submit additional evidence. Based upon this information and evidence, the director concluded that A&B was not suffering from material injury and denied A&B's requested relief that junior users be curtailed.

The Director's findings, inferences, conclusion and decisions are based on facts in the record that show 1) A&B has an adequate water supply and that A&B is not water short, 2) A&B's groundwater farmers use more water than other private groundwater farmers in the area

and have increased their yields over the years, 3) A&B's delivery policies and practices promote inefficiencies, 4) A&B's aggregate diversions of groundwater have increased in recent years and 5) A&B has expanded its irrigated acres and continues to provide water to these additional lands. The Director's conclusion that A&B is not materially injured is based on substantial and competent evidence in the record and the conclusions are reasonably drawn from that evidence and should be affirmed.

A. A&B Has an Adequate Water Supply, Is Not Water Short and A&B Farmers Use More Water Than Surrounding Private Farmers

The evidence showed that A&B was not water-short and that A&B has not historically ever pumped 1,100cfs at any one time nor did it provide the maximum diversion quantity under its water right (0.88 inchers per acre) to every acre within its project. Evidence in the record supports the conclusion that A&B's B Unit farmers have been able to use the amount of water needed to raise crops, meet their long-standing contracts and that they exceed the crop water requirements of adjacent farmers by 1 acre-foot per acre. Stevenson, Tr. Vol. X., p. 2069, L. 1-7; Carlquist Vol., X., p. 2040, L. 31- p. 2041, L. 8. Exhibit 111 shows that surrounding surface water user Twin Falls Canal Company's rate of delivery is 5/8 per inch or 0.625 inches which is less than A&B's delivery rate of 0.75 inches and certainly less than their "maximum rate of 0.88 inches per acre" that they claim they are entitled to. R. 3107 (Recommended Order at 30).

IDWR's analysis, as supported by testimony from area farmers, shows that A&B's B Unit farmers use the same or more water to raise the same or similar crops as the lands surrounding the B Unit. IDWR's evapotranspiration analysis shows that the water deliveries within the B Unit were the same or similar as those surrounding lands. Mr. Kramber's testimony, Tr. 1101-1102 and p. 1112, L. 12-19 and p. 1113, L. 7-12 and p. 1135, L. 22 – p. 1136, L. 12 along with Ex. 427-10, 427-11 and 427-12 show, as determined by the Director in

his analysis, that the lands identified by A&B as water short simply are not short of water. This technical evidence is further supported by the testimony of A&B's witnesses and the Ground Water Users' witnesses that show that private farmers outside A&B use roughly 2 acre-feet per acre, while the average use by A&B farmers is about 3 acre-feet per acre. Ex. 574 at 12; Maughan Tr. Vol. X., p. 2135, L. 18-25; Stevenson, Tr. Vol. X., p. 2088, L. 23- p. 2089, L. 11. Further, A&B's delivery policies promote inefficiencies. *Id.* and D. Temple, Tr. Vol. IV., p. 657, L. 22- p. 658, L. 2; Stevenson Tr. Vol. X., p. 2075, L. 11 – p. 2076, L. 18; Maughan, Tr. Vol X. p. 2135, L. 5-8. Despite their claims shortage, A&B's farmers have increased their production and exceed county averages for crop yields. cf. Ex. 357 and 355A, and 358.[9]

In this case, the evidence presented demonstrates that there is a small area within the southwest portion of A&B's service area that has some water supply difficulties, but the overwhelming weight of the evidence shows that this area has a unique hydrogeology and physical characteristics causing natural difficulties in accessing groundwater. R. 2913-15. As the Hearing Officer found, "conditions of a difficult area for water production do not justify curtailment or mitigation" and "[p]rotection of A&B's water right cannot be based on its poorest performing wells" because to do so would unreasonably limit groundwater development in violation of state law and policy. *See* R. 1138 – 1150 (Recommended Order at 34-46). Although the USBOR chose to site some wells within a challenging hydrogeologic environment, A&B's water right allows it to supplement that supply by interconnecting its wells or wells systems, to add additional points of diversion as needed or to replace abandoned or low yielding wells. R. 2914. Yet, A&B has refused to employ hydrogeologists to help it solve this problem that has

[9] Interestingly, A&B farmers claimed that the herbicide Oust, not water shortages, was to blame for reductions in crop yields in the recent past, however, any evidence of this was blocked by a protective order in the Federal District Court case. Tr. Vol. I, p. 6, L. 9 – p. 7, L. 7.

been ongoing since the inception of the projection. R. 2916 and 2922.

Dr. Ralston testified using Exhibit 159 which is a map of the B Unit of A&B. Exhibit 159 was also Figure 6 in his report titled, *Hydrogeologic Analysis of the A and B Irrigation District Area* dated January 2008. This report is Exhibit 121. Exhibit 159 was used to show an array of information, including those lands that A&B has converted to surface water irrigation as well as the various wells that A&B claims are "water short." These water short areas are in many cases in close proximity to other wells or well systems that have a surplus supply. Ex. 415, 416; R. 2906. Other allegedly water short well systems outside the southwest area are also in close proximity to wells or well systems that have ample water. Exhibit 481 shows that interconnecting some of these well systems is possible; yet, A&B has not even requested that such an evaluation be done. D. Temple, Tr. Vol. IV, p. 704, L. 8-13. Rather, A&B wants to demand that junior groundwater users be curtailed in order to guarantee A&B some undefined historic ground water level.

The Director found that the available water supply available to A&B was adequate, that the amount of water that A&B diverts meets or exceeds the beneficial use of irrigation and that A&B has not exercised all reasonable means of accessing the supply using the multiple options and flexibility afforded it under water right no. 36-2080. As such, the Director determined that there is no material injury. These conclusions and findings are supported by substantial and competent evidence in the record.

B. A&B Has Actually Increased its Diversions in Recent Years

A&B's claim that it needs more water to meet the beneficial use under its water right runs contrary to the evidence in the record that shows that A&B has actually withdrawn more water over the years and irrigates nearly 4,000 more acres than it historically developed under water

right no. 36-2080. Exhibits 409, and 430-C show that A&B's aggregate diversions have increased in recent years from 150,000 acre-feet to over 175,000 acre-feet.

C. A&B Continues to Deliver Water to Enlargement Acres

Of particular note, A&B continues to serve junior acres within its system and its farmers are able to raise crops on expansion or water spread acres, despite A&B's claims of water shortage. A&B's own Exhibits 229A-O; 230-B-N; Ex. 231B-F; 234B-J[10] all show that the members who claim to be water short continue to spread their water on expansion and enlargement acres that were not originally intended to be irrigated with water under water right no. 36-2080. In other words, water right no. 36-2080 now provides water to 2,063 more acres than it was historically developed to serve. Ex. 405, 406 and 407.

While A&B argues that the Director applied some erroneous standard to its delivery call, what the Director actually did was make a determination that A&B was not suffering any water shortages as verified through information supplied by A&B, analyzed by IDWR and confirmed by lay witness testimony. If a senior user doesn't need more water, then it logically follows that there can be no material injury. In this case, the Director's application of the CM Rules to the evidence in the record show that A&B is not suffering material injury and therefore the Director's Final Order should be affirmed.

D. The Director's Application of the CM Rules Is Sound and Based on the Evidence Before Him.

(i) Source. CM Rule 42.01.a allows the Director to evaluate the amount of water available from the source from which the water is diverted. The evidence established that the aggregate recharged to the ESPA substantially exceeds the aggregate groundwater withdrawals.

[10] It appears that these exhibits were inadvertently left out of the agency record and a motion to augment the record will be filed.

See R. p. 1734-59 and Ex. 400 at p. 8; Ex. 408. Further, water levels are likely stabilizing because of the 1991 moratorium on groundwater permits, conversions from gravity to sprinkler irrigation is nearly 85% and public processes such as the Comprehensive Aquifer Management Program are place. Luke, Tr. Vol. VI, p.1343, L. 7-10; Wylie, Tr. Vol. VII, p. 1400, L. 19-24- p. 1401, L. 11. The majority of A&B's problems accessing water are driven by the location of the B Unit. As the evidence established at the hearing, the vast majority of the aquifer underlying A&B is a highly productive water-bearing basalt aquifer. However, in the southwest portion of the B Unit, there are sedimentary interbeds that require site-specific considerations of the hydrogeology to determine whether or not A&B is using the best available means to withdraw water from that source. In a 1948 USGS document, Mr. Nace noted that "[d]ifferent well-construction and well-development methods would probably permit larger production from wells in the Burley Lake bed and other sediment." Ex. 124 at 16.

When the Bureau developed the A&B Irrigation District project in the late 1940s and early 50s, there was an understanding that the service area for the A&B Irrigation District encompassed a variety of lands and that the aquifer underlying A&B had a variety of characteristics. Ex. 113; Ex. 124 at 11-14; Ex. 470. Historical documents show that at the time of development the Bureau chose to develop wells in the high producing basalt aquifer located primarily in the northern portion of the B Unit and later moved to the "922 problem area" in the southwest portion. Ex. 152P and QQ; Vol. VII. Wylie Tr., p. 1368, L. 16- p. 1369, L. 9; Ralston, Vol. I, TR. 64, L. 18- p. 65, L. 2. When the Bureau developed the wells in the southwest portion, it was known that the water-bearing characteristics of the aquifer underlying the southwest portion differed from the hydrogeologic setting for a majority of the B Unit. *Id.* Yet, the Bureau consciously decided to drill wells in the sedimentary zones of the southwest area. Ultimately,

the Bureau re-drilled nearly 50% of its wells throughout the project within a ten-year period. Ex. 404.

Although withdrawing water from the sedimentary interbeds is more difficult than the higher transmissive areas located in the northern part of the B Unit, A&B is not without remedy. First, A&B could employ hydrogeologic consultants to determine whether or not small or supplemental wells would result in additional well yield for its water short wells as recommended by Dr. Ralston and could use different well screens to enhance success. Ralston, Vol. I, Tr. 196, L. 4-9; Ex. 400 at 36. Further, A&B could consider the interconnection of its wells or well systems in order to supplement its supply. "[I]t is ... clear that the licensing requested by the Bureau of Reclamation envisioned flexibility in moving water from one location to another. Consequently, 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 junior users." R. 3097 (Recommended Order at 19). Further, Dr. Petrich showed that limited interconnection of some well systems that are adjacent to well systems with surplus supply is possible. Ex. 481. Finally, A&B developed its project near the peak of the ground water level and it is undisputed that the ESPA is still above the pre-development level. R. 1739-1740.

(ii) Diversion. CM Rule 42.01.d states that if the water right is "for irrigation, the rate of diversion compared to the acreage of land served, the annual volume water diverted, the system diversion and conveyance efficiency, and the method of irrigation of water application" should be evaluated. A&B's system diversion and conveyance efficiency and method of irrigation are important considerations.

Initially, A&B's wells were located on high points within the project to accommodate flood irrigation. A&B's internal physical characteristics such as irregular shaped farms and its 24 hour order requirement caused inefficiency. With the advent of sprinkler irrigation, however, A&B has been able to increase the number of acres irrigated and develop additional water rights. Ex. 349-353, 406 and 407; Ex. 427 at 24, Ex. 427-16.

When one compares the rate of diversion by A&B to the acreage of lands served, it shows there is no shortage. Ex. 409, 430-C shows that A&B's aggregate diversion has increased in recent years. By 2007, 97% of A&B's lands were sprinkler irrigated and in a letter, Ex. 586, from former A&B Manager, Elmer McDaniels, 0.75 inches per acre is "adequate" for irrigation need. These facts were further established by testimony from IGWA lay witnesses, Tim Deeg, Lynn Carlquist, Orlo Maughan and Dean Stevenson, concerning their own practices as well as other farmer members of Magic Valley Ground Water District that surrounds A&B's service areas. Deeg, Tr. Vol. V., p. 1067, L. 9- p. 1069, L. 11, p. 1070 L. 8-18, p. 1071, L 12-21; Stevenson, Tr. Vol. X., p. 2068, L 12 – p. 2069, L. 7, p. 2074, L. 19 – p. 2075, L. 10, p. 2088, L 2-11, p. 2113, L. 5-21; Carlquist, Tr. Vol. X., p. 2036, L. 14-18, p. 2039, L. 5-16, p. 2040, L 21 – p. 2041, L. 8.; Maughan, Tr. Vol. X., p. 2138, L. 17-p. 2139, L. 13, p. 2138, L. 12-16.

These farmers irrigate with a lower rate of diversion and use in the range of 2 acre-feet to raise their crops as compared with A&B farmers that claim their 3 acre-feet delivery rate is somehow inadequate. Dr. Petrich and Mr. Sullivan testified that A&B can meet farmer's crop demands with its current water supply. Ex. 400 at p. 19-22. In fact, as IGWA and A&B farmer Dean Stevenson testified, because A&B provides an ample supply of water, he can "replace water with management" on his A&B land but on his private farms he uses less water and manages it more closely. Stevenson, Tr. Vol X., p. 2102 L. 2-8; Carlquist, Tr. Vol. X, p. 2040,

L. 21- p. 2041, L. 7 (farmer adjacent to B Unit and A Unit shareholder testified that he uses only approximately 2 acre-feet per acre on his private farm).[11]

(iii) Diversion Rate. CM Rule 42.01.e states that the Director should evaluate "the amount of water being diverted and used compared to the water right." A&B's diversion records show that it has never diverted 1,100 cfs simultaneously on one day nor has it exceeded its volume under its water right. A&B's manager, Dan Temple testified that A&B cannot show that it ever delivered 1,100 cfs for one month, one week or even one day based on their records. D. Temple, Tr. Vol. III, p. 632, L. 10-P. 634, L. 23. A&B's claim that it must have its maximum amount at all times at every well is simply contrary to the facts. Furthermore, A&B's historical diversion records show that it has never approached the 0.88 miners inches per acre per well that it is currently demanding. Ex. 155A; Ex. 476; FF36-37; Luke, Tr. Vol. VI., p. 1176, L 12 – p. 1177, L. 13; p. 1184, L. 1-24. The facts show that A&B has diverted roughly 3 acre-feet over time, confirmed by an engineering report from CH2M Hill done at A&B's request. Ex. 574 at 12; *see also* Ex. 407 and 408. Three acre-feet was the intended delivery when the project was designed.

Despite its complaints of shortage, A&B has been able to enlarge the amount of land it was serving by an additional 4,082 acres because of the more efficient sprinkler application Ex. 349-353 (partial decrees for its enlargement and junior priority acres); Ex. 405; Ex. 406 and 407 (showing the location of these acres and the expanded volumes developed by A&B). And while A&B complains that per-acre delivery is critical, A&B doesn't even track where the junior or

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[11] The question of the relevance of costs is covered in the Response Brief of the City of Pocatello. The facts established, that A&B has favorable power rates and as such, their costs to pump water to irrigate their lands is lower than the adjacent farmers. D. Temple, TR. 696, L. 11 – p. 698, L. 3. IGWA farmer, Tim Deeg testified that he pays 4.8 cents per kilowatt hour whereas A&B pays 2.8 cents per kilowatt hour. Deeg, TR. 1063, L. 20-25, p. 1068, L. 12- p. 1069, L. 21.

enlarged acres are located. D. Temple, Tr. Vol. IV. p. 669, L. 10-22. As a result, when there is a shortage on a well or well system, A&B does not require that the junior acres curtail to keep the original lands at a higher per acre rate. Temple, Tr. Vol IV. p. 675, L. 20-25 and Ex. 366 (showing that delivery to junior acres decreases the per acre delivery amount by up to 0.04 inches).

(iv) Summary. In sum, the Director's findings and application of CM Rule 42 factors shows that the ESPA has ample water to supply A&B's needs. Further, A&B's diversions show that it is able to meet crop needs without diverting its maximum authorized rate or volume; and in recent years, despite declining water levels, A&B's aggregate diversion has increased. Ex. 409, 430-C. The conclusion reached by the Director is that Water Right No. 36-2080 has not suffered material injury. The Court should not substitute its judgment as to whether the Director's findings of fact were correct, but rather, should evaluate whether or not the evidence is of such sufficient quantity and probative value that reasonable minds could find that the conclusion was proper. As the record shows, the Director's findings and conclusions are supported by substantial and competent evidence.

IV. THE ESPA SHOULD NOT BE DECLARED A GROUND WATER MANAGEMENT AREA

A&B has alleged that the Director's failure to designate the ESPA as a Ground Water Management Area (GWMA) is arbitrary and capricious. They do so by stating that the Director ignored the evidence of continued water level declines and water supply conditions. They further state that the Director cannot rely on Water Districts to manage water distribution in lieu of designating a GWMA.

A. The Conditions of the Eastern Snake Plain Aquifer (ESPA) Do Not Require the Director to Designate the ESPA as a Ground Water Management Area.

A "ground water management area" is "any ground water basin or designated part thereof

which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area." I.C. § 42-233b. A "critical ground water area" is "any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permit, as may be determined and designated, from time to time, by the director of the department of water resources." I.C. § 42-233a.

As shown in the standard of review, agency decisions, or the decisions of the director of an agency, must not be arbitrary and capricious. Therefore, when making a determination of whether a "critical ground water area" exists, and whether a GWMA is needed, the Director must base his decision upon the "facts and circumstances presented" and must abide by "adequate determining principles." *American Lung Assoc. of Idaho/Nevada v. State of Idaho*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006).

In A&B's Opening Brief, A&B appears to allege that declining water levels in the ESPA are in and of themselves the only factual condition upon which a GWMA should be designated. Indeed, in A&B's attempt to refute their own perceived view of the Director's position regarding water districts as they relate to GWMA, they rely on the report of Dr. Ralston that groundwater levels in the ESPA were declining. Opening Brief at 51. A&B also includes testimony of Dr. Wylie, who testified at hearing that the ESPA levels were declining. *Id.* at 51, 52. But, A&B's assertion that declining levels constitutes a critical groundwater area is incorrect. Further, in light of all the surrounding facts and circumstances, and the purpose for which they seek the GWMA designation, it would be erroneous for the court to designate the ESPA as a GWMA.

The language of the critical groundwater area statute is plain on its face. In order for the

director to designate an area as a GWMA area, he must find that the area is approaching the conditions of a critical ground water area which requires that there be insufficient ground water to "provide a reasonably safe supply for irrigation of cultivated lands" based on current rates of withdrawal. I.C. § 42-233a. Or the Director may make a determination that there is insufficient groundwater for projected rates of withdrawal. *Id.* The wording of the statute leaves the decision to the discretion of the Director. The exact wording allows the Director to make such a designation "as may be determined and designated, from time to time, by the director of the department of water resources." *Id.*

While A&B has presented testimony that aquifer levels were declining, there is also evidence that show that the aquifer levels are stabilizing. Ex. 400 at 30-31; Wylie, Tr. Vol. VII., p. 1400, L. 24-1401, L. 11; Luke, Tr. Vol. p. 1343, L. 7-10. Further, aggregate recharge to the ESPA substantially exceeds aggregate groundwater withdrawals. *See*, R. 1734-39 and Ex. 400 at p. 8; Ex. 408. In addition, the Hearing Officer made the point that IDWR has not been processing applications for permits since 1992 pursuant to a moratorium, except for exempt stock water and domestic appropriations. R. 3116 (Recommended Order). In fact, he further states that the depletive effect of groundwater pumping is within five percent of being fully realized, not more than ten percent, and perhaps even less than five. *Id.* As such, it is apparent that further levels of decline in the aquifer level will be the consequence of factors other than groundwater pumping. *Id.*

A&B has not presented any convincing evidence that the ESPA is approaching a critical groundwater area. A&B has petitioned for a GWMA for the entire ESPA. As discussed above, to prove the requirements for defining a critical groundwater area, a party must show that the ground water basin does not have "sufficient ground water to provide reasonably safe supply for

irrigation." I.C. 42-233a. A&B has failed to do this. In fact, they have provided no evidence that groundwater users on the ESPA do not have a reasonably safe supply for irrigation. Further, even in their own area of the aquifer, there is substantial and competent evidenced in the record to show that there is an adequate water supply and that A&B farmers actually withdraw and use more water for irrigation than surrounding farmers and have consistently increased their production over the years. Ex. 430 (Petrich Sur-Rebuttal) at 2-3, 8-9; Stevenson, Tr. Vol. X. p. 2068, L. 7 – p. 2069, L. 7, p. 2075, L. 11 – p. 2076 L. 8; Adams, Tr. Vol. V. p. 910, L. 25 – p. 913, L. 11; Eames, Tr. Vol. V. p. 845, L. 23 – p. 846, L. 8; Kostka, Tr. Vol. V. p. 990, L. 3 – p. 998, L. 10; Molhman, Tr. Vol V, p. 1037, L. 3-13.

A&B will undoubtedly claim that the fact that the ESPA levels are declining meets the standards set by the statute. However, the statute is specific and plain on its face in that it requires a lack of a reasonably safe supply of groundwater; a judgment call that is left to the sole discretion and expertise of the Director. Because the evidence does not show that the ESPA is approaching a critical groundwater area, it was neither arbitrary nor capricious for the Director to deny the petition to create a GWMA for the ESPA.

B. Even if the ESPA was Approaching the Conditions of a Critical Ground Water Area, Water Districts and Ground Water Districts Have Alleviated the Need to Designate a GWMA.

A&B alleges that Water Districts are created only to distribute water pursuant to established water rights, and that they have no role in protecting an aquifer. To support this, they cite to I.C. § 42-602, 604 and 607. It is true that Water Districts by themselves are not designed to protect the aquifer. However, both the GWMA and the Water District statutes allow the Director to supervise the distribution of water rights. I.C. § 42-602, 42-233b. In fact, as the Hearing Officer pointed out, distributing water within a Water District, provide the Director with

more discretion as to when he curtails water usage because he is not bound by the September 1st notification date required in a GWMA. R. 3116 (Recommended Order at 38); *see also* I.C. § 42-233b.

Further, it has been the position of the Department that the Director can manage water distribution through a water district as well as he could through a GWMA. While A&B cited to Tim Luke's (IDWR Section Manager for the Water Distribution section) testimony during the hearing on this matter, they only selectively cited his testimony to fit their position. A&B Opening Brief at 50. A&B only cited to the portion of Mr. Luke's testimony where he answered a question to the effect that a water district's watermaster doesn't have the authority to create a water management plan within a water district. *Id*; Tr. Vol. VI, p. 1339, L. 24 - p. 1340 L.6. However, Mr. Luke also testified "I think everything that you do in a ground water management area can be done in a water district." Tr. Vol. VI, p. 1,325, L.

In addition, two past Directors of IDWR have set forth affidavits explaining IDWR's practice or have entered orders that show it is the historical practice of the Department to rely on the water districts in lieu of GWMAs to manage water distribution. Aff. Of David R. Tuthill, Jr.[12] However, upon the creation of Water Districts 120 and 130, which overlay portions of the American Falls and Thousand Springs GWMAs, the Director then rescinded the portion of the order creating the GWMAs to the extent that they were now covered by the Water Districts

Finally, in making the argument that Water Districts are not designed to protect the aquifer, A&B ignores the roles that Ground Water Districts can play in protecting the aquifer and water user's interests in the aquifer. Pursuant to I.C. § 42-5201 *et seq.* (the "Ground Water

[12] Found online at: http://www.idwr.idaho.gov/News/WaterCa)lls/A&B_Irrigation_Call/A&B_2007_Filings/Court_docs/Affidavit_of_David_R._Tuthill_Jr_Director_Idaho_Department_of_Water_Resources.pdf. Page 7.

District Act"), Ground Water Districts may be organized in Idaho and in fact are parties to the A&B Delivery Call. These Ground Water Districts have a broad range of powers and duties as laid out in I.C. § 42-5224. These powers and duties include the ability to "monitor, measure, study, and implement programs in the interests of the district's members regarding the protection of ground water diversions, depth of water in wells, aquifer water levels and characteristics." I.C. § 42-5224(17). Further, the Ground Water Districts may "develop, maintain, operate and implement mitigation plans designed to mitigate any material injury caused by ground water use within the district upon senior water uses within and/or without the district." I.C. § 42-5224(11). The lands of the A&B irrigation district are found within the boundaries of the Magic Valley Ground Water District and the North Snake Ground Water District. *cf.* Ex. 484 and 315 (compare map of the location of the Ground Water Districts with map of A&B's location).

Given the powers and duties afforded to Water Districts and Ground Water Districts, combined with the powers and duties of the Director of IDWR, the Director's authority to manage an aquifer is not augmented by the creation of a GWMA. As such, the court should defer to the Director's discretion when he declines to grant a petition to designate a GWMA in an area already covered by a Water District and Ground Water Districts.

The ESPA does not meet the statutory requirement to be designated as a GWMA. As such, the Director's decision to not grant A&B's petition was based on "adequate determining principles" and was done with a "rational basis." Therefore, his decision was not arbitrary and capricious and should be affirmed by the court.

V. THE DIRECTOR'S FINAL ORDER THAT INCORPORATES THE DETAILED FINDINGS OF FACT FROM THE JANUARY 29 ORDER AND THE RECOMMENDED ORDER COMPLIES WITH I.C. § 67-5248(1)(A)

The Director's Final Oder complies with Idaho Code § 67-5248(1)(a), which requires that

an order contain "a reasoned statement in support of the decision" and that the findings of fact "shall be accompanied by a concise and explicit statement of the underlying facts" supporting the findings."

The Final Order states: "the findings of fact and conclusions of law entered herein, and the findings of facts and conclusions of law entered by the Hearing Officer in this matter, unless discussed and modified in this FINAL ORDER, are hereby accepted. All other requests for relief, unless specifically discussed herein are hereby denied." Final Order at 5-6. The Recommended Order at page 8 specifically accepts the Director's January 29 Order findings as part of the recommendation unless altered by the Recommended Order. The evidence relied upon or supporting the January 29 Order was made part of the record. The multiple findings of fact in the January 29 Order, the Recommended Order and the Final Order contain sufficient reasoned statements and references to the underlying facts and evidence. One would be hard pressed to find another agency decision with as many detailed and reasoned statements as that which are set forth here. A&B's claim otherwise is entirely without merit.

CONCLUSION

The facts in this record support the Director's conclusion that A&B has not suffered material injury. The Court should not reweigh or re-examine the substantial and competent evidence that establishes the facts that support that conclusion. Groundwater table declines are not enough to show material injury. An inability to divert the maximum authorized diversion rate on a water right is not enough to show material injury. It is the Director's duty to examine the evidence and apply the CM Rules to a delivery call by a senior user. The Director is required to look at the source, diversion methods and applications, the water right, among other factors, and determine whether or not a senior user is not able to meet his beneficial uses and is

materially injured because of junior water users. In this case, as a matter of law, A&B is not entitled to historic water levels and the record shows that A&B is not materially injured. As such, this Court should affirm the Director's Final Order.

DATED this 28th day of January, 2010.

RACINE OLSON NYE
BUDGE & BAILEY, CHARTERED

By: _____
CANDICE M. McHUGH
Attorneys for IGWA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2010, the above and foregoing document was served in the following manner:

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