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# A & B Irrigation District v. Idaho Dept of Water Resources Clerk's Record Dckt. 38403

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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

SUPREME COURT NO.
DISTRICT COURT NO. CV-2009-647

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATIONOF A GROUND WATER MANAGEMENT AREA

A&B IRRIGATION DISTRICT,

Petitioner-Respondent,

v.
THE IDAHO DEPARTMENT OF WATER RESOURCES, GARY SPACKMAN,
Respondent-Appellant,

v.

THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENEIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,

Intervenors-Respondents,

Vol. 1 of 1

LAW CLERK

Honorable ERIC WILDMAN, District Judge

Chris M. Bromley, DEPUTY ATTORNEY GENERAL P.O. Box 83720, Boise, ID. 83720-0098, Attorney for Respondent/Appellant, IDAHO DEPARTMENT OF WATER RESOURCES

Travis L. Thompson, BARKER ROSHOLT & SIMPS[ON] LLP, P.O. Box 485, Twin Falls, ID. 83303-0485, Attor[ney] for Respondent/Appellant, A&B IRRIGATION DIST[RICT]

A Dean Tranmer, CITY OF POCATELLO, P.O. Box [illegible] Pocatello, ID. 83201 and Sarah A. Klahn, WHITE & JANKOWSKI LLP, 511 Sixteenth At. Suite 500, Denv[er] CO. 80202, Attorneys for Respondent/Appellant, CIT[Y OF] POCATELLO

Candice M. McHugh, RACINE OLSON NYE BUDGE [&] BAILEY, Chartered, 101 S. Capitol Boulevard, Suite [illegible] Boise, ID. 83702, Attorneys for Respondents/Appellan[ts] IDAHO GROUND WATER APPROPRIATORS, INC

Filed this 8 day of March, 2011

Patty Temple, Clerk

Santos Garza, Deputy Clerk

FILED - COPY
MAY 20 2011
Supreme Court ____ Court of Appeals ____
Entered on ATS by ____

38403 38421 38422

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**Supreme Court Docket No.**

**Minidoka County Case No.**

**IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATIONOF A GROUND WATER MANAGEMENT AREA**

---

**A&B IRRIGATION DISTRICT,**

**Petitioner-Respondent,**

**v.**

**THE IDAHO DEPARTMENT OF WATER RESOURCES, GARY SPACKMAN,**
**Respondent-Appellant,**

**v.**

**THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENEIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,**

**Intervenors-Respondents**

**I**

**Appealed from the District Court of the Fifth Judicial District of the State of Idaho in and for Minidoka County**

**Honorable ERIC WILDMAN, District Judge**

Chris M. Bromley, DEPUTY ATTORNEY GENERAL, P.O. Box 83720, Boise, ID. 83720-0098, Attorney for Respondent/Appellant, IDAHO DEPARTMENT OF WATER RESOURCES

Travis L. Thompson, BARKER ROSHOLT & SIMPSON LLP, P.O. Box 485, Twin Falls, ID. 83303-0485, Attorney for Respondent/Appellant, A&B IRRIGATION DISTRICT

A Dean Tranmer, CITY OF POCATELLO, P.O. Box 4169, Pocatello, ID. 83201 and Sarah A. Klahn, WHITE & JANKOWSKI LLP, 511 Sixteenth At. Suite 500, Denver, CO. 80202, Attorneys for Respondent/Appellant, CITY OF POCATELLO

Candice M. McHugh, RACINE OLSON NYE BUDGE & BAILEY, Chartered, 101 S. Capitol Boulevard, Suite 208 Boise, ID. 83702, Attorneys for Respondents/Appellants, IDAHO GROUND WATER APPROPRIATORS, INC.

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| Order Consolidating Appeals | 01-12-11 | 157 |
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| Order Enlarging Time for Submission of Briefs in Support of Rehearing | 06-22-10 | 099 |

| | | |
|---|---|---|
| Order Granting an Extension of Time for Filing the Agency Transcript And Record | 10-26-09 | 018 |
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A & B Irrigation District, Inc. vs. Idaho Department of Water Resources, Gary Spackman

| Date | Code | User | | Judge |
|---|---|---|---|---|
| 8/31/2009 | NCOC | SANTOS | New Case Filed - Other Claims | John M. Melanson |
| | | SANTOS | Filing: L3 - Appeal or petition for judicial review or cross appeal or cross-petition from commission, board, or body to district court Paid by: A & B Irrigation District, Inc. (plaintiff) Receipt number: 0006904 Dated: 8/31/2009 Amount: $88.00 (Check) For: A & B Irrigation District, Inc. (plaintiff) | John M. Melanson |
| | APPR | SANTOS | Plaintiff: A & B Irrigation District, Inc. Appearance Through Attorney John K. Simpson | John M. Melanson |
| | CHJG | SANTOS | Change Assigned Judge | Michael R. Crabtree |
| 9/8/2009 | APPR | SANTOS | Defendant: Idaho Department of Water Resources Appearance Through Attorney Phillip J Rassier | Michael R. Crabtree |
| | APPR | SANTOS | Defendant: Idaho Department of Water Resources Appearance Through Attorney Chris M Bromley | Michael R. Crabtree |
| 9/9/2009 | APPR | SANTOS | Subject: In the Matter of the Petition for Delivery Appearance Through Attorney Randall C. Budge | Michael R. Crabtree |
| 9/10/2009 | ORDR | SANTOS | Procedural Order Governing Judicial Review of Agency Decision by District Court | John M. Melanson |
| 9/14/2009 | STMT | SANTOS | Petitioner's Statement of Initial Issues | John M. Melanson |
| 9/24/2009 | APPR | SANTOS | Other party: Fremont Madison Irrigation District; etal Appearance Through Attorney Jerry R. Rigby | John M. Melanson |
| | | SANTOS | Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Rigby, Jerry R. (attorney for Fremont Madison Irrigation District; etal) Receipt number: 0007557 Dated: 9/24/2009 Amount: $58.00 (Check) For: Fremont Madison Irrigation District; etal (other party) | John M. Melanson |
| 9/25/2009 | APPR | SANTOS | Other party: City Of Pocatello Appearance Through Attorney A. Dean Tranmer | John M. Melanson |
| | APPR | SANTOS | Other party: City Of Pocatello Appearance Through Attorney Sarah A Klahn | John M. Melanson |
| | | SANTOS | Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: White & Jankowski LLP Receipt number: 0007576 Dated: 9/25/2009 Amount: $58.00 (Check) For: City Of Pocatello (other party) | John M. Melanson |
| | NOTC | SANTOS | Notice of Lodging of Transcript and Record with Agency | John M. Melanson |
| 10/8/2009 | MISC | SANTOS | Petitioner's Objection to the Agency Record | John M. Melanson |
| | MISC | SANTOS | IGWA & Pocatello's Joint Objection to the Agency Record | John M. Melanson |
| 10/20/2009 | MOTN | SANTOS | Motion for Extension of time to File Agency Transcript and Record | John M. Melanson |
| 10/21/2009 | MOTN | JANET | Motion for extension of time to file an angecy transcript and record | John M. Melanson |

VI

Fifth Judicial District Court - Minidoka County

ROA Report

Case: CV-2009-0000647 Current Judge: Eric Wildman (SRBA)

A _B Irrigation District, Inc. vs. Idaho Department of Water Resources, etal.

User: SANTOS

A & B Irrigation District, Inc. vs. Idaho Department of Water Resources, Gary Spackman

| )ate | Code | User | | Judge |
|---|---|---|---|---|
| 0/26/2009 | ORDR | JANET | Order granting an extension of time for filing the agency transcript and record | Michael R. Crabtree |
| 0/29/2009 | NOTC | SANTOS | Notice of filing Agency Transcript and Record with District Court | John M. Melanson |
| | ORDR | SANTOS | Order Settling Agency Transcript and Record | John M. Melanson |
| I1/18/2009 | HRSC | SANTOS | Hearing Scheduled (Oral Arguments 03/15/2010 02:00 PM) | John M. Melanson |
| I1/20/2009 | MOTN | SANTOS | Unopposed Motion to Amend Briefing Schedule | John M. Melanson |
| I1/23/2009 | NOTC | SANTOS | Notice of Hearing on Oral Argument | John M. Melanson |
| | ORDR | SANTOS | Order Granting Unopposed Motion to Amend Briefing Schedule and | Michael R. Crabtree |
| I2/2/2009 | HRSC | SANTOS | Hearing Scheduled (Oral Arguments 03/15/2010 02:00 PM) | John M. Melanson |
| 12/16/2009 | CHJG | JANET | Change Assigned Judge (batch process) | |
| 12/31/2009 | ORDR | JANET | Order to disqualify without cause and order of reassignment | R. Barry Wood |
| | CHJG | JANET | Change Assigned Judge | Eric Wildman (SRBA) |
| | MISC | SANTOS | Petitioners Opening Brief | Eric Wildman (SRBA) |
| 1/6/2010 | HRSC | SANTOS | Hearing Scheduled (Oral Arguments 03/02/2010 01:30 PM) | Eric Wildman (SRBA) |
| | | SANTOS | Notice Of Hearing | Eric Wildman (SRBA) |
| 1/29/2010 | LODG | SANTOS | Lodged IDWR Respondents' Brief | Eric Wildman (SRBA) |
| | LODG | SANTOS | Lodged Respondent City of Pocatello's Response Brief | Eric Wildman (SRBA) |
| 2/1/2010 | LODG | SANTOS | Lodged Respondent Idaho Ground Water Appropriators Response Brief | Eric Wildman (SRBA) |
| 2/3/2010 | LODG | SANTOS | Lodged CD of Respondent City of Pocatello's Response Brief | Eric Wildman (SRBA) |
| 2/18/2010 | MOTN | SANTOS | Unopposed Motion to Extend Reply Deadline | Eric Wildman (SRBA) |
| | ORDR | SANTOS | Order Granting Unopposed motion to Extend Reply Deadline | Eric Wildman (SRBA) |
| 2/23/2010 | MISC | SANTOS | Petitioner A&B Irrigation Districts Reply Brief and disc | Eric Wildman (SRBA) |
| 2/25/2010 | MOTN | SANTOS | Motion to Augment and Correct the Agency Record and disc with exhibits to support motion | Eric Wildman (SRBA) |
| 2/26/2010 | ORDR | SANTOS | Order Granting Motion to Augment and Correct the Agency Record | Eric Wildman (SRBA) |

A & B Irrigation District, Inc. vs. Idaho Department of Water Resources, Gary Spackman

| Date | Code | User | | Judge |
|---|---|---|---|---|
| 3/3/2010 | CMIN | SANTOS | Court Minutes<br>Hearing type: Oral Arguments<br>Hearing date: 3/3/2010<br>Time: 2:27 pm<br>Courtroom:<br>Court reporter: Linda Ledbetter<br>Minutes Clerk: Santos Garza<br>Tape Number:<br>Party: A & B Irrigation District, Inc., Attorney: John Simpson<br>Party: Idaho Department of Water Resources, Attorney: Phillip Rassier<br>Party: City Of Pocatello, Attorney: A. Tranmer<br>Party: Fremont Madison Irrigation District; etal, Attorney: Jerry Rigby<br>Party: A & B Irrigation District, Inc., Attorney: John Simpson<br>Party: City Of Pocatello, Attorney: A. Tranmer<br>Party: Fremont Madison Irrigation District; etal, Attorney: Jerry Rigby<br>Party: Gary Spackman<br>Party: Idaho Department of Water Resources, Attorney: Phillip Rassier<br>Party: In the Matter of the Petition for Delivery, Attorney: Randall Budge | Eric Wildman (SRBA) |
| | ADVS | SANTOS | Hearing result for Oral Arguments held on 03/02/2010 01:30 PM: Case Taken Under Advisement | Eric Wildman (SRBA) |
| 5/4/2010 | DEOP | SANTOS | Memorandum Decision and Order on Petition for Judicial Review | Eric Wildman (SRBA) |
| 5/19/2010 | CERT | JANET | Certificate Of Service - Emailed Memorandum Decision and Order on Petition for Judicial Review | Eric Wildman (SRBA) |
| 5/20/2010 | ORDR | JANET | Order of extension re: filing date of memorandum decision | Eric Wildman (SRBA) |
| | CERT | JANET | Certificate Of Service - Mailed Memorandum Decision and Order on Petition for Judicial Review | Eric Wildman (SRBA) |
| | CERT | JANET | Certificate Of Mailing - Order of Extension re: Filing date of Memorandum | Eric Wildman (SRBA) |
| 6/10/2010 | PETN | SANTOS | Respondent City of Pocatello's Petition for Rehearing | Eric Wildman (SRBA) |
| | PETN | SANTOS | Ground Water User's Petition for Rehearing | Eric Wildman (SRBA) |
| 6/21/2010 | MOTN | SANTOS | Motion to enlarge Briefing Deadline in Support of Petitions for Rehearing | Eric Wildman (SRBA) |
| 6/22/2010 | ORDR | SANTOS | Order Enlarging Time for Submission of Briefs in Support of Rehearing | Eric Wildman (SRBA) |
| 7/7/2010 | ORDR | SANTOS | Order Granting Petitions for Rehaearing Notice of Hearing and Scheduling Petitions for Rehearing | Eric Wildman (SRBA) |

A & B Irrigation District, Inc. vs. Idaho Department of Water Resources, Gary Spackman

| Date | Code | User | | Judge |
|---|---|---|---|---|
| 7/7/2010 | CERT | SANTOS | Certificate Of Mailing | Eric Wildman (SRBA) |
| 7/19/2010 | HRSC | SANTOS | Hearing Scheduled (Petition 09/13/2010 01:30 PM) Petitions for Rehearing | Eric Wildman (SRBA) |
| 8/4/2010 | MISC | SANTOS | City of Pocatello's Opening Brief on Rehearing | Eric Wildman (SRBA) |
| 8/5/2010 | MISC | SANTOS | Ground Water Users Opening Brief and Rehearing | Eric Wildman (SRBA) |
| 8/20/2010 | MOTN | SANTOS | Unopposed Motion to Hold Argument on Re-Hearing at the SRBA Courthouse | Eric Wildman (SRBA) |
| 8/25/2010 | MISC | SANTOS | IDWR Respondents' Brief on Rehearing | Eric Wildman (SRBA) |
| | MISC | SANTOS | A & B Irrigation District's Response to IGWA's & Pocatello's Opening Briefs on Rehearing | Eric Wildman (SRBA) |
| 8/26/2010 | MOTN | SANTOS | Unopposed Motion for One Day Extension to File Reply Brief | Eric Wildman (SRBA) |
| 8/27/2010 | ORDR | SANTOS | Order Granting Motion for One Day Extension to file Reply Brief | Eric Wildman (SRBA) |
| 8/31/2010 | MOTN | SANTOS | Unopppposed Motion to Reschedule Argument | Eric Wildman (SRBA) |
| | ORDR | SANTOS | Order Granting Unopposed Motion to Reschedule Arguement | Eric Wildman (SRBA) |
| | HRSC | SANTOS | Hearing Scheduled (Petition 09/20/2010 01:30 PM) Petitions for Rehearing at the SRBA | Eric Wildman (SRBA) |
| 9/7/2010 | MISC | SANTOS | City of Pocatello's Reply Brief in support of Rehearing | Eric Wildman (SRBA) |
| | MISC | SANTOS | Ground Water Users Reply Brief on Rehearing | Eric Wildman (SRBA) |
| 9/20/2010 | ADVS | SANTOS | Hearing result for Petition held on 09/20/2010 01:30 PM: Case Taken Under Advisement Petitions for Rehearing at the SRBA | Eric Wildman (SRBA) |
| | CMIN | SANTOS | Court Minutes | Eric Wildman (SRBA) |
| 11/2/2010 | MEMO | SANTOS | Memorandum Decision and Order on Petitions for Rehearing | Eric Wildman (SRBA) |
| 11/24/2010 | FJDE | SANTOS | Final Judgement, Order Or Decree Entered | Eric Wildman (SRBA) |
| | ORDR | SANTOS | Order Amending Caption | Eric Wildman (SRBA) |
| 12/13/2010 | APSC | SANTOS | Appealed To The Supreme Court | Eric Wildman (SRBA) |
| 12/14/2010 | APSC | SANTOS | IDWR'S Amended Notice of Appeal | Eric Wildman (SRBA) |
| 12/28/2010 | MISC | SANTOS | SC Document Notice of Appeal Filed | Eric Wildman (SRBA) |
| 12/29/2010 | | SANTOS | Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Simpson, John K. (attorney for A & B Irrigation District, Inc.) Receipt number: 0008897 Dated: 12/29/2010 Amount: $101.00 (Check) For: A & B Irrigation District, Inc. (plaintiff) | Eric Wildman (SRBA) |
| | APSC | SANTOS | Appealed To The Supreme Court #2 | Eric Wildman (SRBA) |
| 12/30/2010 | BNDC | SANTOS | Bond Posted - Cash (Receipt 8908 Dated 12/30/2010 for 100.00) | Eric Wildman (SRBA) |

A & B Irrigation District, Inc. vs. Idaho Department of Water Resources, Gary Spackman

| Date | Code | User | | Judge |
|---|---|---|---|---|
| 12/30/2010 | APSC | SANTOS | Appealed To The Supreme Court City of Pocatello Notice of Appeal | Eric Wildman (SRBA) |
| 1/4/2011 | | SANTOS | Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: RACINE OLSON NYE Receipt number: 0000063 Dated: 1/4/2011 Amount: $101.00 (Check) For: ID Ground Water Appropriators subject) | Eric Wildman (SRBA) |
| | BNDC | SANTOS | Bond Posted - Cash (Receipt 64 Dated 1/4/2011 for 100.00) | Eric Wildman (SRBA) |
| | APSC | SANTOS | Appealed To The Supreme Court/ Ground Water Users' Notice of Appeal | Eric Wildman (SRBA) |
| 1/10/2011 | MISC | SANTOS | SC document Clerk's Certificate Filed/ IDWR Docket #38382-2010 (#1 filed) | Eric Wildman (SRBA) |
| 1/12/2011 | MISC | SANTOS | SC document Notice of Appeal Filed /A& B Irrigation Docket #38403-2011 (#2 filed) | Eric Wildman (SRBA) |
| | ORDR | SANTOS | SC Document Order Consolidation Appeals | Eric Wildman (SRBA) |
| 1/13/2011 | MISC | SANTOS | SC Document Notice of Appeal Filed City of Pocatello SC #38421-2011 | Eric Wildman (SRBA) |
| | MISC | SANTOS | SC Document Notice of Appeal Filed Ground Water Appropriators SC#38422-2011 | Eric Wildman (SRBA) |
| 1/26/2011 | MISC | SANTOS | SC Document Clerk's Certificate Filed SC #38422-2011 | Eric Wildman (SRBA) |
| | MISC | SANTOS | SC Document Clerk's Certificte Filed SC#38421-2011 | Eric Wildman (SRBA) |
| 1/28/2011 | ORDR | SANTOS | Order Setting Hearing on A&B Irrigation District's Motion to Enforce Orders and Motion for Expedited Hearing | Eric Wildman (SRBA) |
| 1/31/2011 | MOTN | SANTOS | A&B Irrigation District's Motion to Enforce Orders and Motion for Expedited Hearing | Eric Wildman (SRBA) |
| | MEMO | SANTOS | Memorandum in Support of A&B Irrigation District's Motion to Enforce Orders | Eric Wildman (SRBA) |
| | AFFD | SANTOS | Affidavit of Travis L. Thompson in Support of A&B Irrigation District's Motion to Enforce Orders | Eric Wildman (SRBA) |
| 2/3/2011 | HRSC | SANTOS | Hearing Scheduled (Motion 02/07/2011 01:30 PM) SRBA District Court Motion to Enforce Orders and Motion for Expedited Hearing | Eric Wildman (SRBA) |
| 2/4/2011 | AFFD | SANTOS | Affidavit of Chris M. Bromley | Eric Wildman (SRBA) |
| | MEMO | SANTOS | IDWR Memorandum in Opposition to A&B Irrigation districts Motion and Memorandum to Enforce Orders | Eric Wildman (SRBA) |
| | MEMO | SANTOS | IGWA'S Memorandum in Opposition to A&B Irrigation District's Motion to Enforce | Eric Wildman (SRBA) |
| 2/7/2011 | MISC | SANTOS | A&B Irrigation Districts Reply in Support of Motion to Enforce Orders | Eric Wildman (SRBA) |
| | CMIN | SANTOS | Court Minutes on Motion to Enforce | Eric Wildman (SRBA) |

A & B Irrigation District, Inc. vs. Idaho Department of Water Resources, Gary Spackman

| )ate | Code | User | | Judge |
|---|---|---|---|---|
| :/7/2011 | HRHD | SANTOS | Hearing result for Motion held on 02/07/2011 01:30 PM: Hearing Held SRBA District Court Motion to Enforce Orders and Motion for Expedited Hearing | Eric Wildman (SRBA) |
| :/14/2011 | ORDR | SANTOS | Order Granting Motion to Enforce In Part and Denying Motion to Enforce in Part | Eric Wildman (SRBA) |
| :/17/2011 | MEMO | SANTOS | Memorandum to file re: assigned appeal docket numbers | Eric Wildman (SRBA) |
| :/28/2011 | MISC | SANTOS | SC Document Transmittal of Document | Eric Wildman (SRBA) |
| | ORDR | SANTOS | SC Document Order Consolidating Appeal | Eric Wildman (SRBA) |
| 3/1/2011 | ORDR | SANTOS | SC Document Amended Order Consolidating Appeals | Eric Wildman (SRBA) |
| | MISC | SANTOS | SC document Transmittal of Document | Eric Wildman (SRBA) |
| | MISC | SANTOS | SC document Document Filed Motion to Consolidate Appeals | Eric Wildman (SRBA) |

FILED-DISTRICT COURT
CASE #________

2009 AUG 31 PM 2:49

DUANE SMITH, CLERK
[signature] DEPUTY

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
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Facsimile: (208) 735-2444

Attorneys for Petitioner A&B Irrigation District

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT**

**OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

| | |
|---|---|
| A&B IRRIGATION DISTRICT,<br><br>Petitioner,<br><br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,<br><br>Respondents. | CASE NO. CV 2009-647<br><br>Fee Category L.3 - $88.00<br><br>**NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION** |
| 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 | |

COMES NOW, the Petitioner A&B Irrigation District ("A&B"), by and through its undersigned counsel, and hereby files this Notice of Appeal and Petition for Judicial Review as follows:



SCANNED

## STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 67-5270 and 5279 seeking judicial review of the *Final Order Regarding A&B Irrigation District Delivery Call* issued by the Director of the Idaho Department of Water Resources on June 30, 2009 (made final by order denying A&B's petition for reconsideration dated August 4, 2009).

2. A hearing before the agency was held in the matter from December 3 - 18, 2008.

3. A Statement of Issues which A&B intends to assert in this matter will be filed with the Court within 14 days. Pursuant to I.R.C.P. 84(d)(5), A&B reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated in this petition or which become later discovered.

## JURISDICTION AND VENUE

4. This petition is authorized by Idaho Code §§ 67-5270 and 5279.

5. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1401D and 67-5272.

6. Venue lies in this Court pursuant to Idaho Code §§ 42-1701D and 67-5272. A&B's principal place of business is located in Minidoka County and real property (water right number 36-2080) which was the subject matter of the agency action is appurtenant to lands located in Minidoka County.

7. The Director's *Final Order* is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270.

## PARTIES

8. Petitioner A&B is an Idaho irrigation district, with its principal office located in Minidoka County, specifically Rupert, Idaho.

9. Respondent Idaho Department of Water Resources is a state agency with its main office located at 322 E. Front St., Boise, Idaho. Respondent Gary Spackman is the interim director of the Idaho Department of Water Resources.

**AGENCY RECORD**

10. Judicial review is sought of the Director's June 30, 2009 *Final Order Regarding the A&B Irrigation District Delivery Call.*

11. The agency held a hearing in this matter from December 3 – 18, 2008, which was recorded and a transcript created, which transcript should be made a part of the agency record in this matter. The person who may have a copy of such transcript is Victoria Wigle, Director's Administrative Assistant, Idaho Department of Water Resources, 322 E. Front St., P.O. Box 83720, Boise, Idaho 83720-0098, Telephone: (208) 287-4803, Facsimile: (208) 287-6700, email: victoria.wigle@idwr.idaho.gov. The parties to the administrative case previously paid for the creation of the transcript of the hearing.

12. A&B anticipates that it can reach a stipulation regarding the agency record with the Respondents and the other parties, and will pay its necessary share of the fee for preparation of the record at such time.

13. Service of this Notice of Appeal and Petition for Judicial Review of Agency Action has been made on the Respondents at the time of the filing of this Petition.

**DATED** this 31st day of August 2009.

**BARKER ROSHOLT & SIMPSON LLP**

Travis L. Thompson

Attorneys for Petitioner A&B Irrigation District

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of August, 2009, I served true and correct copies of the *Notice of Appeal and Petition for Judicial Review of Agency Action* 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<br>Rigby Andrus and Moeller<br>25 N 2nd East<br>Rexburg, ID 83440<br>jrigby@rex-law.com | Randall C. Budge<br>Candice M. McHugh<br>Racine Olson<br>P.O. Box 1391<br>201 E Center Street<br>Pocatello, ID 83204-1391<br>rcb@racinelaw.net<br>cmm@racinelaw.net | Sarah A. Klahn<br>White & Jankowski LLP<br>511 Sixteenth Street, Suite 500<br>Denver, CO 80202<br>sarahk@white-jankowski.com |
| A. Dean Tranmer<br>City of Pocatello<br>P.O. Box 4169<br>Pocatello, ID 83201<br>dtranmer@pocatello.us | | |

Travis L. Thompson

FILED-DISTRICT COURT
CASE #________

2009 SEP 10 PM 4:00

DUANE SMITH, CLERK
____ DEPUTY

**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,<br><br>Petitioner,<br><br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,<br><br>Respondents.<br><br>**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. 2009-000647<br><br>**PROCEDURAL ORDER GOVERNING JUDICIAL REVIEW OF AGENCY DECISION BY DISTRICT COURT** |

A Petition for Judicial Review has been filed in the above-entitled District Court seeking judicial review of a final order issued by the Director of the Idaho Department of Water Resources. This ***Order***, together with Rule 84, Idaho Rules of Civil Procedure, (I.R.C.P.), and the applicable statutes shall govern all proceedings before the court.

**1. <u>Petition for Judicial Review or Cross-Petitions for Judicial Review; Filing Fees</u>:** A&B Irrigation District filed a Petition for Judicial Review on August 31, 2009. If not already paid, all filing fees, if any, must be paid within seven (7) after entry of this



SCANNED

*Order*. Failure to timely pay any filing fee shall be grounds for dismissal without further notice.

2. <u>Stays</u>: Unless provided by Statute, the filing of a Petition or Cross Petition does not automatically stay the proceedings and enforcement of the action of an agency that is subject to the Petition. Any application or Motion for Stay must be made in accordance with I.R.C.P. 84(m).

3. <u>Form of Review</u>: Pursuant to 84(e)(1), when judicial review is authorized by statute, judicial review shall be based upon the record created before the Agency rather than as a trial de novo, unless the statute or the law provides for the procedure or standard. If the statute provides that the district court may take additional evidence upon judicial review, it may order the same on its own motion or the motion of any party. If the statute provides that review is de novo, the appeal shall be tried in the district court on any and all issues, on a new record. Pursuant to I.R.C.P. 84(e)(2), the scope of review on petition from an agency to the district court shall be as provided by statute.

4. <u>Preparation of Agency Record; Payment of Fees</u>: Pursuant to I.R.C.P. 84(f), when the statute provides what shall be contained in the official record of the agency upon judicial review, the agency shall prepare the record as provided by statute. Otherwise, the documents listed in paragraph (3) of I.R.C.P. 84(f) shall constitute the agency record for review. Petitioner and Cross-Petitioner shall pay all fees as required for preparation of the agency record in accordance with I.R.C.P. 84(f)(4). **The clerk of the agency in accordance with I.R.C.P. 84(f)(5) shall lodge the record with the agency within 14 days of the entry of this *Order*, or no later than September 24, 2009.** Any extension in time for preparation of the agency record shall be applied for by the agency to the district court.

5. <u>Preparation of Transcript, Payment of Fee</u>: The Court requires the provision of a written transcript prepared from the recorded or reported proceedings. It is the responsibility of the Petitioner (or Cross-Petitioner as the case may be) to timely arrange and pay for preparation of all portions of the transcript reasonably necessary for review. Pursuant to I.R.C.P. 84(g), the responsible party shall contact the agency clerk to determine the estimated cost of the transcript, and pay the estimated cost in accordance with I.R.C.P. 84(g)(1)(A) or (2)(A) as the case may be. **The transcript shall be lodged with the agency within 14 days of the entry of this *Order*, or no later than September 24, 2009.** The transcriber may apply to the district court for an extension of time, for good cause shown.

6. <u>Settlement of Transcript and Record</u>: Pursuant to I.R.C.P. 84(j), and unless otherwise provided by statute, upon receipt of the transcript and upon completion of the record, **the agency shall mail or deliver Notice of Lodging of Transcript and Record to all attorneys of record or parties appearing in person and to the district court. The parties shall have 14 days from the date of mailing of the notice to pick up a copy of the transcript and agency record and to object to the transcript or record.** All fees for the preparation of the transcript and record shall be paid by the responsible

party at or before the pick up of the agency record and transcript. **Any objection to the record shall be determined by the agency within 14 days of the receipt of the objection and the agency decision on the objection shall be included in the record on petition for review.** Upon the failure of the party to object within 14 days the transcript and record shall be deemed settled. **Pursuant to I.R.C.P. 84(k), the settled record and transcript shall be lodged with the district court within 42 days of the entry of this Order or no later than October 22, 2009.**

7. **Augmentation of the Record – Additional Evidence Presented to District Court -- Remand to Agency to Take Additional Evidence**: Pursuant to I.R.C.P. 84(l) the agency record and/or transcript on review may be augmented upon motion by a party within 21 days of the filing of the settled transcript and record in the manner prescribed by Idaho Appellate Rule (I.A.R.) 30. The taking of additional evidence by the district court and/or agency on remand shall be governed by statute or I.R.C.P. 84(l).

8. **Briefs and Memoranda**: The petitioner's brief shall be filed with the clerk within 35 days after lodging of the transcript and record. The respondent's brief (cross-petitioner's brief) shall be filed within 28 days after service of petitioner's brief. The petitioner may file a reply brief within 21 days after service of respondent's brief. The organization and content of briefs shall be governed by I.A.R. 35 and 36. Pursuant to I.R.C.P. 84(p) only one (1) original signed brief may be filed with the court and copies shall be served on all parties.

9. **Extension of Time**: Motions to extend the time for filing a brief shall be submitted in conformity with I.A.R. 34(e). All other requests for extension of time shall be submitted in conformity with I.A.R. 46.

10. **Motions**: All motions shall be submitted in conformity with I.R.C.P. 84(o) and shall be heard with out oral argument unless ordered by the court.

11. **Oral Arguments**: **The court will set the time and date for Oral Argument at a future date. The form and order of argument shall be governed by I.A.R. 37.**

12. **Judgment or Decision**: The Court's decision will be by written memorandum which shall constitute the Judgment or Decision required by I.R.C.P. 84(t)(1).

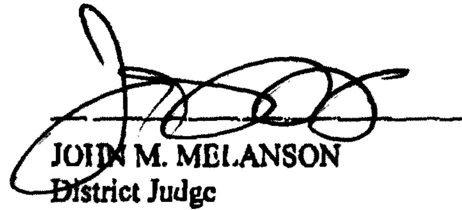
13. **Attorney's Fees and Costs on Appeal**: Costs and attorneys fees on judicial review shall be claimed, objected to and fixed in accordance with I.A.R. 40 and 41, provided that only one original signed claim, objection or supporting or opposing affidavit need be filed.

14. **Remittitur**: If no notice of appeal to the Idaho Supreme Court is filed within forty-two (42) days after filing of the Court's written decision, the clerk shall issue a *remittitur* remanding the matter to the agency as provided in I.R.C.P. 84(t)(4).

15. **Failure to Comply**: Failure by either party to timely comply with the requirement of this Order or applicable provisions of the Idaho Rules of Civil Procedure

of Idaho Appellate Rules, if applicable, shall be grounds for imposition of sanctions, including, but not limited to the allowance of attorney's fees, striking of briefs, or dismissal of the appeal pursuant to I.R.C.P. 11 and 84(u) and I.A.R. 11.1 and 21.

Dated Sept. 10, 2009



JOHN M. MELANSON
District Judge

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11$^{TH}$ day of September, 2009 , she caused a true and correct copy of the foregoing PROCEDURAL ORDER on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto:

John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON
P.O. Box 485
Twin Falls, ID. 83303-0485

Phillip J. Rassier
Chris M. Bromley
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID. 83720-0098

Randall C. Budge
Candice M. McHugh
Scott J. Smith
RACINE OLSON NYE BUDGE & BAILEY
P.O. Box 1391
Pocatello, ID. 83201

Dated this 11$^{th}$ day of September, 2009

Santos Garza, Deputy Clerk

09-14-'09 14:25 FROM- T-274 P002/005 F-666

FILED-DISTRICT COURT
CASE #________

2009 SEP 14 PM 3:43

DUANE SMITH, CLERK
_______ DEPUTY

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
Sarah W. Higer, ISB #8012
**BARKER ROSHOLT & SIMPSON LLP**
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Petitioner A&B Irrigation District

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT**

**OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

| | |
|---|---|
| A&B IRRIGATION DISTRICT,<br><br>Petitioner,<br><br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,<br><br>Respondents. | CASE NO. CV 2009-647<br><br>**PETITIONER'S STATEMENT OF INITIAL ISSUES** |
| 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 | |

COMES NOW, the Petitioner A&B Irrigation District ("A&B"), by and through its undersigned counsel, and hereby files this *Statement of Initial Issues* for its *Petition for Judicial Review* previously filed with the Court on August 31, 2009.



SCANNED

**STATEMENT OF INITIAL ISSUES**

1. The Petitioner intends to assert the following issues on judicial review:

a. Whether the Director erred by failing to provide for timely and lawful administration of junior priority ground water rights to satisfy A&B's decreed senior ground water right.

b. Whether the Director unconstitutionally applied the Department's Conjunctive Management Rules (IDAPA 37.03.11 *et seq.*) and erred in failing to recognize and honor A&B's decreed senior ground water right by unlawfully shifting the burden of proof to A&B for purposes of administration.

c. Whether the Director erred in reducing and re-adjudicating A&B's decreed diversion rate from 0.88 to 0.75 miner's inch per acre and then refused to even find injury to A&B's senior water right based upon wells producing less than that criteria.

d. Whether the Director erred in finding A&B is required to take additional measures to interconnect individual wells (points of diversion) or well systems across the A&B irrigation project before a delivery call against junior priority ground water rights can be filed.

e. Whether the Director erred in concluding that A&B's senior decreed ground water right with a September 9, 1948 priority date was subject to the provisions of Idaho's Ground Water Act adopted ex post facto in 1951 and amended several times thereafter, contrary to the express provisions of the Act which provides that: "This act shall not effect the rights to the use of ground water in this state acquired before its enactment".

f. Whether the Director erred in finding that A&B has not been required to pump water beyond a "reasonable ground water pumping level" notwithstanding the evidence in

the record and the fact no objective pumping level has ever been set by IDWR or the Director contrary to the Legislature's directive set forth in Idaho Code § 42-226.

g. Whether the Director erred in failing to designate all or a portion of the Eastern Snake Plain Aquifer as a Ground Water Management Area pursuant to Idaho Code § 42-233b.

h. Whether the Director erred in failing to limit the annual withdrawal of groundwater from the ESPA to the "reasonably anticipated average rate of future natural recharge" pursuant to Idaho Code § 42-237a(g).

i. Whether the Director abused his discretion in failing and refusing to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources, including the ESPA, as required by Idaho Code § 42-231.

j. Whether the Director erred by failing to issue a final order in compliance with Idaho Code § 67-5248.

2. Pursuant to I.R.C.P. 84(d)(5), the Petitioner reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated herein which become later discovered.

**DATED** this 14th day of September 2009.

**BARKER ROSHOLT & SIMPSON LLP**

Travis L. Thompson

Attorneys for Petitioner A&B Irrigation District

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of September, 2009, I served true and correct copies of the *Petitioner's Statement of Initial Issues* 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<br>Rigby Andrus and Moeller<br>25 N 2nd East<br>Rexburg, ID 83440<br>jrigby@rex-law.com | Randall C. Budge<br>Candice M. McHugh<br>Racine Olson<br>P.O. Box 1391<br>201 E Center Street<br>Pocatello, ID 83204-1391<br>rcb@racinelaw.net<br>cmm@racinelaw.net | Sarah A. Klahn<br>White & Jankowski LLP<br>511 Sixteenth Street, Suite 500<br>Denver, CO 80202<br>sarahk@white-jankowski.com |
|---|---|---|
| A. Dean Tranmer<br>City of Pocatello<br>P.O. Box 4169<br>Pocatello, ID 83201<br>dtranmer@pocatello.us | | |

Travis L. Thompson

FILED-DISTRICT COURT
CASE #________

2009 SEP 25 AM 11:40

DUANE SMITH, CLERK
________ DEPUTY

**LAWRENCE G. WASDEN**
ATTORNEY GENERAL
**CLIVE J. STRONG**
Deputy Attorney General
Chief, Natural Resources Division

**PHILLIP J. RASSIER, ISB #1750**
**CHRIS M. BROMLEY, ISB #6530**
Deputy Attorneys General
Idaho Department of Water Resources
P. O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700

Attorneys for Respondents

**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-2009-000647

**NOTICE OF LODGING OF TRANSCRIPT AND RECORD WITH AGENCY**

TO: CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL COUNSEL OF RECORD:



SCANNED

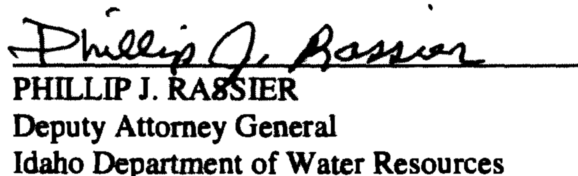
YOU ARE HEREBY NOTIFIED, pursuant to I.R.C.P. 84(j), that the agency transcript and record having been prepared pursuant to I.R.C.P. 84(f) and (g), the transcript and record are lodged with the agency for the purpose of settlement in accordance with I.R.C.P. 8(j).

A copy of the transcript and record, including hearing exhibits, contained on a single DVD, has been served by mail with a copy of this notice on the attorneys for petitioner A&B Irrigation District, and the respective attorneys for respondents Idaho Ground Water Appropriators, Inc., the City of Pocatello, and Fremont Madison Irrigation District et al. The parties previously paid for and received copies of the transcript of the agency hearing from the transcriber. No fee is being charged by the agency for preparation of the record.

The parties have fourteen (14) days from the date of this notice to file any objections to the transcript and record. If no objections are filed within that time, the record shall be deemed settled. Any objections and the agency's decision thereon shall be included in the record. The record is required to be settled and filed with the district court by October 22, 2009.

DATED this 24th day of September 2009.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION



PHILLIP J. RASSIER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 24th day of September, 2009.

Document Served: **NOTICE OF LODGING OF TRANSCRIPT AND RECORD WITH AGENCY**

| | |
|---|---|
| Deputy Clerk<br>Clerk of Minidoka County Court<br>715 G Street<br>P.O. Box 368<br>Rupert, ID 83350<br>Fax: (208) 436-5272 | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☐ Email |
| John K. Simpson<br>Travis Thompson<br>Paul L. Arrington<br>Sarah W. Higer<br>BARKER ROSHOLT & SIMPSON LLP<br>113 Main Avenue West, Suite 303<br>P.O. Box 485<br>Twin Falls, ID 83303-0485<br>jks@idahowaters.com<br>tlt@idahowaters.com<br>pla@idahowaters.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |
| Randy C. Budge<br>Candice M. McHugh<br>Scott J. Smith<br>RACINE OLSON NYE BUDGE BAILEY<br>P.O. Box 1391<br>Pocatello, ID 83201<br>rcb@racinelaw.net<br>cmm@racinelaw.net | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |
| A. Dean Tranmer<br>City of Pocatello<br>P.O. Box 4169<br>Pocatello, ID 83201<br>dtranmer@pocatello.us | ☐ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |

| | |
|---|---|
| Sarah A. Klahn<br>Mitra M. Pemberton<br>WHITE & JANKOWSKI LLP<br>511 Sixteenth Street, Suite 500<br>Denver, CO 80202<br>sarahk@white-jankowski.com<br>mitrap@white-jankowski.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |
| Jerry R. Rigby<br>Rigby Andrus & Rigby<br>25 N 2nd East<br>Rexburg, ID 83440<br>jrigby@rex-law.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |

Phillip J. Rassier

PHILLIP J. RASSIER
Deputy Attorney General

FILED-DISTRICT COURT
CASE #_______

2009 OCT 26 PM 2:36

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

DUANE SMITH, CLERK
_______, DEPUTY

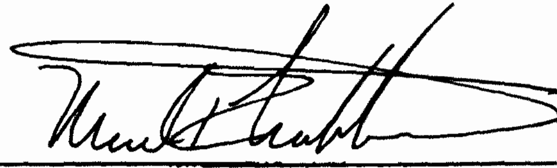
| | |
|---|---|
| A & B IRRIGATION DISTRICT,<br><br>Petitioner,<br><br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,<br><br>Respondents. | Case No. CV 2009-647<br><br>**ORDER GRANTING AN EXTENSION OF TIME FOR FILING THE AGENCY TRANSCRIPT AND RECORD** |
| 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 | |

The Court having reviewed the *Motion for Extension of Time to File Agency Transcript and Record* filed by the respondent Idaho Department of Water Resources ("IDWR") in this action, and good cause appearing therefor,

SCANNED

IT IS ORDERED that the time for lodging the agency transcript and record in this action shall be extended and that IDWR shall file the transcript and record with the Court on or before October 29, 2009.

DATED this 23d day of October 2009.



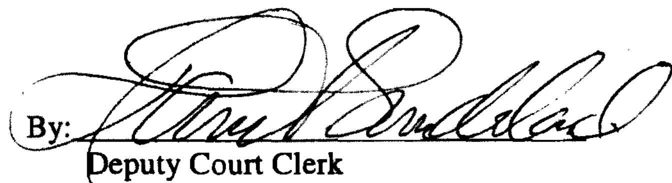
~~JOHN M. MELANSON~~
District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on this 28 day of October 2009, I mailed (served) a true and correct copy of the within instrument to:

| | |
|---|---|
| John K. Simpson<br>Travis Thompson<br>Paul L. Arrington<br>Sarah W. Higer<br>BARKER ROSHOLT & SIMPSON LLP<br>113 Main Avenue West, Suite 303<br>P.O. Box 485<br>Twin Falls, ID 83303-0485 | Randy C. Budge<br>Candice M. McHugh<br>RACINE OLSON NYE BUDGE BAILEY<br>P.O. Box 1391<br>Pocatello, ID 83201 |
| A. Dean Tranmer<br>City of Pocatello<br>P.O. Box 4169<br>Pocatello, ID 83201 | Jerry R. Rigby<br>Rigby Andrus and Moeller<br>25 N 2nd East<br>Rexburg, ID 83440 |
| Sarah A. Klahn<br>Mitra M. Pemberton<br>WHITE & JANKOWSKI LLP<br>511 Sixteenth Street, Suite 500<br>Denver, CO 80202 | Phillip J. Rassier<br>Chris M. Bromley<br>Deputy Attorney General<br>Idaho Department of Water Resources<br>P.O. Box 83720<br>Boise, Idaho 83720-0098 |

DUANE SMITH
Clerk of the District Court



By: ______________
Deputy Court Clerk

FILED-DISTRICT COURT
CASE #______

2009 OCT 29 AM 9:34

DUANE SMITH, CLERK
DEPUTY

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,<br><br>Petitioner,<br><br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,<br><br>Respondents. | Case No. CV-2009-000647<br><br>**ORDER SETTLING AGENCY TRANSCRIPT AND RECORD** |
| 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 | |

The Idaho Department of Water Resources ("Department" or "IDWR") served its *Notice of Lodging of Transcript and Record* ("*Notice*") in this matter upon the parties on September 28, 2009, pursuant to I.R.C.P. 84(j). The *Notice* gave the parties fourteen (14) days from the date of the *Notice* to file any objections to the agency transcript and record. On October 8, 2009, the Idaho Ground Water Appropriators, Inc., ("IGWA") and the City of Pocatello timely filed *IGWA & Pocatello's Joint Objection to the Agency Record* (*Objection*). Also, on October 8, 2009, the Petitioner A&B Irrigation District ("A&B") filed its Petitioner's Objection to the Agency Record. On October 21, 2009, IDWR filed its Motion for Extension of Time to File Agency Transcript and Record. The Order Granting the Motion for Extension of Time to File Agency



SCANNED

Transcript and Record was signed by Judge Crabtree on October 23, 2009.

No objection was made to the transcript of the agency hearing.

Each of the objections raised by the parties is set forth below with the Department's response and/or stating the corrective action taken.

I.

## IGWA AND POCATELLO'S OBJECTION TO THE AGENCY RECORD

## MISSING DOCUMENTS

IGWA and Pocatello objected that the agency record as lodged with the Department for settlement did not include the documents listed below. The Department has determined that the documents should be included in the agency record. Those documents now included in the record are as follows:

1. Entry of Appearance & Notice of Change Attorneys Rule 11(b)(1), IRCP dated November 1, 2007.
2. IGWA's Notice of Intent to Remain a Party, dated November 1, 2007.
3. Notice of Intent to Participate Individually & Notice on Behalf of the Terminated Joe Houska Trust, dated November 6, 2007.
4. Notice of Withdrawal as Attorney on Behalf of Joe Houska Trust, dated November 6, 2007.
5. Notice of Intent to Participate, McCain Foods USA, Inc., dated November 9, 2007.
6. Notice of Intent to Participate, Water Mitigation Coalition, dated November 9, 2007.
7. Notice of Withdrawal as Attorney on Behalf of City of Chubbuck, dated November 13, 2007.
8. Notice of Intent to Participate, Amalgamated Sugar Co., dated November 20, 2007.
9. Notice of Intent to Participate, City of Arco, dated November 28, 2007.
10. Joint Response to Stipulated Motion to Amend Schedule, dated November 30, 2007.
11. IGWA & Pocatello's Joint Motion for Summary Judgment, dated October 3, 2008 (not dated December 24, 2008 as stated in objection).
12. Response to Motion to Authorize Interrogatories & Notice of Hearing, dated January 16, 2008.
13. Notice of Service of IGWA's 1st Set of Interrogatories and 2nd Request for Production, dated January 22, 2008.

14. Letter and accompanying documents from A&B Irrigation District regarding costs, dated January 22, 2008.
15. Motion for Limited Admission entering White & Jankowski as attorneys, dated April 30, 2008.
16. Order Regarding Objections to Recommended Order, dated June 10, 2008.
17. Notice of Taking Deposition Duces Tecum of Dan Temple, dated June 2, 2008.
18. Amended Notice of Taking Deposition Duces Tecum of Rick Raymondi, dated June 19, 2008.
19. Notice of Filing Opening Pre-Filed Testimony and Exhibit List (Pocatello), dated July 15, 2008.
20. Notice of Filing of Expert Direct Testimony, Expert Report & Exhibits (IGWA), dated July 16, 2008.
21. Notice of Service of Corrected Chapter 3 of A&B's Expert Report & Corrected Testimony of John Koreny and Notice of Availability to Other Parties, dated July 24, 2008.
22. Exhibit List for Opening Pre-Filed Testimony and Expert Report and Rebuttal Report, dated August 27, 2008.
23. Rebuttal Testimony of Gregory K. Sullivan, dated August 27, 2008.
24. Notice of Service of Responses to A&B's 1st Set of Interrogatories and Requests for Production to IGWA, Notice of Availability to Other Parties, dated September 8, 2008.
25. Corrected Exhibit List for Opening Pre-Filed Testimony and Expert Report and Rebuttal Report and Sur-Rebuttal Report, dated September 16, 2008.
26. Notice of Filing Expert Sur-Rebuttal Report, Pre-Filed Rebuttal Testimony and Exhibits, dated September 16, 2008.
27. Order Approving Stipulation to Move Dispositive Motion Deadline, dated September 22, 2008.
28. Notice of Service of Second Set of Interrogatories and Third Request for Production on A&B Irrigation District, dated October 1, 2008.
29. Notice of Service of A&B Irrigation District's Response to Joint Motion for Partial Summary Judgment – Notice of Availability to Other Parties, dated October 22, 2008.
30. Reply in Support of IGWA & Pocatello's Joint Motion for Partial Summary Judgment, dated October 30, 2008.
31. IGWA's Pre-Hearing Brief, dated November 25, 2008.
32. Pocatello's Pre-Hearing Brief, dated November 25, 2008.
33. Notice of Filing Response to A&B Irrigation District's Post-Hearing Memorandum & Proposed Findings, dated February 13, 2009.
34. Response to A&B's Post-Hearing Memorandum & Proposed Findings, dated February 13, 2009.
35. Notice of Service of Petition for Reconsideration of Hearing Officer's 3-27-09 Opinion Constituting Findings of Facts, Conclusions of Law & Recommendations, Notice of Availability to Other Parties, dated April 10, 2009.
36. Response to A&B's Post-Hearing Memorandum & Proposed Findings, dated February 13, 2009 (not dated May 1, 2009 as stated in objection).
37. Response to A&B Irrigation District's Petition for Reconsideration, dated May 1,

2009.

38. Notice of Service of Response to A&B's Petition for Reconsideration – Notice of Availability to Other Parties, dated June 15, 2009.
39. Notice of Service of Response to Petition for Clarification & Request for Director's Order that Deadline to File Exceptions Has Expired, Notice of Availability to Other Parties, dated June 15, 2009.

**II**

**DOCUMENTS IN THE OBJECTION THAT IDWR WILL NOT BE INCLUDING THE RECORD**

1. IDWR has determined that the Order Denying USBR Petition for Reconsideration and Pocatello's Response, dated October 10, 2008 was filed in a entirely different matter and should not have been included on the A&B portion of IDWR's website

**III.**

**IGWA AND POCATELLO'S OBJECTION TO THE AGENCY RECORD EXHIBITS**

IGWA objected that the agency record as lodged with the Department for settlement did not include Exhibit numbers 327, 361, 362, 365, 482, and 574. The Department has determined that the exhibit numbers 361, 482, and 574 should be included in the agency record. IDWR has determined that Exhibit numbers, 327, 362, and 365 are not to be included in the record because Exhibit number 327 was not offered, Exhibit number 362 was withdrawn from the record and Exhibit number 365 was objected to and subsequently disallowed.

**IV.**

**A&B'S OBJECTION TO THE AGENCY RECORD MISSING DOCUMENTS**

A&B objected that the agency record as lodged with the Department for settlement did not include the documents listed below. The Department has determined that the documents

should be included in the agency record. Those documents now included in the record are as follows:

1. Memo from Phil Rassier to Director Higginson, dated August 5, 1994.
2. Motion to Dismiss filed by the U.S. Department of Energy, dated May 18, 1994.
3. Order RE Discover, dated September 10, 2007.
4. List of Respondents to A&B Irrigation Petition, dated September 24, 2007.
5. Order Regarding Preliminary Findings of Fact and Intent to Remain a Party, dated October 26, 2007.
6. Notice of Intent to Participate by U.S. Dept. of Energy, dated November 5, 2007.
7. Notice of Intent to Participate Individually and Not on Behalf of the Terminated Joe Houska Trust, dated November 6, 2007.
8. Notice of Withdrawal as Attorney on Behalf of Joe Houska Trust, dated November 6, 2007.
9. Notice of Intent to Participate by Idaho Power Company, dated November 7, 2007.
10. U.S. Bureau of Reclamation's Notice of Intent to Remain a Party, dated November 8, 2007.
11. Water Mitigation Coalition's Notice of Intent to Participate, dated November 9, 2007.
12. McCain Foods USA, Inc.'s Notice of Intent to Participate, dated November 9, 2007.
13. Notice of Withdrawal as Attorney on Behalf of the City of Chubbuck, dated November 13, 2007.
14. Notice of Intent to Participate Fremont-Madison Irrigation District et al., dated November 13, 2007.
15. The Amalgamated Sugar Company LLC's Notice of Intent to Participate, dated November 20, 2007.
16. Notice of Intent to Participate City of Arco, November 28, 2008.
17. Information from A&B in Response to Order Requesting Information for A&B Delivery Call, dated December 14, 2007.
18. Response to Motion to Authorize Interrogatories & Notice of Hearing, dated January 16, 2008.
19. A&B Summary Cost Letter, dated January 22, 2008.
20. Notice of Service of IGWA's First Set of Interrogatories and Second Request for Production, dated January 22, 2008.
21. U.S. Bureau of Reclamation's Notice of Withdrawal as a Party, dated March 20, 2008.
22. A&B Irrigation District Export Report, prepared by HDR Engineering, Inc., Brockway Engineering PLLC, an ERO Resources, Inc., dated July 16, 2008. Due to the size of the exhibit, the Department did not see the necessity of duplicating the document in both the Exhibits and in the Record. It is included soley as an exhibit.
23. Corrected Chapter 3 of A&B Irrigation District Expert Report, dated July 16, 2008.

24. Notice of Service of Corrected Chapter 3 of A&B's Expert Report and Corrected Testimony of John Koreny; Notice of Availability to Other Parties, dated July 24, 2008.
25. Pocatello's Notice of Filing Pocatello's Corrected Opening Expert Report, dated July 24, 2008.
26. A&B Rebuttal Reports of Expert Reports and Testimony Filed by Charles Brendecke, Christian Petrich and Greg Sullivan, dated August 27, 2008.
27. IGWA's Notice of Service of Responses to A&B Irrigation District's First Set of Interrogatories and Requests for Production to Idaho Ground Water Appropriators, Inc. Notice of Availability to Other Parties, dated September 8, 2008.
28. Order Approving Stipulation to Move Dispositive Motion Deadline, dated September 22, 2008.
29. Scheduling Order, dated September 25, 2008.
30. Notice of Service of A&B's Response to Joint Motion for Partial Summary Judgment; Notice of Availability to Other Parties, dated October 22, 2008.
31. Affidavit of Gregory K. Sullivan, dated October 22, 2008.
32. IGWA Pre-Hearing Brief, dated November 25, 2008.
33. Notice of Service of A&B Irrigation District's Petition for Reconsideration of Hearing Officer's March 27, 2009 Opinion Constituting Finding of Fact, Conclusions of Law and Recommendations, Notice of Availability to Other Parties, dated April 10, 2009.
34. Notice of Service of IGWA's Response to A&B's Petition for Reconsideration; Notice of Availability to Other Parties, dated May 1, 2009.
35. Notice of Service of A&B Irrigation District's Petition for Clarification; Notice of Availability to Other Parties, dated June 12, 2009.

## V.

## A&B'S OBJECTION TO THE AGENCY RECORD

## EXHIBITS THAT SHOULD BE IN THE RECORD

1. A&B objected and requested that the report that was introduced at the hearing as Exhibit 200 be included in the record and bate stamped for ease of reference on appeal (IGWA's Notice of Filing of Expert Direct Testimony, Expert Report and Exhibits, dated July 16, 2008). IDWR has determined that the size and content of Exhibit 200 does not justify the need for the document to be duplicated. IDWR has cross-referenced the Exhibit in the Table of Contents for ease of reference.

2. A&B objected and requested that information referenced in a Letter from IDWR

to Parties which was included on an attached CD, dated February 7, 2008, be included in the record. This information is provided in the exhibits and IDWR has determined that because of the size of this document it will not be duplicated. Instead, a list of each of the documents has been created which cross references the location of each Exhibit.

## VI.

## DOCUMENTS THAT ARE DUPLICATIVE OR IRRELEVANT AND SHOULD BE REMOVED FROM THE RECORD

In addition to the above-missing documents, A&B states that the there were duplicative or irrelevant documents that should be removed from the record. The Department agrees and the following corrections to the record have been made.

1. The letter from Roger Ling to Victoria Wigle was contained at both page 815 and again at page 816. The document now only appears once and can be located at page 829.
2. A&B's March 16, 2007 *Motion to Proceed* was contained at pages 817-828 and again at pages 843-854 has been deleted. The document now only appears once and is located at pages 830-840.
3. The additional documents attached to A&B's March 16, 2007 Motion to Proceed that were contained at pages 829-842; 855-868 have been removed.
4. The letter from IDWR to John Simpson et al. In the Matter of Water Right 03-7018 found at page 967 is not a part of this proceeding and has been removed.
5. The Comments from the Surface Water Coalition, dated April 22, 2008 at pages 1461-1477 are not part of this proceeding and has been removed.
6. The first page of IGWA's Response to Motion for Declaratory Ruling is actually dated April 11, 2009, not May 2, 2009 as stated in the objection. The document was also contained at both pages 1514 and 1412. The document now only appears once and can be located at pages 1528-1541.
7. The Expert Testimony of John S. Koreny previously located at pages 2500-2516 has been correctly sequenced and is no located at pages 1798-1814.
8. The letters from Fred Stewart to IDWR and to the Hearing Officer previously located at pages 2760-2761 and 2809-2918, respectively, have been removed.
9. IDWR has determined that the Court's September 10, 2009 Procedural Order will remain as part of the agency record.

## ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that no objection having been made to the agency transcript in this matter, the transcript is deemed settled. Timely objections having been made to the agency record, the record is settled with the changes identified above.

IT IS FURTHER ORDERED that pursuant to Idaho Rule of Civil Procedure 84(j), the Ground Water Users' *Objection*, and this Order shall be included in the record on petition for judicial review. The Department shall provide the parties with replacement copies of the agency record on compact disks consistent with the modifications made in this order.

DATED this 26th day of October 2009.

GARY SPACKMAN
Interim-Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of October 2009, the above and foregoing, was served by the method indicated below, and addressed to the following:

John K. Simpson
Travis Thompson
Paul L. Arrington
Sarah W. Higer
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, ID 83303-0485

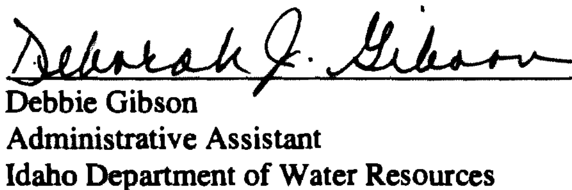
Randy C. Budge
Candice M. McHugh
RACINE OLSON NYE BUDGE BAILEY
P.O. Box 1391
Pocatello, ID 83201

A. Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, ID 83201

Jerry R. Rigby
Rigby Andrus and Moeller
25 N 2nd East
Rexburg, ID 83440

Sarah A. Klahn
Mitra M. Pemberton
WHITE & JANKOWSKI LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202

Phillip J. Rassier
Chris M. Bromley
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098



Debbie Gibson
Administrative Assistant
Idaho Department of Water Resources

-FILED-DI[illegible] COURT
CASE #________

2009 OCT 29 AM 9:34

DUANE [illegible] CLERK
________ DEPUTY

**LAWRENCE G. WASDEN**
ATTORNEY GENERAL

**CLIVE J. STRONG**
Deputy Attorney General
Chief, Natural Resources Division

**PHILLIP J. RASSIER (ISB#1750)**
**CHRIS M. BROMLEY (ISB#6530)**
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700

Attorneys for Respondent

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

**NOTICE OF FILING AGENCY TRANSCRIPT AND RECORD WITH DISTRICT COURT**



SCANNED

**TO: THE DISTRICT COURT AND PARTIES OF RECORD**

On September 28, 2009, the Idaho Department of Water Resources ("IDWR") provided notice to the parties that the agency transcript and record in this matter were lodged with the agency for the purpose of settlement in accordance with the I.R.C.P. 84(j).

Pursuant to the notice, the parties had fourteen (14) days to file any objections to the transcript and record. Objections were filed by the A&B Irrigation District, the City of Pocatello, and the Idaho Ground Water Appropriators, Inc. As described in the *Order Settling Agency Record and Transcript*, IDWR has reviewed the objections and incorporated the necessary documents to settle the agency record.

A compact disk, containing copies of the record and transcript as filed with the Court in hard copy is being mailed with this Notice to the attorneys of record. Copies of the compact disk also are being provided to the Court.

DATED this 28th day of October, 2009.

LAWRENCE G. WASDEN
Attorney General
CLIVE R. J. STRONG
Chief, Natural Resources Division

CHRIS M. BROMLEY
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

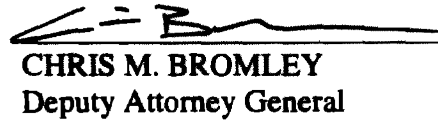
I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described documents on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 28th day of October, 2009.

Documents Served: NOTICE OF FILING AGENCY TRANSCRIPT AND RECORD WITH DISTRICT COURT

Persons Served:

| Recipient | Method of Service |
|---|---|
| Deputy Clerk<br>Clerk of Minidoka County Court<br>715 G Street<br>P.O. Box 368<br>Rupert, ID 83350<br>Fax: (208) 436-5272 | ☐ U.S. Mail, postage prepaid<br>☒ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☐ Email |
| John K. Simpson<br>Travis Thompson<br>Paul L. Arrington<br>Sarah W. Higer<br>BARKER ROSHOLT & SIMPSON LLP<br>113 Main Avenue West, Suite 303<br>P.O. Box 485<br>Twin Falls, ID 83303-0485<br>jks@idahowaters.com<br>tlt@idahowaters.com<br>pla@idahowaters.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☐ Email |
| Randy C. Budge<br>Candice M. McHugh<br>RACINE OLSON NYE BUDGE BAILEY<br>P.O. Box 1391<br>Pocatello, ID 83201<br>rcb@racinelaw.net<br>cmm@racinelaw.net | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☐ Email |

| | |
|---|---|
| A. Dean Tranmer<br>City of Pocatello<br>P.O. Box 4169<br>Pocatello, ID 83201<br>dtranmer@pocatello.us | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☐ Email |
| Sarah A. Klahn<br>Mitra M. Pemberton<br>WHITE & JANKOWSKI LLP<br>511 Sixteenth Street, Suite 500<br>Denver, CO 80202<br>sarahk@white-jankowski.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☐ Email |
| Jerry R. Rigby<br>Rigby Andrus and Moeller<br>25 N 2nd East<br>Rexburg, ID 83440<br>jrigby@rex-law.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☐ Email |



CHRIS M. BROMLEY
Deputy Attorney General

FILED-DISTRICT COURT
CASE #________

2009 NOV 23 AM 10: 34

DUANE ... CLERK
________ DEPUTY

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

**ORDER GRANTING UNOPPOSED MOTION TO AMEND BRIEFING SCHEDULE AND NOTICE OF HEARING ON ORAL ARGUMENT**

On November 19, 2009, the Petitioner A&B Irrigation District filed an *Unopposed Motion to Amend Briefing Schedule*. The Court, having reviewed the *Unopposed Motion*, hereby grants the motion and ORDERS that the briefing schedule and hearing date agreed to by the parties be adopted as follows:

| | |
|---|---|
| A&B Opening Brief Due | December 31, 2009 |
| Response Briefs Due | January 28, 2010 |
| A&B Reply Due | February 18, 2010 |



SCANNED

Oral argument shall be heard on **March 15, 2010 at 2:00 p.m.** at the Minidoka County Courthouse located at 715 G St., Rupert, Idaho 83350.

**DATED** this 23rd day of November 2009.

District Judge

FILED-DISTRICT COURT
CASE #CV-2009-6

2009 DEC 31 AM 9:07

DUANE [illegible], CLERK
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT ~~OF THE~~

STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

| | | |
|---|---|---|
| Re: Minidoka County District Court Cases | ) | ORDER TO DISQUALIFY WITHOUT CAUSE AND ORDER OF ASSIGNMENT |

COMES NOW, JONATHAN BRODY, District Judge in the above-entitled court and does hereby disqualify himself without cause in the cases identified in Exhibit A and petitions and requests the Administrative Judge to appoint another District Judge to hear the entitled cases.

DATED this 30 day of December, 2009

Jonathan Brody, District Judge

In accordance with the above order of Jonathan Brody, District Judge, and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that ________________, District Judge of the Fifth Judicial District is appointed to hear the entitled cases in exhibit A.

DATED this ____ day of ________________, 2009.

HONORABLE R. BARRY WOOD
Administrative Judge

**EXHIBIT "A"**

A & B IRRIGATION DISTRICT INC. V IDAHO DEPT OF WATER RESOURCES, ET AL.
CV-2009-647

FILED-DISTRICT COURT
CASE #______

2009 DEC 31 AM 9:06

DUANE SMITH, CLERK
______ DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

Re: Minidoka County District Court Cases

ORDER TO DISQUALIFY WITHOUT CAUSE AND ORDER OF ASSIGNMENT

COMES NOW, JONATHAN BRODY, District Judge in the above-entitled court and does hereby disqualify himself without cause in the cases identified in Exhibit A and petitions and requests the Administrative Judge to appoint another District Judge to hear the entitled cases.

DATED this 28 day of December, 2009

Jonathan Brody, District Judge

In accordance with the above order of Jonathan Brody, District Judge, and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Eric Wildman District Judge of the Fifth Judicial District is appointed to hear the entitled cases in exhibit A.

DATED this 31 day of December, 2009

HONORABLE R. BARRY WOOD
Administrative Judge

EXHIBIT "A"

A & B IRRIGATION DISTRICT INC. V IDAHO DEPT OF WATER RESOURCES, ET AL.
CV-2009-647

## CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31 of December, 2009, I served a true, correct copy of the ORDER TO DISQUALIFY WITHOUT CAUSE AND ORDER OF ASSIGNMENT upon the following in the manner provided:

John K. Simpson
P. O. Box 1906
Twin Falls, ID 83303-1906
(X) First Class Mail

Philip J. Rassier
317 Main Street, Room 100
Boise, ID 83720
(X) First Class Mail

Chris M. Bromley
317 Main Street, Room 100
Boise, ID 83720
(X) First Class Mail

Randall C. Budge
P. O. Box 1391
Center Plaza
Pocatello, ID 83204
(X) First Class Mail

Jerry R. Rigby
25 N. Second East
Rexburg, ID 83440
(X) First Class Mail

Dean A. Tranmer
P. O. Box 4169
Pocatello, ID 83201
(X) First Class Mail

Sarah A. Klahn
511 Sixteenth Street, Suite 500
Denver, CO 80202
(X) First Class Mail

Trial Court Administrator's Office
Attn: Linda Wright
P. O. Box 126
Twin Falls, ID 83303-0126
(X) Faxed 736-4002

Duane Smith
Clerk of the District Court

By [signature]
Deputy Clerk

FILED-DISTRICT COURT
CASE #

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT 2010 FEB 18 PM 2:30

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

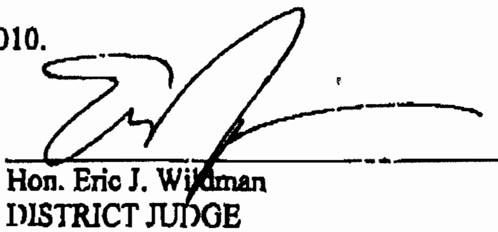
CLERK
DEPUTY

| | |
|---|---|
| A&B IRRIGATION DISTRICT,<br><br>Petitioner,<br><br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,<br><br>Respondents. | CASE NO. CV-2009-647<br><br>**ORDER GRANTING UNOPPOSED MOTION TO EXTEND REPLY DEADLINE** |
| 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 | |

On February 17, 2010, the Petitioner A&B Irrigation District filed an *Unopposed Motion to Extend Reply Deadline*. The Court, having reviewed the *Unopposed Motion*, hereby grants the motion and ORDERS that the briefing schedule be modified as follows:

A&B Reply Due February 22, 2010

**DATED** this 18 day of February, 2010.



Hon. Eric J. Wildman
DISTRICT JUDGE

SCANNED

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the $18^{TH}$ day of February, 2010, she caused a true and correct copy of the foregoing ORDER GRANTING UNOPPOSED MOTION TO EXTEND REPLY DEADLINE on the persons listed below by faxing thereto to the parties at the indicated fax number:

John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON
P.O. Box 485
Twin Falls, ID. 83303-0485
208-735-2444

Phillip J. Rassier
Chris M. Bromley
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID. 83720-0098
208-287-~~4800~~ 6700

Randall C. Budge
Candice M. McHugh
RACINE OLSON NYE BUDGE & BAILEY
P.O. Box 1391
Pocatello, ID. 83201
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Jerry R. Rigby
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Dated this $18^{th}$ day of February, 2010

Santos Garza, Deputy Clerk

FILED-DISTRICT COURT
CASE #________

2010 FEB 26 PM 1:18

DUANE ... CLERK
____ DEPUTY

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**

**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

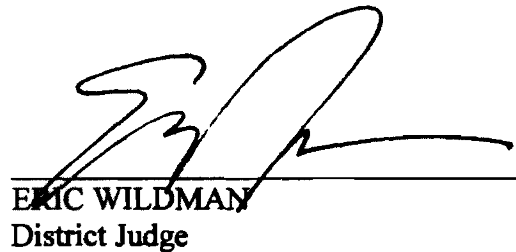
**ORDER GRANTING MOTION TO AUGMENT AND CORRECT THE AGENCY RECORD**

The Idaho Department of Water Resources ("IDWR") filed the Agency Transcript and Record with this Court in the above-captioned matter on October 29, 2009. On February 23, 2010, the Idaho Ground Water Appropriators, Inc., Magic Valley Ground Water District and North Snake Ground Water District (collectively the "Ground Water Users") filed a Motion to Augment and Correct the Agency Record. The Ground Water Users request that the Agency Record be corrected pursuant to errors and omissions discovered in the record as it currently stands. The Ground Water Users' counsel in the motion indicates that the other parties in the case have been consulted and there is no objection to their Motion to Augment and Correct the Agency Record.


SCANNED

THEREFORE IT IS ORDERED pursuant to I.A.R.30 and 30.1(b) that the Ground Water Users' Motion to Augment and Correct the Agency Record is hereby **GRANTED.** The Agency Record in this matter shall be augmented and corrected in accordance with the motion and its attached appendices which were provided on compact disc.

DATED this 26 day of February 2010.



ERIC WILDMAN
District Judge

## CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of February, 2010, the above and foregoing document was served in the following manner:

| | |
|---|---|
| Candice M. McHugh<br>RACINE OLSON NYE BUDGE & BAILEY, CHTD.<br>101 S. Capitol Blvd., Suite 208<br>Boise, Idaho 83702 | [ ] U.S. Mail/Postage Prepaid<br>[✓] Facsimile 208-232-6109<br>[ ] Overnight Mail<br>[ ] Hand Delivery |
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CLERK OF THE COURT

FILED-DISTRICT COURT
CASE #________

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DUANE SMITH, CLERK
______, DEPUTY

**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. 2009-000647

**MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW**

**Ruling:**

**The 1951 Idaho Ground Water Act, I.C. § 42-226 *et seq.*, applies retroactively with respect to the administration of ground water rights including the management of ground water levels.**

**The Director did not err in finding that reasonable pumping levels had not been exceeded based on determination that the 36-2080 right suffered no material injury at current levels. Consistent with a finding of no material injury, Director was not required to make a determination on reasonableness of pumping levels.**



SCANNED

**The Director erred in failing to apply proper evidentiary standard of clear and convincing evidence in finding of no material injury to A & B's right. Remanded for purpose of applying correct evidentiary standard.**

**The Director did not err by analyzing material injury to the 36-2080 right in cumulative as opposed to analyzing injury separately to the 177 points of diversion based on the way in which the right was licensed and decreed.**

**The Director did not err by failing to designate a Ground Water Management Area pursuant to I.C. § 42-233b.**

**Appearances:**

John K. Simpson, Travis L. Thompson, Paul Arrington, Sarah W. Higer, Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, on behalf of Petitioner A & B Irrigation District, ("A & B"), (Travis Thompson argued);

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, on behalf of Respondents Idaho Department of Water Resources, and Gary Spackman in his capacity as Interim Director of the Idaho Department of Water Resources, ("Director," "IDWR" or "Department") (Chris M. Bromley argued);

Randall C. Budge, Candice M. McHugh, Scott J. Smith, Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, on behalf of Respondent Idaho Ground Water Appropriators, Inc. ("IGWA") (Candice M. McHugh argued);

Sarah A. Klahn, White & Jankowski, LLP, Denver, Colorado, A. Dean Tramner, Pocatello, Idaho, on behalf of Respondent City of Pocatello ("City of Pocatello") (Sara A. Klahn argued);

Jerry R. Rigby, Rigby, Andrus & Rigby, Chartered, Rexburg, Idaho, on behalf of Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, and Stan D. Neville, ("Fremont-Madison *et. al.*").

## I.

## STATEMENT OF THE CASE

### A. Nature of the Case

This case is a proceeding for judicial review of the *Final Order Regarding the A & B Delivery Call* ("*Final Order*") issued June 30, 2009, by David R. Tuthill, Jr., Director of IDWR. Record ("R.") R. 3318-3325. Following the retirement of Director Tuthill on June 30, 2009, Gary Spackman was appointed Interim Director. The *Final Order* was issued at the conclusion of proceedings relating to a *Petition for Delivery Call* originally filed with the Department by A & B on July 26, 1994. R. 12-14. The *Petition for Delivery Call* also requested that the Director designate the Eastern Snake Plain Aquifer ("ESPA") as a Ground Water Management Area ("GWMA") pursuant to Idaho Code § 42-233b. The *Final Order* denied both the delivery call and the request for GWMA designation. On August 31, 2009, A & B filed the instant *Notice of Appeal and Petition for Judicial Review of Agency Action* ("*Petition for Judicial Review*") pursuant to the Idaho Administrative Procedure Act, Title 67, Chap 52, Idaho Code.

### B. Course of Proceedings

On June 26, 1994, A & B filed the *Petition for Delivery Call* seeking administration of ground water rights diverting from the ESPA that were junior in priority to water right 36-2080, as well as GWMA designation of the ESPA. R. 12-14. The *Petition* alleged *inter alia* that junior priority ground water pumping from the ESPA had lowered the water table an average of 20 feet and in excess of 40 feet in some areas. The Petition also alleges that the declines in the water table level resulted in reducing A & B's diversions from its authorized 1,100 cfs to 974 cfs and reduced diversions from 40 wells serving approximately 21,000 acres to a diversion rate insufficient to irrigate the lands served by the wells. R. 13.

Notice of the filing was served on approximately 7,200 holders of water rights who divert from the ESPA with priorities junior to September 16, 1994. R. 669. Responses were received from over 200 junior water right holders or entities representing water right holders. *Id.* Thereafter, A & B, IDWR and the participating respondents

entered into a stipulation, which among other things, stayed the *Petition for Delivery Call* until such time as any party filed a *Motion to Proceed* to have the stay lifted. R. 1106.

On March 16, 2007, A & B filed a *Motion to Proceed* with the Department, moving to lift the stay agreed to by the parties. Following a status conference on the *Motion to Proceed*, the Director issued an order lifting the stay. *Id.* On January 29, 2008, the Director issued an *Order* ("*January 29, Order*") denying A & B's *Petition for Delivery Call* and request for GWMA designation. R. 1105-1151. The *January 29, Order* concluded, based on the application of the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 ("CMR"), that A & B's 36-2080 water right had not suffered "material injury." *Id.* at 1151. In response, A & B requested an administrative hearing challenging the *January 29, Order*. R. 1182. An evidentiary hearing was conducted December 3 through 17, 2008, before Hearing Officer Gerald F. Schroeder ("Hearing Officer"). Respondents IGWA, City of Pocatello and Fremont Madison *et. al.* participated in the hearing. R. 116-17.

On March 27, 2009, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("*Recommended Order*"). R. 3078-3120. The *Recommended Order* agreed with the conclusion of the Director's *January 29, Order*, that A & B's water right no. 36-2080 had not suffered material injury and that designation of a GWMA would not add any benefit to the management of the ESPA that could not already be accomplished through the water districts already in existence. *Id.* On May 29, 2009, the Hearing Officer issued an *Order Granting in Part and Denying in Part A & B's Petition for Reconsideration*, correcting certain errors in the *Recommended Order* but otherwise affirming the *Recommended Order*. R. 3231-3233. On June 19, 2009, the Hearing Officer issued a response to *A & B's Petition for Clarification* which clarified the Hearing Officer's use of the term "total project failure." R. 3262. A & B filed exceptions to the *Recommended Order* on June 30, 2009. R. 3318. On June 30, 2009, the Director issued the *Final Order* accepting all substantive recommendations of the Hearing Officer. On August 4, 2009, the Director issued an *Order Denying Petition for Reconsideration* making the *June 30, 2009, Order*, final. R. 3360.

On August 31, 2009, A & B timely filed the *Petition for Judicial Review* now before the Court. IGWA, City of Pocatello and Fremont-Madison *et. al*. all appear as Respondents. This case was assigned to the undersigned Judge in his capacity as a District Judge and not in his capacity as Presiding Judge of the Snake River Basin Adjudication ("SRBA").

**C. Statement of Relevant Facts**

**1. A & B Irrigation Project**

The North Side Pumping Division of the Minidoka Project was developed by the United States Bureau of Reclamation ("USBOR"). The project was completed in 1963. A & B is an irrigation district organized by the landowners of the North Side Pumping Division of the Minidoka Project. The USBOR transferred operation and maintenance of the project to A & B in 1966 pursuant to a repayment contract. The project consists of two units. Unit A serves approximately 15,000 acres with surface water diverted from the Snake River. Unit B serves approximately 66,000 acres with ground water pumped from the ESPA primarily authorized under the 36-2080 water right.[1]

**2. Water Right 36-2080**

Water right 36-2080 is a ground water right held in trust by the USBOR for the benefit of the landowners within A & B Irrigation District. *See United States v. Pioneer Irr. Dist*., 144 Idaho 106, 157 P.3d 600 (2007). The right was decreed with a priority date of September 9, 1948, and cumulatively authorizes the diversion of 1100 cfs from 177 separate points of diversion (wells) for the irrigation of 62,604.3 acres from April 1 to October 31. The decreed quantity calculates to 0.88 miner's inches per acre.[2] A partial decree was issued for the right in the SRBA on May 7, 2003. Exh. 139.

A subsequent administrative transfer approved the use of up to 188 wells and expanded the authorized number of acres to 66,686.2. A & B currently operates 177

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[1] Unit B is also irrigated with other ground water rights, including enlargement rights, which cumulatively authorize the irrigation of 66,686.2 acres. R. 1112.

[2] This is calculated as follows: 1,100 cfs / 62,604.3 acres = .0176 cfs or 0.88 (0.0176/.02) miner's inches per acre. However, this is an average, as not all wells produce 0.88 inches per acre some produce more and others less. R. 3108. Well capacity ranges from 0.8 cfs to 10.6 cfs. R. 3093

wells. R. 3081. The place of use for all points of diversion is described as "the boundary of A & B Irrigation District service area pursuant to Section 43-323, Idaho Code." R. 3094. As a result, water diverted from any one of the wells is appurtenant to all acres within the place of use. R. 3092. The rate of diversion for the right is decreed in the cumulative and does not ascribe any rate of diversion to a particular well. The USBOR applied to have the right licensed in this manner to provide for the greatest amount of flexibility in distributing water throughout the project. R. 3093-94; Exh. 157D.

Despite being decreed in this manner, the Unit B ground water project is not a system of interconnected wells. The Unit is comprised of 130 independent well systems. R. 3093. A well system consists of one or more wells that provide water to a distribution system that services a particular number of acres. On average, five farm units are served from each well system. Eighty-eight of the systems consist of a single well. Approximately 40 of the systems consist of two wells. The Unit has two or three systems comprised of three wells. R. 3092-93. Water delivery for the average well system requires less than one mile of canal with a capacity of 5.6 cfs. R. 3095. Although not all of A & B's wells are underperforming, because of the design of the system and the geographic layout of the lands within the Unit, water cannot readily be distributed throughout the Unit from areas served by wells capable of pumping more than required for the area of service, to areas served by underperforming wells. R. 3095.

### 3. Historical Development of the Unit B Ground Water Project System

The Unit B ground water project was originally designed as an open discharge system where water was pumped from the ground into surface ponds and delivered through open lateral systems to the user. R. 3098. Irrigation was initially accomplished by gravity flow. R. 3099. Gravity flow has been replaced by more efficient sprinkler systems. R. 3099. As of 2007, only 3 to 4 percent of the irrigation in Unit B was gravity flow. *Id.* The original conveyance system included 109.71 miles of laterals and 333 miles of drains. The current system includes 51 miles of laterals, 138 miles of drains and 27 miles of distribution piping. Sixty-nine water injection wells have also been eliminated and the water applied to other purposes. R. 3099. In sum, the current system

is more efficient than the original system. Conveyance loss system wide is between 3 and 5 percent. R. 3099. These efficiencies reduced the amount of water re-entering the ESPA. R. 3102.

A & B maintains the Unit B ground water project system on an annual basis including a "rectification" program for underperforming wells. The rectification program includes deepening wells, drilling new wells and increasing horsepower to existing pumps. A & B's criteria for rectification targets wells delivering below 0.75 miner's inches per acre. R. 3101.

#### 4. Declines in ESPA Levels

The project was developed when water levels in the ESPA were at their peak. Gravity flow irrigation from the Snake River resulted in significant amounts of recharge to the ESPA. Ground water pumping was also limited. Since that time changes in irrigation practices reducing incidental recharge, ground water pumping and drought have all contributed to declines in aquifer levels. Declines in aquifer levels since the wells were installed range from 8.5 feet to 46.4 feet. Although the overall annual recharge to the ESPA exceeds depletions from ground water pumping, less water enters the project area than leaves the area. Despite declines in certain areas the aquifer is not being "mined" by ground water pumping. R. 3113.

#### 5. A & B's Delivery Call

The declines in aquifer levels have resulted in A & B being unable to pump the full amount of its authorized rate of diversion during peak demand periods. The declines reduced cumulative withdrawals from 1,100 cfs (0.88 miner's inches per acre) to 974 cfs (0.78 miner's inches per acre) for the entire project. Depletions have also resulted in some wells being abandoned. The shortages are not uniform throughout the project. A & B alleges ground water pumping by juniors has materially injured the 36-2080 water right. R. 3113. However, certain areas within the project, which lie over hydrogeologic regions of poor transmissivity, have realized the greatest shortages. These areas are primarily located in the southwest region of the project but shortages are not exclusively limited to that area. R. 3111; Exh. 200N & 216.

### D. Decision of the Director

The Hearing Officer's *Recommended Order* determined the following: 1) A & B's 36-2080 right was subject to the provisions of the Idaho Ground Water Act (I.C. §§ 42-226 *et seq.*) ("GWA") and A & B's wells had not exceeded reasonable pumping levels; 2) 0.75 miner's inches per acre was the minimum quantity necessary to satisfy A & B's water requirements despite the 36-2080 right being decreed in the aggregate for 0.88 miner's inches per acre; 3) inherent hydrogeologic conditions making pumping difficult in certain areas of the project was not a basis for curtailment; 4) A & B was required to take reasonable measures to move water to underperforming areas within the project; 5) A & B had not suffered material injury to its senior water right; and 6) no additional benefit to the management of the ESPA would result from the formation of a GWMA. R. 3078. In the *Final Order* the Director accepted all substantive recommendations of the Hearing Officer. R. 3318.

## II.
## ISSUES PRESENTED ON APPEAL

A & B raises the following issues on appeal:

**A.** Whether the Director erred in concluding that the provisions of the GWA apply to pre-enactment water rights?

**B.** Whether the Director unconstitutionally applied the CMR by disregarding the proper presumptions and burdens of proof resulting in: (i) reducing A&B's diversion rate per acre from 0.88 to 0.75 miner's inches; (ii) creating a new "failure of the project" standard for injury; and (iii) using a "minimum amount needed" for crop maturity standard?

**C.** Whether the Director erred in failing to separately analyze A & B's 177 individual points of diversion, as opposed to cumulatively, for purposes of determining injury to A & B's senior water right?

**D.** Whether the Director erred and unconstitutionally applied the CMR by concluding 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.** Whether the Director erred in finding that A & B has not been required to pump water beyond a "reasonable ground water pumping level" even though (1) the Director provided no factual support for this conclusion, (2) 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 (3) no such level has ever been determined as required by Idaho Code § 42-226?

**F.** Whether the Director erred in failing to designate all or a portion of the ESPA as a GWMA pursuant to Idaho Code § 42-233b?

**G.** Whether the Director violated I.C. § 42-231 by failing to protect the ESPA, set a reasonable pumping level or designate a GWMA?

**H.** Whether the Director erred by failing to issue a final order in compliance with I.C. § 67-5248?

## III.

## MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held March 2, 2010. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or March 3, 2010.

## IV.

## APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, I.C. § 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. Idaho Code § 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.

Idaho Code § 67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the party has been prejudiced. I.C. § 67-5279(4). *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Even 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.[3] *Id.* The Petitioner (the party challenging the agency decision) 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 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

[3] 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 eg. 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 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); *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).

## V.
## ANALYSIS AND DISCUSSION

### A. The Director Did Not Err in Concluding the GWA Applies to the Administration of the Right to Use Water Rights Pre-dating its Enactment.

A & B argues the Director erred in adopting the Hearing Officer's conclusion that the GWA applies to water rights appropriated prior to its enactment. Water right 36-2080 has a priority date of September 9, 1948. The GWA was enacted in 1951. 1951 Idaho Sess. Laws, ch. 200, pp. 423-29 (codified as Idaho Code §§ 42-226 *et. seq.*). The significance of whether the GWA applies to water rights established prior to its enactment comes from I.C. § 42-226 which was amended in 1953 to provide:

> [W]hile 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 pumping levels* as may be established by the state reclamation engineer as herein provided.

1953 Idaho Sess. Laws, ch. 182, p. 278 (emphasis added).[4]

A & B argues that because water right 36-2080 was established prior to the enactment of the GWA, the right is not subject to the "reasonable pumping level" provision of I.C. § 42-226. A & B argues instead that the right is protected to historic pumping levels as provided by common law. In support of its argument, A & B cites to the plain language of the 1987 amendment to I.C. § 42-226, which remains in the current version of the statute, and provides: "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." 1987 Idaho Sess. Laws Ch. 347, p. 743. Among other things, A & B also points out where this same provision has been cited to by both the Idaho Supreme Court and the SRBA District Court for the proposition that the GWA does not apply to water rights pre-existing its enactment. *See Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 813 (1994); *In re: SRBA Case No. 39576, Order on Cross Motions for Summary Judgment*, Subcase No. 91-00005, p.22 (July 2, 2001)(citing *Musser*). The issue of whether the GWA applies to pre-existing water rights is a question of law over which a reviewing court exercises free review. *Farber v. Idaho State Insurance Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009). Moreover, the issue requires a comprehensive review of the GWA in its entirety.

### 1. Application of Standards of Statutory Interpretation to the GWA.

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. *Farber at* 310, 208 P.3d at 292 (2009) (citing *Payette River Prop. Owners Ass'n v. Bd. Of Comm'rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999)). Statutory interpretation begins with the literal language of the statute. *Id.* (citing *Paolini v. Albertson's, Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006)). When the statutory language is unambiguous, the clearly expressed intent of the

[4] The original language has since been amended but not in substance. I.C. § 42-226 currently provides:

> [W]hile 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. *Prior appropriators of underground water shall be protected in the maintenance of reasonable pumping levels* as may be established by the director of the department of water resources as herein provided.

legislative body must be given effect, and the court need not consider rules of statutory construction. *Id.* (citing *Payette River*, 132 Idaho at 557, 976 P.2d at 483). Statutory provisions should not be read in isolation, but must be interpreted in the context of the entire document. *Id.* (citing *Westerburg v. Andrus*, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988)). The statute should be considered as a whole and the words given their plain, usual, ordinary meaning. *Id.* A statute is passed as a whole and not in parts or sections. Each part or section should therefore be construed in connection with every other part or section so as to produce a harmonious whole. It is not proper to confine interpretation to the one section to be construed. SUTHERLAND, STAT. CONST. § 46:05 (6th ed. 2001).

**2. When Construed in its Entirety, it is Clear the Legislature Intended the GWA to Apply to the *Administration* of *All* Rights to the Use of Ground Water Whenever or However Acquired.**

The language of the 1987 amendment to I.C. § 42-226, which provides "[t]his act shall not affect the rights to the use of ground water in this state acquired before its enactment" appears, when read in isolation, to exempt water rights existing prior to the enactment of the GWA from its application. However, when construing the Act in its entirety, and specifically taking into account the plain language of I.C. § 42-229, it becomes clear that the Legislature intended a distinction between the "right to the use of ground water" and the "*administration* of all rights to the use of ground water." This distinction is significant in that the plain language of the Act makes clear that the Act applies retroactively to the later category unless specifically exempted.

Prior to the enactment of the GWA in 1951, Idaho did not have a statutory scheme in place specifically governing the appropriation and administration of ground water. In discussing the enactment of the GWA in 1951, the Idaho Supreme Court has noted that:

> In the years since World War II, most western states have enacted legislation establishing administrative controls over ground water withdrawals . . . Idaho was in the vanguard of this movement when we enacted our Ground Water Act in 1951 I.C. §42-226 et seq.

*Baker v. Ore-Ida Food*, 95 Idaho 575, 580, 513 P.2d 627, 632 (1973).

In its original form, Section 1 of the Act (now codified as I.C. § 42-226) re-affirmed that the traditional policies of this state pertaining to the beneficial use of water through appropriation apply to ground water:

> Section 1 GROUND WATERS ARE PUBLIC WATERS
>
> 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. Law, ch. 200, pp. 423-424. (emphasis added).

Section 1 of the Act was subsequently amended by the Legislature in 1953, 1980, and 1987.[5] The phrase: "*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*" remained in force until the 1987 amendment when that provision was replaced by the following provision now at issue: "*This act shall not affect the rights to the use of ground water in this state acquired before its enactment.*" 1987 Idaho See. Laws ch. 347, p. 743. (emphasis added). By its plain language, the 1987 amendment applies only to "the rights to the use of ground water."

In its original form, Section 4 of the Act (now codified as I.C. § 42-229) provided as follows:

> Section 4. METHODS OF APPROPRIATION
>
> The ***right to the use of ground water of this state*** may be acquired only by appropriation. Such appropriations may be perfected by means of diversion and application to beneficial use or by means of the application permit and license procedure in this act provided. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of chapter 2 of title 42, Idaho Code, may be completed under the provisions of said chapter 2 and rights to the use of ground water may be thereby acquired. ***But the administration of all rights to the use of ground water, whenever or***

[5] In 1953, Section 1 was amended to include the "full economic development" and "reasonable ground water pumping levels" provisions. See *Supra* fn. 4

> ***however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provision of this act.***

1951 Idaho Sess. Laws, ch. 200, p.424. (emphasis added). The plain language of the last sentence of this provision specifically addresses and applies to "the *administration*" of the right to the use of ground water. The last sentence of the original Section 4 has remained unchanged and appears in its original form in the current version of I.C. § 42-229.

When the two above-mentioned provisions are read in conjunction it is clear that the last sentence of I.C. § 42-226 governs the applicability of the GWA to rights to the use of ground water acquired before its enactment, whereas the last sentence of I.C. § 42-229 applies to the *administration* of rights to the use of ground water acquired before its enactment. By its plain language then, the GWA applies to the *administration* of rights to the use of ground water "whenever or however" acquired. I.C. § 42-229.

A & B's argument that the 1987 amendment language to what is now I.C. § 42-229 excludes the application of the GWA from pre-existing water rights leads to two problematic results. First, the interpretation renders the "whenever or however acquired" language of the last sentence of I.C. § 42-229, which pertains to the administration of the right to use ground water, meaningless. Courts must give effect to all the words and provisions of a statute so that none will be void, superfluous or redundant. *Faber*, 147 Idaho at 310, 208 P.3d at 293. Second, the argument results in the conclusion that pre-existing water rights are insulated from *all* administrative provisions enumerated in the GWA, including but not limited to provisions regarding the equipping of wells with flow valves, rights of inspection by IDWR, maintenance of casings, pipes, fittings, etc. *See* I.C. § 42-237a.g. This conclusion leads to an absurd result and must be rejected. As shown above, the Director has the authority under the GWA to administer rights to the use of ground water "whenever or however acquired."

**3. Within the Structure of the GWA, the Management of Ground Water Pumping Levels was Intended to be Addressed under the Purview of the *Administration* of Ground Water Rights.**

The GWA vests the Director with a number of enumerated powers and responsibilities associated with the supervision and administration of ground water rights. Of significance to the facts of this case, the maintenance of ground water levels is one such power:

> To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria . . . .

I.C. § 42-237a.g.[6]

Within the structure of the GWA, the management of ground water pumping levels was therefore intended to be addressed under the purview of the *administration* of groundwater rights. Although (as is discussed below) the common law may have protected the means of diversion of senior appropriators to historic pumping levels, ground water pumping levels have never been treated as an element of a water right, nor have pumping levels been memorialized in any decree or license. *See. e.g.* I.C. § 42-1409 (required elements in Notice of Claim – no reference to well depth); I.C. § 42-222 (setting forth changes to water right requiring transfer proceeding – no reference to well depth); I.C. § 42-202 (contents of permit application – no reference to well depth). Likewise in *Baker v. Ore-Idaho Foods*, the Idaho Supreme Court recognized most western states, including the state of Idaho via the GWA "have enacted legislation establishing *administrative* controls over ground water withdrawals." *Baker*, 95 Idaho at 580, 513 P.2d at 632 (emphasis added).

[6] This provision was originally included in the 1953 version of the GWA and read the same except that it referred to the "state reclamation engineer."

The fact that (1) pumping level is not considered an element of a right, (2) the GWA delegated a number of duties to IDWR associated with the maintenance of ground water levels, and (3) the acknowledgement by the Idaho Supreme Court that the GWA established administrative controls over the withdrawal of groundwater in *Baker v. Ore-Ida Foods* all strongly suggest that the issues pertaining to ground water levels fall under the category of the administration of the right to the use of ground water. The plain language of I.C. § 42-229 makes clear that the *administration* of the right to the use of ground water shall be governed by the GWA "whenever or however" the water right was acquired.

**4. The Case Law Applying the GWA is Consistent with this Interpretation.**

The limited case law applying the provisions of the GWA is consistent with the conclusion that the management of ground water levels is a matter of administration and therefore is subject to the retroactive application of the GWA. In *Noh v. Stoner*, 53 Idaho 651, 26 P. 531 (1933), prior to the enactment of GWA in 1951, the Idaho Supreme Court addressed the issue of maintenance of water tables in a dispute involving a junior well interfering with a senior ground water right. The Court held that senior well owners were protected absolutely to the extent of their historical pumping level. Junior well owners could not be enjoined from pumping so long as they held the senior harmless for the cost of modifying or lowering the senior's means of diversion such that the senior received the same flow of water. *Id.* at 657, 26 P.2d at 1114.

In *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973), the Idaho Supreme Court addressed the application of the GWA in a dispute between ground water pumpers over the maintenance of ground water tables. The Court concluded the GWA was "consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest." *Id.* at 584, 513 P.2d at 636 (citing Idaho Const. Art. 15 § 7). The Court held:

> [A] senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to

> accept some modification of their rights in order to achieve the goal of full economic development. . . .
>
> In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water to promote full economic development of the resource . . . .
>
> We conclude that our legislature attempted to protect historic water rights while at the same time promoting full economic development of ground water. Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of diversion demands an unreasonable pumping level his historic means of diversion will not be protected.

*Id.* at 584, 513 P.2d at 636 (citations omitted). The Court determined the holding in *Noh* was "inconsistent with the full economic development of our ground water resources" and that "the Ground Water Act was intended to eliminate the harsh doctrine of *Noh*." *Id.* at 581-82, 513 P.2d at 633-34. Further:

> Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate the common law. . . . We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest. *Noh* is further inconsistent with the GWA.

*Id.* at 583, 513 P.2d at 635 (citations omitted). Although the Court never specifically addressed the issue of whether or not the reasonable pumping level provisions of the GWA were intended to apply to pre-existing rights, two of the senior rights held by the plaintiffs who made the delivery call had priorities pre-dating the enactment of the GWA. Consequently the Court did in fact apply the reasonable pumping provision to pre-existing rights. While the case is not dispositive of the issue, the ruling makes it clear that the Legislature through the enactment of the GWA modified the common law rule in *Noh*.

In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), a subsequent case involving a delivery call by a holder of a domestic ground water right, the Idaho Supreme Court applied the historic pumping level rule in *Noh* to the circumstance where it was

determined that the GWA did not apply. In *Parker*, the senior domestic water right had a priority date of 1964. The Idaho Supreme Court held that prior to the 1978 amendment the GWA did not apply to domestic wells. In reaching the holding the Court relied on the original 1951 version of the GWA which provided an exclusion for domestic use until 1978 when the GWA was amended to eliminate the exclusion.[7] *Id.* at 510, 650 P.2d 652. The Court held that the 1951 version of the language excluding domestic wells to be unambiguous. *Id.* at 511, 650 P.2d 653. After determining that the GWA did not apply the Court distinguished the holding in *Baker* and applied the ruling in *Noh*.

> Although this Court in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 581-83, 513 P.2d 627, 633-35 (1973), held that *Noh* is not applicable to cases determined under the reasonable pumping level provisions of the Ground Water Act, *Noh* is applicable to circumstances such as these in which [the GWA] does not apply.

*Id.* at 513, 650 P.2d 655. On first impression the holding in *Parker* appears inconsistent with the holding in *Baker*, which arguably overruled the rule in *Noh* independent of the GWA. However, it is important to note that prior to the 1978 amendment, the GWA did not apply in any respect, retroactively or otherwise to domestic wells. This blanket exclusion was solely limited to domestic wells. Accordingly, the holding in *Parker* is consistent with *Baker* for purposes of applying the GWA to water rights that are not expressly exempt from its application.

### 5. The *Musser* Decision

The issue of whether the GWA was intended to apply retroactively to the administration of pre-existing rights has never been squarely addressed by the Idaho Supreme Court. However, as correctly argued by A & B, the Idaho Supreme Court decided the case of *Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 813 (1994), in part, on the basis that the "statute [ I.C. § 42-226] does not affect the rights to the use of ground water acquired before enactment of the statute." *Id.* at 396, 871 P.2d at 813 (citing the language of the 1987 amendment to I.C. § 42-226). In *Musser*, the Director

[7] Section 2 of the original version of the GWA provided an exclusion for domestic wells as follows: "The excavation and opening of wells and withdrawal of water therefrom for domestic purposes *shall not be in any way affected by this act.*" 1951 Idaho Sess. Laws, ch. 200, p. 424 (now codified as I.C. § 42-227)

refused to honor the demand for a delivery call initiated by a senior surface user. The Director reasoned he lacked the authorization to conjunctively administer ground and surface water within a water district without a formal hydrologic determination that conjunctive management was appropriate. *Id.* at 394, 871 P.2d at 811. The district court issued a writ of mandate, ordering the Director to administer the rights. The Director appealed. *Id.*

On appeal, the Director argued that although he had a mandatory statutory duty to administer water within a water district, I.C. § 42-226 left to the Director's discretion the means used to respond to delivery calls. The Supreme Court rejected the argument citing the principle that, although certain details regarding how an agency is to carry out a mandatory duty are left to the agency's discretion such, is not a basis for relief from mandamus. *Id.* at 394-395, 871 P.2d at 811-12 (citations omitted). The Supreme Court held:

> This principle applies to this case. The director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water.

*Id.* The basis for the holding is the Director's duty to distribute water pursuant to I.C. § 42-602. The Court then goes on to address the Director's explanation for refusal to honor the demand:

> The director defended his refusal to honor the Mussers' demand by claiming that a 'policy' of the department prevented him from taking action. In his testimony at the hearing to consider whether the writ would issue, the director referred to I.C. § 42-226 and stated 'a decision has to be made in the public interest as to whether those who are impacted by ground water development are unreasonably blocking full use of the resource.'
>
> We note that the original version of what is now I.C. § 42-226 was enacted in 1951. 1951 Idaho Sess. Laws, ch. 200, § 1, p. 423. *Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute. Therefore, we fail to see how I.C. § 42-226 in anyway affects the director's duty to distribute water to the Mussers, whose priority date is April 1, 1892.*

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(emphasis added). In 1978, I.C. § 42-227 was amended to eliminate the exclusion. 1978 Idaho Sess. Laws, ch. 323, p. 819.

*Id.* at 396, 871 P.2d at 813 (emphasis added).

This language is compelling if read outside of the context of the entire GWA. It is important to note, however, that *Musser* was decided based on principles governing mandamus in relation to the Director's duty to distribute water in water districts pursuant to I.C. § 42-602 and not the application of the GWA. In citing to I.C. § 42-226, the Court was responding to one of the defenses raised by the Director. Since enactment, the GWA has undergone several amendments and I.C. § 42-226 is only one component of the act. The application of I.C. § 42-226 or the GWA was not before the Court in *Musser*. Accordingly, the Court did not have the occasion to analyze the issue in the framework of the entire GWA, nor was it necessary.[8] As shown above, it is clear when read in its entirety that the intent of the legislature in passing the GWA was to distinguish between the right to the use of ground water and the administration of the right to the use of ground water. It is also clear that under the plain language of I.C. § 42-229 the GWA applies to the administration of all rights to the use of ground water whenever or however acquired.

**6. The More Reasonable Interpretation and Purpose of the Language of the 1987 Amendment.**

As noted previously, the GWA was the first statutory scheme in place specifically governing the appropriation and administration of ground water. However, the GWA was not the first authorization of the ability to appropriate a ground water right. The more reasonable interpretation of the intent of the original language "[a]ll 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" was to acknowledge this very point and eliminate any confusion that ground water rights of existing holders were unauthorized or that existing right holders would have to make application under the GWA. While this interpretation is straight forward, the confusion arises as a result of the 1987 amendment, which when read independently from the rest of the act, appears to exempt pre-existing

[8] The SRBA also cited *Musser* for the proposition that the 1951 GWA did not apply to pre-existing water rights. The issue of the retroactive application of the GWA was not before the Court. In Re: SRBA Case

rights from the GWA. However, the more plausible justification behind the amendment and its choice of language was to avoid confusion in the forthcoming SRBA. Namely, that the validated and confirmed language could be construed as a legislative determination of the validity of pre-existing rights. Accordingly, this Court concludes that both the original language and the 1987 amendment were not intended to exempt pre-existing rights from the application of the GWA but rather to establish that pre-existing rights were acknowledged as valid and not supplanted by the operation of the GWA. Therefore this Court holds the Director did not err in concluding that the reasonable pumping level provisions of the GWA apply to pre-enactment water rights.

**B. The Director did not err in determining that A & B had not been required to pump below a reasonable pumping level. This determination however, is dependent on the Director's material injury analysis and his determination that there is sufficient water available to supply 0.75 miner's inches per acre.**

A & B argues the Director erred by concluding A & B had not been forced to exceed reasonable ground water pumping levels to satisfy its right without first establishing a reasonable ground water pumping level from which to make the determination. In his *January 29, 2008 Order,* the Director determined "[a]though ground water levels throughout the ESPA have declined from their highest levels reached in the 1950's, ground water levels generally remain of pre-irrigation developmental levels. There is no indication that ground water levels in the ESPA exceed reasonable ground water levels required to be protected under the provisions of Idaho Code § 42-226." R. 1109. In the *Recommended Order*, the Hearing Officer determined: 1) A & B is not protected to historic levels; 2) that the aquifer is not being mined in that more water enters the aquifer than is being removed by ground water pumping; and 3) that A & B's poorest performing wells could not be used as a measure for establishing the reasonableness of the ground water levels. R. 3113. Ultimately the Hearing Officer concluded "[t]he right to water [quantity] established in the partial decree remains, but that right is dependent upon A & B's ability to reach the water from those wells or to

No. 39576, *Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits*, Subcase 91-00005 (Basin-Wide Issue 5) (July 2, 2001), p.22.

import it from other wells." *Id.* The Director adopted the Hearing Officer's recommendation in the *Final Order*. R. 3321.

Idaho Code § 42-237a.g. sets forth the Director's duties with respect to establishing ground water levels:

> In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources ***in his sole discretion*** is empowered . . . .
>
> g. To supervise and control the exercise and administration of all rights to the use of ground waters ***and in the exercise of this discretionary power*** he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he ***may*** establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, ***contrary to the declared policy of this act***[9], the present or future use of any prior surface or ground water right ***or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated rate of future natural recharge.***

(emphasis added). Accordingly, the GWA does not mandate that the Director establish ground water levels automatically as a matter of course in conjunction with a delivery call by a ground water pumper.

The Hearing Officer's conclusion that reasonable pumping levels had not been exceeded was based on the finding that sufficient water was available satisfy the 36-2080 right at current pumping levels following the consideration of factors associated with the material injury analysis. In light of this finding the Hearing Officer concluded it was not necessary for the Director to establish a reasonable level in conjunction with the delivery call. This Court agrees and affirms the determination, subject to one proviso.

[9] The policy of the GWA is included in I.C. § 42-226 which provides in relevant part: "Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided."

The Director's conclusion is based on two threshold determinations made in conjunction with the material injury analysis. First, the Director's determination that sufficient water exists at current pumping levels relies on the finding that 0.75 miner's inches per acre is sufficient quantity to satisfy the purpose of use for the 36-2080 right despite the right being decreed for 0.88 miner's inches per acre. Second, the Director's determination that it was appropriate to analyze injury cumulatively based on injury to the entire right as opposed to evaluating injury to the 177 separate points of diversion. The significance of which would require A & B to move available water around within the project from wells capable of over performing to those areas served by underperforming wells. In other words injury would not be determined without looking at the depletive effects to entire right as opposed to individual points of diversion. These threshold issues are addressed separately in this opinion. To the extent the Director erred in either of these determinations it may require that the Director revisit the issue of the reasonableness of the pumping levels.

**C. The Director erred in failing to apply the constitutionally protected presumptions and burdens of proof.**

A & B argues the Director unconstitutionally applied the CMR by failing to apply the proper presumptions and burdens of proof resulting the reduced diversion rate per acre for the 36-2080 right from 0.88 to 0.75 miner's inches. This Court agrees. The 36-2080 right was licensed and ultimately decreed with a diversion rate of 0.88 miner's inches per acre for the 62,604.3 acre place of use.[10] Following application of the CMR, Rule 42 in particular, the Director determined that 0.75 miner's inches met A & B's minimum irrigation needs. The 0.75 miner's inches per acre, among other things, was therefore used to arrive at the finding of no material injury.

**1. The CMR, Material Injury, and Efficient use of Water Without Waste.**

[10] The fact that the right was decreed for 1,100 cfs to a 62,604.3 place of use involves a separate issue addressed later in this opinion.

The 36-2080 right is included in an organized water district. CMR Rule 40 pertains to responses to delivery calls in organized water districts, and in relevant part provides as follows:

> **040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (RULE 40).**
>
> **01. Responding To a Delivery Call.** When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of a diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering ***material injury***, and upon a finding by the Director as provided in Rule 42 that ***material injury*** is occurring, the Director, through the water master, shall:
>
> **a.** Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district . . . .

IDAPA 37.03.11.040.01.a (emphasis added). CMR Rule 040.03 provides:

> **Reasonable exercise of rights**. In determining whether diversion and the use of water under rights will be regulated under Subsection 040.01.a. or 040.01.b, the 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 without waste***, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. ***The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.***

IDAPA 37.03.11.040.03. (emphasis added). CMR 010.14 defines "***material injury***" as: "***Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set for in Rule 42.***" IDAPA 37.03.11.010.14 (emphasis added).

CMR Rule 42 sets forth the factors for determining material injury and the use of water efficiently without waste as follows:

**042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).**

**01. Factors.** Factors the Director may consider in determining whether the holders of water rights are ***suffering material injury and using water efficiently without waste***, include but are not limited to:

**a.** The amount of water available in the source from which the water is diverted.

**b.** The effort or expense of the holder of the water right to divert the water from the source.

**c.** Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year cumulative impacts of all ground water withdrawals from and area having a common ground water supply.

**d.** If for irrigation, the rate of diversion compared to the acreage of the land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.

**e.** The amount of water being diverted and used compared to other rights.

**f.** The existence of water measuring and recording devices.

**g.** The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices. . . .

**h.** The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

IDAPA 37.03.11.042.01.a.-h.

### 2. *American Falls Reservoir Dist. No. 2 v. IDWR*

In *American Falls Reservoir Dist. No. 2 v. IDWR,* 143 Idaho 862, 154 P.3d 433 (2007) (*AFRD #2*), the Idaho Supreme Court addressed the constitutionality of the CMR in the context of a facial challenge. The issue arose as a result of senior surface right holders challenging the constitutionality of the CMR because the Rules required the senior making the call to prove material injury after the Director requested information from the surface users for the prior fifteen irrigation seasons instead of automatically giving effect to the decreed elements of the water right. The district court held the CMR to be facially unconstitutional for failing to "also integrate the concomitant tenets and procedures relating to a delivery call, which have historically been necessary to give effect to the constitutional protections pertaining to senior water rights. . . ." *Id.* at 870, 154 P.3d at 441. The district court held that "under these circumstances, no burden equates to impermissible burden shifting." *Id.* at 873, 154 P.3d at 444.

On appeal, the Idaho Supreme Court held that the CMR were not facially defective for failure to include the applicable burdens of proof and evidentiary standards based on the application of principles unique to facial challenges. Integral to the Supreme Court's determination was the recognition that:

> CM Rule 20.02 provides that: '[T]hese rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law.' 'Idaho law' as defined by CM Rule 10.12 means '[T]he constitution, statutes, administrative rules and case law of Idaho.' Thus, the Rules incorporate by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are part of the CM Rules.'

*Id.* at 873, 154 P.3d at 444. Accordingly, even though the CMR do not expressly address the burdens and presumptions the Director could still apply the CMR in a constitutional manner by including the constitutional burdens and presumptions. The Court then held that "**the Rules do not permit or direct the shifting of the burden of proof . . . [r]equirements 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.**" *Id.* at 874, 154 P.3d at 445 (emphasis added). Further:

> **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.** The Rules do give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A & B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579. **Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.**

*Id.* at 877-78, 154 P.3d at 448-49 (emphasis added).

### 3. The Significance of a Licensed or Decreed Water Right.

In applying the factors as set forth in CMR Rule 42, the Director concluded that despite a decreed rate of diversion of 0.88 miner's inches per acre, the minimum rate of diversion per acre that would satisfy A & B's irrigation requirements was 0.75 miner's inches. The Director concluded sufficient water supply was available to provide the 0.75 miner's inches and denied A & B's delivery call. The issue arises as a result of the variance between the quantity decreed for the water right and the quantity the Director determined was actually needed to accomplish the decreed purpose of use, or put differently, the quantity that could be put to beneficial use.

As part of Idaho's licensure statutes the permit holder is required to make proof of beneficial use and the Department is required to examine such use. I.C. § 42-219. Idaho Code § 42-219 provides:

> [U]pon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law

> has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. Such license shall . . . state . . . the purpose for which such water is used, the quantity of water which may be used, ***which in no case shall be an amount in excess of the amount that has been beneficially applied***.

*Id.* (emphasis added). Idaho Code § 42-220 provides that "[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . . ." Further, "neither such licensee nor anyone claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed . . . ." I.C. § 42-220.

Idaho's adjudication statutes require the Director to evaluate the extent and nature of each water right for which a claim was filed based on state law. I.C. § 42-1410. The Department's role in the adjudication "is that of an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported." Further, [t]he director shall make recommendations as to the extent of beneficial use and administration of each water right under state law. . . . I.C. § 41-1401B. Idaho Code § 42-1402 provides: "The right confirmed by such decree . . . shall describe the land to which such water shall become appurtenant. The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed . . . ." Idaho Code § 42-1411 requires the Director to prepare and file a director's report which among other things determines the quantity of water used. The statute further provides that "[e]ach claimant of a water right has the ultimate burden of persuasion for each element of the water right." Further, that because the "director's report is prima facie evidence of the nature and extent of the water rights acquired under state law, a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report." I.C. § 42-1411(5). Finally, Idaho Code § 42-1420 provides "the decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system." I.C. § 42-1420.

Accordingly, both Idaho's licensure and adjudication statutory schemes expressly take into account the extent of the beneficial use in regards to the quantity element of a water right and expressly prohibit quantity from exceeding the amount that can be beneficially used. **In sum, the quantity specified in a decree of an adjudicated water right is a judicial determination of beneficial use consistent with the purpose of use for the water right.**

**4. The License or Decree However, is not Conclusive as to the Quantity Put to Beneficial Use Due to Post-Decree Factors.**

Although a license or decree among other things includes a determination of beneficial use for a water right, it is not conclusive that the water user is actually putting the full quantity to beneficial use. In *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court acknowledged in the context of the SRBA that the Director was not obligated to accept a prior decree as conclusive proof of a water right because water rights can be lost or reduced based on evidence that the water right has been forfeited. *Id.* at 741, 947 P.2d at 414. The Supreme Court acknowledged this same point in *AFRD#2* noting that there may be post-adjudication factors relevant to the determination of how much water is actually needed. *AFRD#2* at 878, 154 P.3d at 449.

Conditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed. The most obvious example would be if the senior is not irrigating the full number of acres for which the right was decreed. Efficiencies, new technologies and improvements in delivery systems that reduce conveyance losses can result in a circumstance where the full decreed quantity may not be required to irrigate the total number of decreed acres. The subsequent lining or piping of a ditch or the conversion from gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed.[11] Year to year variations in water

[11] Also, the rate of diversion for an irrigation water right sets a maximum rate of diversion to satisfy the peak water demand for the most water intensive crop grown in the region. In the event the senior is irrigating a less water intensive crop, the maximum rate of diversion may not be required. However, this limitation is less significant in the administration of ground water and tempered by the fact that any relief

requirements also result from the types of crops that may be planted. The Idaho Legislature specifically acknowledged water users could reduce water requirements through the implementation of efficiencies and authorized the ability to expand irrigated acreage so long as the rate of diversion was not increased. *See* I.C. § 42-1426.

In this case, the Director determined that A & B successfully implemented a number of measures that have reduced the amount of water required to irrigate the 62,604.3 acres: including the conversion of 1440 acres from ground to surface water irrigation; reduction of conveyance losses from approximately 8 percent to 3 percent; conversion of 96 percent of the irrigation systems to sprinkler; and the re-use of drain water. R. 1148. It should therefore come as no surprise that a water user can require less water than the decreed quantity to accomplish the purpose for which the right was decreed. As such, the quantity reflected in a license or decree is not conclusive as to whether or not all of the water diverted is being put to beneficial use in any given irrigation season.

**5. Waste Results from the Failure to Put the Full Diverted Quantity to Beneficial Use.**

If circumstances do not require the full amount of the decreed quantity to accomplish the purpose of use but the senior nonetheless continues to divert the decreed quantity, the issue is one of waste. The wasting of water is not only contrary to Idaho law but it is a recognized defense to a delivery call. In *Martiny v. Wells*, 91 Idaho 215, 218-19, 419 P.2d 470 (1966), the Idaho Supreme Court held:

> Wasting of irrigation water is disapproved by the constitution and laws of this state. As we said in *Mountain Home Irrigation District v. Duffy*, supra, ***it is the duty of a prior appropriator of water to allow the use of such water by a junior appropriator at times when the prior appropriator has no immediate need for the use thereof.***

*Id.* (emphasis added). Simply put, a water user has no right to waste water. If more water is being diverted than can be put to beneficial use, the result is waste.

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from regulation of junior wells is typically not instantaneous. Therefore, even though a senior may not be irrigating the most water intensive crop in the current irrigation season administration needs to take into account the ability of a senior to rotate to a more water intensive crop in the next irrigation season.

Consequently, Idaho law prohibits a senior from calling for the regulation of juniors for more water than can be put to beneficial use.

This exact issue was addressed in context of the SRBA. The SRBA Court addressed the issue of whether or not partial decrees should include a remark qualifying that the amount of water that could be sought incident to a delivery call was limited to the quantity that could be beneficially used as opposed to the quantity actually stated in the decree. The Hon. R. Barry Wood presiding, expressly rejected the necessity of such a remark based on the following reasoning:

> Implicit in the quantity element in a decree, is that the right holder is putting to beneficial use the amount decreed. As the Idaho Supreme Court has stated: 'Idaho's water law mandates that the SRBA not decree water rights 'in excess of the amount actually used for beneficial purposes for which such right is claimed'.' State v. Hagerman Water Right Owners, 130 Idaho 727, 730, 947 P.2d 400, 403 (1997); quoting I.C. § 42-1402. However, **the quantity element in a water right necessarily sets the 'peak' limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time** (i.e. there is no right to divert water that will be wasted). A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 415, 958 P.2d 568 (1997). **The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc. The Idaho Constitution recognizes fluctuations in use in that it does not mandate that non-application to a beneficial use for any period of time no matter how short result in a loss or reduction to the water right.** State v. Hagerman Water Right Owners, at 730, 947 P.2d at 403.
>
> Finally, it is a fundamental principal of the prior appropriation doctrine that a senior right holder has no right to divert, (and therefore to 'call,') more water than can be beneficially applied. Stated another way, a water user has no right to waste water. In State v. Hagerman Water Rights Owners, 130 Idaho at 735, 947 P.2d at 408, the Idaho Supreme Court stated:
>
> > A water user is not entitled to waste water...It follows that a water right holder cannot avoid a partial forfeiture by wasting portion of his or her water right that cannot be put

> to beneficial use during any part of the statutory period. If a water user cannot apply a portion of the water right to beneficial use during any part of the statutory period, but must waste the water in order to divert the full amount of the water right, forfeiture has taken place.
>
> Id. (citations omitted).
>
> NSGWD has not convinced this Court that it is necessary to have a restatement of this principal on the face of a water right decree. More importantly, the quantity element of a water right does not contemplate minute by minute, or hour by hour, limitations on diversions, as this truly would be an administrative nightmare.

*American Falls Reservoir District # 2 v. IDWR*, Gooding Dist. Court Case No. CV-2005-0000600, page 95 (June 2, 2006) (Hon. R. Barry Wood) (quoting *Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Facts; Order of Recommitment with Instructions to Special Master Cushman* (Nov. 23, 1999)) (emphasis in original). The significance of the decision is the recognition that the partial decree is a determination of beneficial use. The inclusion of the remark would require the senior to "prove up" the extent of beneficial use every time administration is sought. The decision did not reject the argument that the senior has no right to call for water that is not or will not be put to beneficial use. However, implicit in the rejection of the remark is the recognition that the senior's failure to put the decreed quantity to beneficial use is a defense to a delivery call. The SRBA Court rejected the inclusion of an undefined limitation on the decreed quantity requiring the senior making the call to re-establish the extent of beneficial use.

In sum, if a water user is not making beneficial use of the water diverted, irrespective of the quantity decreed, the result is waste. Idaho law prohibits a senior from depriving a junior appropriator of water if the water called for is not being put to beneficial use. Therefore a decree or license does not insulate a senior appropriator from an allegation of waste or the failure to put the decreed quantity to beneficial use. Waste or the failure to put the decreed quantity to beneficial use is a defense to a delivery call.

**6. The Burden to Establish Waste as a Defense is on the Junior Appropriator and Must be Shown by Clear and Convincing Evidence.**

Idaho law provides that the burden of establishing waste is on the junior appropriator. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). Idaho law has also consistently required that incident to a delivery call the burden is on the junior to establish by clear and convincing evidence that the diverting of water by the junior will not injure the right of the senior appropriator on the same source. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Moe v. Harger*, 10 Idaho 302, 7 P. 645 (1904). Accordingly whether the junior's defense is that there is no injury because the diversions of the junior do not physically interfere with the right of the senior (i.e futile call) or that the senior is not injured because the senior is putting less than the decreed quantity of water to beneficial use or wasting water, that burden rests on the junior. Clear and convincing evidence refers to a degree of proof greater than a mere preponderance of the evidence or evidence indicating that the thing to be proved is highly probable or reasonably certain. *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008); *Idaho State Bar v. Top*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996).

A determination that a portion of a decreed water right is being wasted (or is not being put to beneficial use) is a diminishment of a property right. The decreed quantity is reduced by the amount determined not being put to beneficial use. Whether the senior is deprived of water for part of an irrigation season, an entire irrigation season or the quantity element is permanently reduced through a finding of partial forfeiture, the senior's right to divert water up to the decreed quantity is nonetheless diminished.[12] The

[12] The counter-argument raised by Respondents is that there is not a diminishment in the property right because the senior's property right is limited to the amount that can be put to beneficial use. While that may be true, the argument overlooks the fact that the decree is a determination of the beneficial use subject to various defenses. The burden is on the junior to show by clear and convincing evidence that less than the decreed amount is being put beneficial use. To conclude otherwise accords no presumptive weight to the decree. This is precisely the reason why the SRBA Court rejected including a remark expressly limiting quantity to that put to beneficial use. The inclusion of such a remark would have resulted in an unlawful shifting of the burden of proof by making the senior re-prove quantity in conjunction with a delivery call. Simply put, the senior is entitled to the quantity reflected in the decree unless it can be shown by clear and convincing evidence that the full quantity is not or would not be put to beneficial use. The process gives proper presumptive weight to the decree and at the same time takes into account that the decree is not conclusive. However, the standard of proof (clear and convincing evidence) required for establishing that less than the decreed quantity is being put to beneficial use is much higher than the standard of proof (preponderance) initially required in the adjudication and distinguishes what is truly a defense to the right from a re-adjudication of the right.

Idaho Supreme Court has consistently held that actions resulting in the diminishment of a water right must be proved by clear and convincing evidence. Forfeiture or abandonment of a water right must be established by a standard of clear and convincing evidence. *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984); *Jenkins v. IDWR*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). The same is true with respect to establishing prescriptive title to the water right of another. *Gilbert* at 739, 552 P.2d at 1224 (citing *Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945)). Similarly, a futile call defense requires a showing of clear and convincing evidence that diversions by a junior appropriator will not injure the rights of a senior appropriator.

The application of the clear and convincing standard of proof only makes sense from a common sense perspective. If the Director determines that a senior can satisfy the decreed purpose of use on less than the decreed quantity reflected, he needs to be certain to a standard of clear and convincing evidence. In making a determination of whether or not to regulate juniors, the Director is required to evaluate whether the quantity available meets or exceeds the quantity the senior can put to beneficial use. If the Director regulates juniors to satisfy the senior's decreed quantity there is no risk of injury to the senior. However, if the Director regulates juniors to satisfy a quantity less than decreed, there is risk to the senior that the Director's determination is incorrect. There is no remedy for the senior if the Director's determination turns out to be in error and the senior comes up short of water during the irrigation season. Any burden of this uncertainty should be borne by the junior. The only way to eliminate risk to the senior while at the same time give effect to full economic development and optimum use of the water resources is to require a high degree of certainty supporting the Director's determination. Put differently, if the Director has a high degree of certainty that the senior is exceeding beneficial use requirements then there is no risk of injury to the senior. However, if the Director's determination is only based on a finding "more probable than not," the senior's right is put at risk and the junior is essentially accorded the benefit of that uncertainty. The requisite high standard accords appropriate presumptive weight to the decree.

**7. Reconciling the Alleged Disparity Between the Decreed Quantity and the Quantity of Water Actually Required to Satisfy the Purpose of Use Consistent with Idaho Law and Without Re-Adjudicating the Quantity Element.**

In recognizing that a difference can exist between the decreed quantity and the quantity put to beneficial use, the question becomes how the Director can give proper effect to the decree and still administer to the quantity put to beneficial use without resulting in a *de facto* re-adjudication of the water right? The answer lies in the application of the constitutionally engrained presumptions and burdens of proof.

The following example illustrates the conundrum that occurs when proper effect is not given to the decree. Assume for the sake of discussion that A & B claimed the 36-2080 right in the SRBA with a diversion rate of 0.88 miner's inches per acre. The Director investigated the claim and recommended a diversion rate of 0.75 miner's inches. A & B filed an objection to the recommendation. IGWA, the City of Pocatello and Fremont Madison *et al.* file responses and a trial is held. At trial A & B presents its case including expert testimony in support of the claim that the requisite rate of diversion is 0.88 miner's inches. The respondents present conflicting evidence including expert testimony that 0.75 miner's inches or less is sufficient to accomplish the purpose of use. The experts present opinions on the amount of water necessary to raise crops to maturity, the significance of soil moisture etc. Ultimately, the SRBA Court finds that A & B established a quantity of 0.88 miner's inches by a preponderance of the evidence and issues a partial decree for that quantity. Six months later A & B is unable to pump the full decreed quantity and seeks administration from the Department. The Director performs a "material injury" analysis and concludes that 0.75 miner's inches is sufficient to satisfy A & B's purposes of use. A & B disagrees with the determination and requests a hearing. At the hearing A & B presents its case including expert testimony in support of the claim that the requisite rate of diversion is 0.88 miner's inches. The respondent's present conflicting evidence, including the expert testimony that 0.75 miner's inches or less would be sufficient to accomplish the purpose of use. The experts present opinions on the amount of water necessary to raise crops to maturity, the significance of soil moisture etc. Déjà Vu? Ultimately the Director concludes by a preponderance of the evidence that 0.75 miner's inch per acre is sufficient. The example illustrates that under

the Director's application of the CMR the senior can be forced to re-litigate the exact same issue when proving up the elements of the water right and when subsequently seeking administration for the same right.

In this case the Hearing Officer's recommendation acknowledged that "the analysis of experts varies dramatically" on the amount of water needed to meet the minimum requirements for the crops. "Farmers with comparable experience differ on the amount needed to meet minimum requirements. Experts with comparable education have similar disagreements." R. 3109. The Hearing Officer ultimately concluded "the Director's determination is supported by substantial evidence." R. 3110. No reference was made to the evidentiary standard applied.

In *AFRD #2* the Supreme Court made it clear that the CMR should not be read to require the senior to re-prove or re-adjudicate a decreed right but also acknowledged that there may be post-adjudication factors relevant to the determination of how much water is actually needed. At the district court level in *AFRD#2* Judge Wood opined that "a decreed water right is far more than a right to have another lawsuit only this time with the Director." *American Falls Reservoir District # 2 v. IDWR*, at 93. Absent the application of an evidentiary standard of clear and convincing evidence this Court has difficulty distinguishing how this is not a re-adjudication of A & B's right. Issues pertaining to necessary quantity, beneficial use, evapotranspiration of crops, waste and the like should have been identified in Director's recommendation and ultimately litigated in the context of the SRBA proceedings. The Director reasons that it is not a re-adjudication of A & B's right because A & B still has the right to divert up to the full 0.88 miner's inches when water is available but that the Director will only consider the administration of junior's based on the determination of actual need of the senior, which is the 0.75 miner's inch per acre. This Court fails to see the distinction. In a prior appropriation system a water right becomes meaningless if not honored in times of shortage. The call is the means by which effect is given to the priority date. The priority date is the essence of a water right in a prior appropriation system.

The problem arises with the initial determination of "material injury." *In AFRD #2* the Supreme Court held once the initial determination is made that "material injury" is occurring or will occur, the junior then bears the burden of proving that the call would be

futile or to challenge, in some other constitutionally permissible way, the senior's call. *AFRD #2*, 143 Idaho at 878, 154 P.3d at 449. However, the Director's "threshold" material injury determination includes what would otherwise be a defense to a delivery call. The problem with this approach is that it circumvents the constitutionally inculcated presumptions and burdens of proof.

The CMR distinguish between "material injury" and "using a water right efficiently without waste." CMR Rule 010.14 defines "material injury" as "hindrance to or impact upon the exercise of a water right caused by the use of water by another person." CMR Rule 010.25 defines "water right" as the legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by a decree, permit or license . . . ." Prior to regulating junior rights in an organized water district, CMR Rule 040.03 requires the Director to consider whether the senior is suffering "material injury" ***and*** "is diverting and using water efficiently and without waste." The factors in Rule 042.01 also provides "[f]actors the Director may consider in determining whether holders of water rights are suffering material injury ***and*** using water efficiently without waste include. . . ." (emphasis added). Although the CMR address the two concepts in conjunction with each other, the Supreme Court held the rules cannot be read as a burden shifting provision to require the senior to re-prove or re-adjudicate his right. *AFRD#2* 143 Idaho at 877-78, 154 P.3d at 448-49.

**Therefore, this Court holds that in order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence. Accordingly, this Court holds the Director erred by failing to apply the correct presumptions and burdens of proof. The case is remanded for this purpose.**

### D. The Director Did Not Err by Failing to Separately Consider Depletions to Individual Points of Diversion For Purposes of Determining Material Injury to the 36-2080 Right.

A & B argues the Director erred in failing to determine material injury based on depletions to the 177 individual points of diversion as opposed to determining injury

based on depletions to the cumulative decreed quantity. A & B argues further that the Director erred by requiring that A & B take reasonable steps to interconnect individual wells or systems within the Unit prior to seeking regulation of junior pumpers. The Hearing Officer concluded that it was proper to consider the system as a whole but that consideration must be given to account for the fact that water from one well is not accessible to the entire acreage:

> 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. However, it is equally 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 juniors. A & B has some interconnection within the system to utilize the water it can pump. But the record does not establish whether further interconnection is either financially or technically practical.

R. 3096. This Court agrees that the system must be considered as a whole based on the way in which the water right is decreed. Further, that the extent to which the Director may require A & B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director. The Director concluded that A & B must make reasonable efforts to maximize interconnection of the system and placed the burden on A & B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

The way in which the 36-2080 water right was licensed and ultimately decreed in the SRBA is not typical. The partial decree does not define or limit the place of use for any of the 177 points of diversion within the boundaries of the Unit. Instead, the decree lists the 177 different points of diversion and describes the place of use as "the boundary of A & B Irrigation District service area pursuant to Section 43-323, Idaho Code." *See* Exh. 139. The legal effect is that water diverted from any one of the points of diversion is appurtenant to and therefore can be used on any and all of the 62,604.3 acres within the defined place of use. The license or partial decree also does not describe or assign a rate of diversion or volumetric limitation to any of the individual points of diversion. Instead,

the right is licensed and decreed at the cumulative diversion rate of 1,100 cfs with a 250,417.20 AFY limitation for the entire water right. The legal effect is that up to the full rate of diversion can be diverted from any combination of the 177 points of diversion up to the AFY volumetric limitation and applied to any of the lands within the Unit.

Structuring the right in this manner was not due to oversight. The USBOR applied for the right to be licensed as such in order to provide for the greatest amount of flexibility in distributing water throughout the project. R. 3093-94. In a response from the USBOR to the Department regarding the permit application, the USBOR states:

> We emphasize that the project is one integrated system, physically, operationally, and financially. Some lands, depending on project requirements, can be served from water from several wells. Therefore, it is impractical and undesirable to designate precise land area within the project served by each of the specific wells on the list.

Exh. 157D.

Although decreed as such, the Unit presently does not consist of a system of interconnected wells and due to the geographic terrain, water cannot presently readily be distributed throughout the entire project from any particular well or system. Nonetheless, the right is essentially decreed as having alternative points of diversion for the 1100 cfs for the entire 62,604.3 acres. Therefore, because no rate of diversion or volumetric limitation is decreed to a particular point of diversion, A & B has no basis on which to seek regulation of juniors in order to divert a particular rate of diversion from a particular point of diversion, provided a sufficient quantity can be diverted through the various alternative points of diversion that are appurtenant to the same lands. Simply put, based on the way in which the right is decreed A & B does not get to dictate particular quantities that need to be diverted from particular points of diversion.

If A & B wishes to have its right administered on a more regionalized basis, it would be incumbent on A & B undergo a transfer proceeding to have particular points of diversion assigned to more discrete places of use within the Unit. The drawback would be that A & B may have to forgo the high degree of flexibility it currently holds with respect to the use of the water within the project. The current flexibility with respect to the use of the right results in uncertainty over the availability of water to subsequent appropriators because A & B is authorized under the right to divert up to its decreed

amount from any combination of its points of diversion at its discretion. However, A & B can't have it both ways. Flexibility has its benefits and burdens. The Director also has flexibility when it comes to responding to requests for regulation. Until such time as the right is defined with more particularity, the extent to which the Director can require interconnectedness is left to his discretion.

**1. Issues with Respect to Enlargement Claims.**

Another problem with seeking regulation of juniors to satisfy underperforming wells is that A & B has been allowed to establish enlargement claims pursuant to I.C. § 42-1426, based on areas of the project that produce water in excess of what is required in a particular area of the project. A & B irrigates approximately 2000 enlargement acres. The way in which the right is decreed creates an anomaly whereby A & B seeks regulation of juniors to satisfy underperforming points of diversion for the 36-2080 right while at the same time continues to irrigate enlargement acres from alternative points of diversion authorized under the same right. The indirect result is that the enlargement rights are protected under the September 9, 1948, priority date and the subordination provision that applies to all enlargement rights is circumvented.[13] Accordingly, prior to seeking regulation of pumpers junior to September 9, 1948, it would be incumbent on A & B to first apply the water servicing the enlargement acres on its original lands or alternatively to factor that quantity of water used in conjunction with the enlargement acres into the Director's material injury analysis in determining water shortages, if any, to the 36-2080 right. Thereafter, if there is insufficient water to satisfy the enlargement

[13] The following subordination remark is included in all enlargement rights perfected pursuant to I.C. § 42-1426:

> This water right is subordinate to all other water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to section 42-1426, Idaho Code, the earlier priority is the superior right.

The remark was included in decrees for enlargement rights following the Idaho Supreme Court's holding in *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). Ironically the inclusion of the remark was challenged by A & B in the SRBA with respect to its enlargement claims stemming from the 36-2080 right. *In Re: SRBA Case No. 39576, Order on Challenge, (A & B) Irr. Dist.*, Subcase Nos. 36-2080 *et. al.* (April 25, 2003) (Hon. Roger S. Burdick). The inclusion of the remark was affirmed by the Idaho Supreme Court in *A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist. et. al.*, 141 Idaho 746, 118 P.3d 78 (2005).

rights A & B can seek administration in accordance with the priority limitations assigned to the enlargement acres.

Therefore, based on the way in which the right is structured and in giving proper legal effect to the decree, this Court holds the Director did not err in considering the project as a whole for purposes of determining material injury.

### 2. The Director Erred in Applying a "Failure of the Project Standard."

A & B argues that the Hearing Officer erred by applying a failure of the project standard. The Hearing Officer concluded:

> There is evidence that in 2007 there was 5000 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 result of costly rectification efforts. . . . 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 decrees.

R. 3097. A & B also notes that underperforming wells are not just located in the southern part the Unit but rather are located throughout the project. *See* Exh. 200N & 216.

Whether or not the Hearing Officer actually applied or relied on a "failure of the project standard" or was making a finding of fact is not entirely clear.[14] However, A & B is correct in that there is not a recognized legal basis for applying a failure of the project standard - even based on the way in which A & B's right is decreed. The fact that an injury may be arguably be so slight as to represent only a small portion of the overall project is irrelevant. Injury to a water right is still injury. However, as previously discussed, the Director must evaluate material injury from the perspective that A & B has

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[14] The *Hearing Officer's Response to A & B's Petition for Clarification* states:

> In context the finding that there has not been a 'total project failure' is a finding of fact, not a measure of material injury. Material injury may occur before a total project failure. It is a finding made because of the extensive evidence offered concerning the nature and operation of the project, not as a threshold requirement before curtailment or mitigation can be sought.

R. 3262.

the obligation to move water around within the Unit as all points of diversion are appurtenant to all lands within the Unit. If performing wells are capable of producing sufficient water to compensate for underperforming areas then injury may not exist. Alternatively, if performing wells are incapable of producing additional water needed to compensate for underperforming wells then injury may exist. This Court recognizes, however, that the regulation of juniors to increase performance of underperforming wells located in regions of poor transmissivity may be subject to a futile call defense.[15]

In sum, aside from there being no legally recognized *de minimus* threshold exclusion for finding injury, based on this Court's analysis there is no reason to engage in a "failure of the project" standard, as established legal principles governing water law adequately address the issue.

**E. The Director Did Not Err in Failing to Designate All or a Portion of the ESPA as a Ground Water Management Area (GWMA) Pursuant to Idaho Code § 42-231.**

A & B next argues that the Director erred by failing to designate a GWMA for either all or a portion of the ESPA. The Director concluded that the designation of a GWMA was not necessary because the water rights are now included in an organized water district. The Director reasoned that the designation of a GWMA would not confer any additional management function that is not already available in an organized water district. This Court agrees.

The decision of whether or not to designate a GWMA is discretionary with the Director. Idaho Code § 42-231 sets forth the duties of the Director with respect to the management of ground water:

> It shall likewise be the duty of the [Director] to control the appropriation and use of the ground water of this state as in this [GWA] provided and to

---

[15] CMR 010.08 defines "Futile Call" as:

> A delivery call made by a holder of a senior-priority surface or ground water right that, for physical or hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior- priority ground water rights or that would result in waste of the resource.

IDAPA 37.03.11.010.08.

> do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this [GWA].

Idaho Code § 42-237a defines the power of the Director with respect to carrying out the provisions of the GWA:

> In the administration and enforcement of this act and in effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources *in his sole discretion*, is empowered:
>
> . . .
>
> g. To supervise and control the exercise and administration of all rights to the use of ground waters *and in the exercise of this discretionary power he may* initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. . . .

(emphasis added). Idaho Code § 42-233a provides:

> When a 'critical ground water area'[16] is designated by the [Director], or at anytime thereafter during the existence of the designation, the director ***may*** *approve a ground water management plan for the area.* The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and any other hydraulically connected sources of water.

(emphasis added).

---

[16] Idaho Code § 42-233a defines "critical ground water area" as:

> [A]ny ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

Idaho Code § 42-233b sets forth the conditions for the designation of a GWMA.[17] In this case, the Director determined factually that despite declines, the aquifer was neither being mined nor that reasonable pumping levels had been exceeded. Further that a moratorium on new permit applications was in effect. Hence, the aquifer was not approaching critical ground water area conditions thereby triggering the need for the designation of a GWMA. However, even if the Director concluded aquifer levels met the criteria of a critical ground water area, the designation of a GWMA is still not mandatory. The designation of a GWMA is one of the tools or mechanisms available to the Director for carrying out his duty to manage the aquifer as required by I.C. § 42-231.

Another mechanism available is the creation of an organized water district pursuant to I.C. § 42-602.[18] Unlike the designation of a GWMA, the Director is required

---

[17] Idaho Code § 42-233b provides as follows:

> **Ground water management area.** – 'Ground water management area' is defined as any ground water basin or designated part thereof which the director of the department of water resources *has determined may be approaching the conditions of a critical ground water area.*
>
> When a ground water management area is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director *may* approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.
>
> Applications for permits made within a ground water management area shall be approved by the director only after he has determined on an individual basis that sufficient water is available and that other prior water rights will not be injured.
>
> The director *may* require all water right holders within a designated water management area to report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.
>
> *The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. . . .*

(emphasis added).

[18] Idaho Code § 42-602 *et seq.* sets forth the requirements for the creation and distribution of water in water districts as follows:

> **Director of the department of water resources to supervise water distribution within water districts.** – The director of the department of water resources shall have direction

to create water districts. I.C. § 42-604.[19] However, the creation of water districts only applies with respect to adjudicated water rights.[20] I.C. § 42-604. Because a GWMA designation does not have the same restriction, the designation of a GWMA has been used as a mechanism prior to water rights being decreed in the SRBA and included in the boundaries of an organized water district. However, the position of the Director is that after an organized water district is created as required then a GWMA is no longer necessary:

> Following the creation of water districts in accordance with chapter 6, title 42, Idaho Code, the Director rescinded, in whole or in part, his orders that

---

> and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.
>
> *The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.*

(emphasis added). Idaho Code § 42-607 governs the distribution of water within a water district:

> **Distribution of water.** – It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom *according to the prior rights of each respectively* . . . .

(emphasis added).

[19] Idaho Code § 42-604 requires the creation of water districts:

> **Creation of water districts.** – The director of the department of water resources *shall divide the state into water districts* in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: provided, that any stream of water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts: provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream: provided, that any stream may be divided into two (2) or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district: *provided, that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof.*

(emphasis added).

[20] Prior to entry of the final decree in the SRBA the Department has sought interim administration from the SRBA Court, pursuant to I.C. § 42-1417, prior to creating water districts.

> created the American Falls and Thousand Springs Ground Water Management Areas. The Director determined that preserving the ground water management areas was no longer necessary to administer water rights for the protection of senior surface and ground water rights because administration of such rights is now accomplished through the operation of water districts.

R.1110.

Water District Nos. 100, 110, 120, 130 and 140 were either established or boundaries revised between February 19, 2002, and December 20, 2006, in order to provide for the administration of water rights diverting from the ESPA. There has also been in effect since 1992 a moratorium on permit applications for new water rights developed from the ESPA.

At the hearing Tim Luke from the Department testified as to the administrative difference between a GWMA and an organized water district:

> **Q.** No effective difference between what you can do administratively in a water district and ground water management area?
>
> **A.** I think anything that you do in a ground water management area can also be done in a water district.
>
> **Q.** Greater flexibility of the water district.
>
> **A.** I think so.

Tr. pp. 1324-25.

In regards to flexibility, the CMR expressly distinguish between delivery calls made within an organized water district (CMR 040), from those made in a ground water management area (CMR 041). The process for responding to a delivery call in an organized water district requires less procedural components prior to the regulation of junior water users.

The Hearing Officer ultimately concluded that "[t]he benefit of designating the ESPA as a [GWMA] is not apparent. There may be no harm in doing so, but it would appear to add an administrative overlay without identifiable benefits." R. 3116. This Court agrees.

For the above-stated reasons, the Director did not abuse discretion by failing to designate the ESPA as a GWMA, and his decision is therefore affirmed.

**F. The Director's *Final Order* Complies with Idaho Code § 67-5248(1).**

Idaho Code § 67-5248(1)(a) provides in relevant part that an order must be in writing and shall include "a reasoned statement in support of the decision." It further provides that 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." *Id.* A & B argues that certain conclusions set forth in the *Final Order* do not comply with Idaho Code § 67-5248(1)(a) on the grounds that they are not supported by reasoned statements. At issue is the Director's conclusion that "[t]he record does not support the relief requested by A & B in its Exceptions Brief," and his conclusion that the Hearing Officer's interpretations of "the State Constitution, Idaho Statutes and the Conjunctive Management Rules" in previous delivery call proceedings will not be incorporated into the *Final Order*. R. at 3322.

With respect to the conclusion that "[t]he record does not support the relief requested by A & B in its Exceptions Brief," A & B reads this statement in isolation. Such a reading is too narrow. The *Final Order* expressly incorporates "the Findings of Fact entered previously by the Director and recommendations of the Hearing Officer," as well as the "Conclusions of Law set forth in the Director's orders in the above-captioned matter" unless expressly modified by the *Final Order*. R. at 3321 & 3322.

Aside from a couple newly raised procedural issues which were specifically addressed in the *Final Order*,[21] A & B's Exceptions Brief asserts the same substantive arguments it set forth at hearing before the Hearing Officer, in its *Petition for Reconsideration*, and in its *Petition for Clarification*. These arguments have been fully addressed, and reasoned statements supporting the resulting conclusions set forth, by the Director in his *January 29, Order*, as well as by the Hearing Examiner in his *Recommended Order*, his *Order on Clarification* and his *Order on Reconsideration*. Indeed, A & B does not identify any *specific* exception set forth in its Exceptions Brief that it alleges has not been addressed in this matter or that the resulting conclusion has

not been supported with a reasoned statement. The Director is not required to engage in the needless duplication of established findings where, as here, he incorporates by reference and accepts findings of fact and conclusions of law previously entered in the same matter.

Likewise, the conclusion that the Hearing Officer's interpretations of "the State Constitution, Idaho Statutes and the Conjunctive Management Rules" in previous delivery call proceedings will not be incorporated into the *Final Order* complies with Idaho Code § 67-5248(1)(a). The Director supported his conclusion with reasoned statements, including but not limited to, that the records developed in the other delivery call proceedings are distinct from the record developed in this proceeding.

Accordingly, the Director did not err by failing to issue a final order in compliance with I.C. § 67-5248.

## VI.
## CONCLUSION AND INSTRUCTIONS ON REMAND

In conclusion, this Court holds and provides the following instructions on remand:

1. The decision of the Director that the 1951 GWA applies to the administration of pre-enactment water rights is **affirmed**.

2. The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A & B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.

3. The decision of the Director that A & B has not been required to exceed reasonable pumping levels is **affirmed.** This is based on the finding of no material injury

[21] These procedural issues revolve around the Director's ability to shorten time to file exceptions.

3. The decision of the Director that A & B has not been required to exceed reasonable pumping levels is **affirmed**. This is based on the finding of no material injury at existing pumping levels. On remand, following the application of the appropriate evidentiary standard a finding of material injury may require that the Director reevaluate this determination.

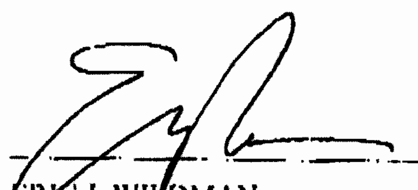
4. The decision of the Director to evaluate material injury to the 36-2080 water right based on depletion to the cumulative quantity as opposed to determining injury based on depletions to individual points of diversion is **affirmed**. The decision of the Director to require A & B to take reasonable steps to move water from performing to underperforming areas or alternatively demonstrate physical or financial impracticability is **affirmed**.

5. The decision of the Director not to designate the ESPA as a GWMA is **affirmed**.

6. The Director did not fail to issue a final order in compliance with I.C. § 67-5248.

IT IS SO ORDERED

Dated May 4, 2010



ERIC J. WILDMAN
Presiding Judge of the Snake River Basin Adjudication

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

| | |
|---|---|
| In Re SRBA<br><br>Case No. 39576 | Subcase No.: 2009-000647<br><br>**ORDER OF EXTENSION RE: FILING DATE OF MEMORANDUM DECISION** |

1. On May 4, 2010, this Court filed its *Memorandum Decision and Order on Petition for Judicial Review* ("*Memorandum Decision*") in the above-captioned matter.

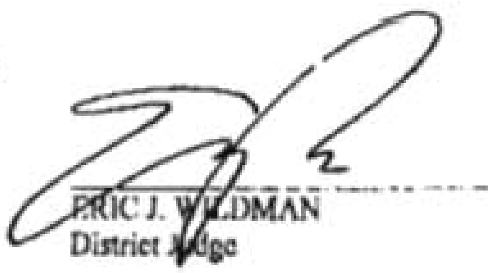
2. Today it was brought to this Court's attention that the *Memorandum Decision* was inadvertently not served upon the parties until May 19, 2010, and that such service was accomplished via email as evidenced by the *Certificate of Service* attached hereto.

THEREFORE, THE FOLLOWING ARE HEREBY ORDERED:

1. The Clerk of the Minidoka District Court shall serve the parties with a hard copy of the *Memorandum Decision* on May 20, 2010 consistent with the Idaho Rules of Civil Procedure together with the service of this *Order*.

2. For all purposes the date of entry of the *Memorandum Decision* shall be treated as May 20, 2010.

Dated May 20, 2010



ERIC J. WILDMAN
District Judge



SCANNED

FILED-DISTRICT COURT
CASE #CV-2009-647
2010 MAY 20 PM 1:15
DUANE SMITH CLERK
DEPUTY

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 of May, 2010, I served a true, correct copy of the ORDER OF EXTENSION RE: FILING DATE OF MEMORANDUM DECISION upon the following in the manner provided:

| | |
|---|---|
| Travis Thompson<br>P. O. Box 1906<br>Twin Falls, ID 83303-1906 | (✓) First Class Mail<br>( ) Hand Delivery - Basket<br>( ) Facsimile |
| Chris M. Bromley<br>317 Main Street, Rm 100<br>Boise, ID 83720 | (✓) First Class Mail<br>( ) Hand Delivery - Basket<br>( ) Facsimile |
| Jerry R. Rigby<br>250 North 2nd East<br>Rexburg, ID 83440 | (✓) First Class Mail<br>( ) Hand Delivery - Basket<br>( ) Facsimile |
| Randall C. Budge<br>P. O. Box 1391 Center Plaza<br>Pocatello, ID 83204 | (✓) First Class Mail<br>( ) Hand Delivery - Basket<br>( ) Facsimile |
| Candice M. McHugh<br>101 S. Capitol Blvd., Suite 208<br>Boise, ID 83702 | (✓) First Class Mail<br>( ) Hand Delivery - Basket<br>( ) Facsimile |
| Sarah A. Klahn<br>511 Sixteenth Street, Suite 500<br>Denver, CO 80202 | (✓) First Class Mail<br>( ) Hand Delivery - Basket<br>( ) Facsimile |
| A. Dean Tranmer<br>City of Pocatello<br>P. O. Box 4169<br>Pocatello, ID 83201 | (✓) First Class Mail<br>( ) Hand Delivery - Basket<br>( ) Facsimile |

Clerk of the District Court

By

Deputy Clerk



SCANNED

FILED-DISTRICT COURT
CASE #CV 2009-647

2010 MAY 20 PM 1:20

DUANE SMITH CLERK
DEPUTY

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 of May, 2010, I served a true, correct copy of the MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW upon the following in the manner provided:

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Rexburg, ID 83440

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P. O. Box 4169
Pocatello, ID 83201

(✓) First Class Mail
( ) Hand Delivery - Basket
( ) Facsimile

Duane Smith
Clerk of the District Court

By ____________
Deputy Clerk



SCANNED

FILED [illegible]
CASE #CV-2009-647

2010 MAY 19 PM 5:21

DUANE SMITH, CLERK
DEPUTY

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 of May, 2010, I served a true, correct copy of the MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIWE upon the following in the manner provided:

| | |
|---|---|
| Travis Thompson tlt@idahowaters.com | (✓) EMAILED |
| Chris Bromley chris.bromley@idwr.idaho.gov | (✓) EMAILED |
| Randy Budge rcb@racinelaw.net | (✓) EMAILED |
| Candice McHugh cmm@racinelaw.net | (✓) EMAILED |
| Jerry Rigby jrigby@rex-law.com | (✓) EMAILED |
| Sarah Klahn sarahk@white-jankowski.com | (✓) EMAILED |
| Dean Tranmer dtranmer@pocatello.us | (✓) EMAILED |

Duane Smith
Clerk of the District Court

By ______________
Deputy Clerk



SCANNED

FILED-DISTRICT COURT
CASE #

2010 JUN 22 AM 11:42

DUANE SMITH, CLERK
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

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

**ORDER ENLARGING TIME FOR SUBMISSION OF BRIEFS IN SUPPORT OF REHEARING**

On June 10, 2010, the Ground Water Users and the City of Pocatello filed *Petitions for Rehearing* in the above-captioned matter. On June 21, 2010, the Ground Water Users filed a Motion to Enlarge Briefing Deadline in Support of Petitions for Rehearing indicating that all parties agree to the proposed enlargement of time.



SCANNED

AS SUCH, IT IS HEREBY ORDERED that the following schedule applies: June 29, 2010 deadline for filing the Ground Water Users and the City of Pocatello's Brief in Support of Petition for Rehearing.

IT IS SO ORDERED.

DATED this 22 day of June, 2010.

JUDGE ERIC J. WILDMAN

FILED-
CASE #

2010 AUG 27 AM 10: 33

DUANE CLERK
DEPUTY

**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 RESEROUCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,

Respondents.

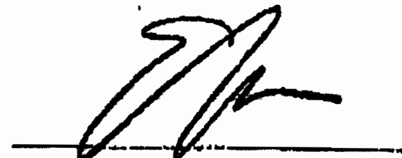
IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF GROUND WATER MANAGEMENT AREA

**CASE NO. CV 2009-647**

**ORDER GRANTING MOTION FOR ONE DAY EXTENSION TO FILE REPLY BRIEF**

Pocatello's Motion for One Day Extension to File Reply Brief having come before the Court and the Court having reviewed the premises GRANTS the Motion. Because of counsel's emailing of the reply brief to all parties, no prejudice will accrue.

Done this 26th day of August, 2010.



Eric Wildman
District Judge

SCANNED

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27TH day of August, 2010, she caused a true and correct copy of the foregoing ORDER GRANTING MOTION FOR ONE DAY EXTENSION TO FILE REPLY BRIEF on the persons listed below by faxing thereto to the parties at the indicated fax number:

John K. Simpson
Travis L. Thompson
Paul L. Arrington
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208-234-6297

Sarah A. Klahn
WHITE & JANKOWSKI LLP
511 Sixteenth St. Suite 500
Denver, CO. 80202
303-825-5632

Dated this 27th day of August, 2010

Santos Garza, Deputy Clerk

FILED DISTRICT COURT
CASE #

2010 AUG 31 PM 3:00

DUANE SMITH, CLERK
DEPUTY

**LAWRENCE G. WASDEN**
ATTORNEY GENERAL

**CLIVE J. STRONG**
Deputy Attorney General
Chief, Natural Resources Division

**GARRICK L. BAXTER, ISB #6301**
**CHRIS M. BROMLEY, ISB #6530**
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P. O. Box 83720
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Facsimile: (208) 287-6700

Attorneys for Respondents

**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,<br><br>Petitioner,<br><br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,<br><br>Respondents. | Case No. CV 2009-647<br><br>**ORDER GRANTING UNOPPOSED MOTION TO RESCHEDULE ARGUMENT** |
| 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 | |

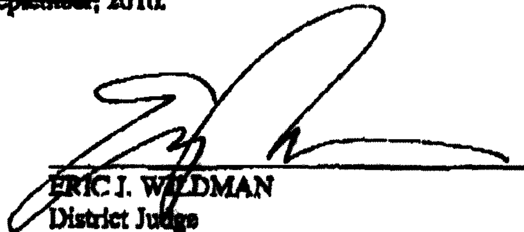


SCANNED

On August 31, 2010, counsel for the Idaho Department of Water Resources ("Department") filed an *Unopposed Motion to Reschedule Argument* ("Motion"). The Motion sought to reschedule oral argument on rehearing from 1:30 p.m. on September 13, 2010 to 1:30 p.m. on September 20, 2010 at the SRBA courthouse in Twin Falls, Idaho. The Motion also sought to allow counsel the ability to participate at rehearing either in-person, by phone, or by video teleconference in Conference Room C at the Department's State Office in Boise, Idaho.

Good cause appearing, the Motion is hereby GRANTED. If participating by phone use the SRBA court's regular dial-in number: 1-215-446-0193; followed by 4061284.

DATED this 31 day of ~~September~~ August, 2010.



ERIC J. WILDMAN
District Judge

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this ___1___ day of September, 2010.

Document Served: **Order Granting Unopposed Motion to Reschedule Argument**

| | |
|---|---|
| John K. Simpson<br>Travis L. Thompson<br>Paul L. Arrington<br>BARKER ROSHOLT & SIMPSON, LLP<br>P.O. Box 485<br>Twin Falls, ID 83303<br>jks@idahowaters.com<br>tlt@idahowaters.com<br>pla@idahowaters.com | Jerry R. Rigby<br>RIGBY ANDRUS & RIGBY<br>25 North 2nd East<br>Rexburg, ID 83440<br>jrigby@rex-law.com |
| Randall C. Budge<br>Candice M. McHugh<br>RACINE OLSON<br>P.O. Box 1391<br>Pocatello, ID 83204-1391<br>rcb@racinelaw.net<br>cmm@racinelaw.net | Sarah A. Klahn<br>WHITE JANKOWSKI<br>511 16th St., Ste. 500<br>Denver, CO 80202<br>sarahk@white-jankowski.com |
| Dean A. Tranmer<br>City of Pocatello<br>P.O. Box 4169<br>Pocatello, ID 83205<br>dtranmer@pocatello.us | |

DUANE SMITH
Clerk of the District Court

By:
Deputy Court Clerk

FILED-DISTRICT COURT
CASE #
2010 NOV -2 PM 3: 12
DUANE SMITH, CLERK
DEPUTY

**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. 2009-000647

**MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING**

**Ruling: Affirming prior ruling.**

**Appearances:**

John K. Simpson, Travis L. Thompson, Paul Arrington, Sarah W. Higer, Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, on behalf of Petitioner A & B Irrigation District, ("A & B");



SCANNED

Chris M. Bromley, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, on behalf of Respondents Idaho Department of Water Resources, and Gary Spackman in his capacity as Interim Director of the Idaho Department of Water Resources, ("Director," "IDWR" or "Department");

Randall C. Budge, Candice M. McHugh, Scott J. Smith, Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, on behalf of Respondent Idaho Ground Water Appropriators, Inc. ("IGWA");

Sarah A. Klahn, White & Jankowski, LLP, Denver, Colorado, A. Dean Tramner, Pocatello, Idaho, on behalf of Respondent City of Pocatello ("City of Pocatello");

Jerry R. Rigby, Rigby, Andrus & Rigby, Chartered, Rexburg, Idaho, on behalf of Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, and Stan D. Neville, ("Fremont-Madison *et. al.*").

## I. PROCEDURE

### A. Issue on rehearing.

On rehearing this Court is asked by the Department, IGWA and the City of Pocatello (collectively as "Ground Water Users") to reconsider its ruling in the ***Memorandum Decision and Order on Petition for Judicial Review*** (May 4, 2010) ("***Order***") regarding the appropriate burden of proof and evidentiary standards applied in a delivery call made pursuant to the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources,* IDAPA 37.03.11. ("CMR"). In particular, the issue pertains to the standard of proof and burdens necessary to support a determination of no material injury when the determination relies on a finding by the Director that the water requirements of the senior right holder initiating the call can be satisfied with less than the decreed quantity. This Court held that such a finding must be supported by clear and convincing evidence. The issue on rehearing therefore involves the significance of a partial decree in a delivery call proceeding made pursuant to the CMR, and the standard of proof required to support a determination by the Director that the senior user initiating the call requires less water than previously decreed.

**B. The purpose of the remand.**

The ***Order*** remanded the case to the Director for application of the standard of proof to his determination that A & B could get by with less water than decreed to it in the SRBA. In the June 30, 2009, Final Order, the Director did not state the evidentiary standard applied. In *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 843, 70 P.3d 669, 681 (2003) the Idaho Supreme Court held that where the Department failed to state whether or not its findings were based on clear and convincing evidence it was outside the role of the reviewing court to review the evidence and decide whether there was clear and convincing evidence supporting the Department's findings. Following *Sagewillow*, this Court did not review the evidence to determine whether the above-mentioned finding was supported by clear and convincing evidence, but rather remanded the case to the Director to make such a determination.

**C. The reasoning supporting the *Order*.**

This Court reasoned that a decreed quantity in a SRBA decree is a judicial determination of the quantity of water put to beneficial use consistent with the purpose of use for which the right was decreed. Therefore, any determination that a senior right holder can accomplish the purpose of use for the water right on a quantity less than decreed would be akin to a finding of waste because the senior would not be making beneficial use of the entire decreed quantity. No material injury to the senior water right would inure and junior rights could not be regulated to satisfy the senior's decreed quantity. In the ***Order***, the Court held that a finding of waste requires the higher standard of clear and convincing evidence.

The holding reconciled the objectives of giving proper effect and certainty to the adjudicated elements of a water right while at the same time also giving effect to the CMR by acknowledging that a quantity less than decreed may be all that is necessary to satisfy a senior right at the time a delivery call is made. The reasoning, however, placed any risk of uncertainty in the Director's determination resulting in the senior having an insufficient water supply on junior water rights. Absent a higher standard, the senior making the call can be put in the position of re-proving or re-litigating quantity

requirements for a particular water right. Simply put, if the Director is going to administer to provide the senior with less than the decreed quantity, taking into account the implementation of any reasonable measures imposed on the senior, the Director should be convinced to a high degree of certainty that his determination will provide the senior with sufficient water to accomplish the purpose of use. The high degree of certainty is necessary because a water right is a valuable property right. If the Director is turns out to be incorrect in his determination that senior can get by with less than the decreed quantity of water, the senior will receive less water than he would otherwise be entitled under the decree. Under those circumstances the senior is in effect deprived a portion of his property right. Such diminishment of the senior's right should only be made through the evidentiary standard of clear and convincing evidence.

## II. CLARIFICATION, RESPONSES TO ISSUES RAISED AND DISCUSSION

### A. The clear and convincing standard does not guarantee the senior the decreed quantity nor does it require that the Director administer according to strict priority.

The Ground Water Users argue the Court's ***Order*** results in requiring that the Director administer strictly to the decree unless juniors intervene and demonstrate by clear and convincing evidence less water is necessary. This argument misunderstands the Court's ***Order***.

#### 1. The presumptions and burdens of proof were not clearly addressed in the administrative proceedings as required by *AFRD #2*.

This Court previously discussed the significance of the Idaho Supreme Court's decision in ***American Falls Reservoir District No. 2. v. IDWR***, 143 Idaho 862, 154 P.3d 433 (2007) (***AFRD #2***). ***Order,*** 27-28. The Supreme Court held that the CMR survived a facial challenge despite the lack of stated burdens of proof and evidentiary standards applicable to a delivery call. Nevertheless, the Court recognized that the Department is

still required to apply the proper evidentiary standards and burdens of proof in order to apply the CMR in a constitutional or "as applied" manner. In the instant case, the evidentiary standards and burdens of proof were not clearly articulated by the Director.

**i. Administration of rights in an organized water district does not avoid the application of the established burdens of proof.**

The CMR distinguish between whether or not administration is sought in an organized water district. (*Compare* CMR Rule 40 and Rule 30). The initiation of a contested case is not required in an organized water district. This is significant because in an organized water district, water rights must first be adjudicated. *See* I.C. § 42-604 (requirements for water district). In responding to a delivery call in an organized water district, the Director is required to make findings and to administer rights through a water master if material injury is found. This is accomplished without the initiation of a contested case process. In ***AFRD #2*** the Idaho Supreme Court held that "[r]equirements 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. There is simply no basis from which to conclude the Director can never apply the proper evidentiary standard in responding to a delivery call." *Id.* at 874, 154 P.3d at 445. Therefore, whether or not a junior intervenes in the proceedings, the Director must give effect to established evidentiary burdens and presumptions.

**ii. The CMR do not modify the burdens or presumptions applied in a delivery call.**

The Ground Water Users argue that the burden of proof is a preponderance of the evidence as it is the appropriate evidentiary standard in most administrative proceedings. The Ground Water Users additionally assert that the evidentiary standards that apply to the administration of ground water rights are different from those involving solely surface water administration. The Ground Water Users also argue the cases relied on by the Court in the ***Order*** only address surface to surface administration and that different

burdens and evidentiary standards apply in cases involving ground water administration. This Court disagrees that different burdens and evidentiary standards apply.

Again, in ***AFRD #2*** the Supreme Court did not hold that a different set of evidentiary standards and burdens apply to the administration of ground water. The Supreme Court held that the CMR were not unconstitutional for failing to articulate the appropriate standards and burdens. The Court added that "[r]equirements 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." *Id.* at 874, 154 P.3d at 445. This statement is unequivocal. The argument that the CMR modify historically developed burdens and presumptions is inconsistent with that holding.

The City of Pocatello argues that the burden is on the senior to prove material injury. *Pocatello Opening Brief* at 10-11. In ***AFRD #2*** American Falls argued that specific provisions of the CMR squarely contradict Idaho law by placing the burden of proving material injury on the senior making the call. The Supreme Court held "[n]owhere do the Rules state that the senior must prove material injury before the Director will make such a finding. To the contrary, this Court must presume the Director will act in accordance with Idaho law, as he is directed to do under CM Rule 20.02. . . . [O]ur analysis is limited to the rules as written, or 'on their face,' and the rules do not permit or direct the shifting of the burden of proof." *Id.* at 873-74, 154 P.3d at 444-45. Accordingly, the express provisions of the CMR do not operate to modify the historically recognized burdens and presumptions.

Finally, the issue before this Court does not deal with the complexities and uncertainties posed by the hydraulic interrelation of ground and surface water. On rehearing, the issue focuses solely on the presumptive weight accorded a partial decree and the standard of proof required to support a determination that the senior initiating the call requires less water than previously decreed. At issue is the quantity of water necessary to accomplish the senior's purpose of use.

**iii. The Court's *Order* does not result in the Director administering rights strictly in accordance with the decreed quantity.**

The Court's ***Order*** does not conclude that a senior right holder is guaranteed the maximum quantity decreed or that the Director is required to administer strictly according to the decree. Rather, the ***Order*** concludes that the decreed quantity includes a quantitative determination of beneficial use resulting in a presumption that the senior is entitled to that decreed quantity. The ***Order*** contemplates that there are indeed circumstances where the senior making the call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full decreed quantity. The ***Order*** holds, however, that any determination by the Director that the senior is entitled to less than the decreed quantity needs to be supported by a high degree of certainty.

The clear and convincing evidentiary standard is not an insurmountable standard. The Department is not new to the administration of water and should be able to determine present water requirements taking into account multiple factors including the existing conveyance system. If the senior right holder has made efficiencies or changes to a delivery system resulting in the conservation of water, such should be no more difficult to establish at the higher evidentiary standard. Therefore the senior is not guaranteed the decreed quantity nor is the Director required to administer strictly in accordance with the decreed quantity. While a senior may not be guaranteed the decreed quantity in a delivery call, he should have assurances that any reduced quantity determined to be sufficient to satisfy current needs is indeed sufficient. Otherwise what occurs is a redistribution of the senior right to be apportioned among junior rights. The apportionment of water among users as common property was rejected by the Idaho Supreme Court in the early stages of water development. *Kirk v. Bartholomew*, 3 Idaho 367, 29 P. 40 (1892).

**iv. The application of a clear and convincing standard does not turn a delivery call proceeding into a hearing on forfeiture.**

The Ground Water Users argue that the Court's ruling essentially turns a delivery call into a proceeding on forfeiture. The Ground Water Users argue that that the Court's reliance on waste is in error because in a delivery call the senior's water right is not permanently reduced. This argument misses the point of the ruling. The Court simply

held that the quantity element represents a quantitative determination of beneficial use. In the delivery call, the senior's present water requirements are at issue. If it is determined that the senior's present use does not require the full decreed quantity, then the quantity called for in excess of the senior's present needs would not be put to beneficial use or put differently would be wasted. One leading commentator in analyzing the development of the use of the concepts of reasonable use and economical use in association with beneficial use among various western states, including Idaho, states:

> As considered and applied in these decisions, economical use is an antonym of waste. If an appropriator wastes, he necessarily is not using it economically. As he has no right to waste water unreasonably or unnecessarily, then of necessity he must make economical as well as reasonable and beneficial use. . . . The limitation of the appropriative right to economical and reasonable use thus precludes any waste of water that can reasonably be avoided. The use of water is so necessary as to preclude its being allowed to run to waste. Its 'full beneficial and economical use requires' that when the wants of one appropriator are supplied, another may be permitted to use the flow.

Wells A. Hutchins, *Water Rights in the Western Nineteen States*, Vol I, 502 (1971). The holdings of the SRBA District Court have historically viewed waste and beneficial use in this manner. For example, the SRBA Court rejected the inclusion of a remark in partial decrees which specified that the quantity sought in a delivery call is limited to that which the senior right holder put to beneficial use. The SRBA Court reasoned that the remark was not necessary because it was a restatement of the law and held "that a senior has no right to divert, (and therefore to 'call,') more water than can be beneficially applied. Stated another way, a water user has no right to waste water." ***Order*** at 32 (quoting *Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Facts; Order of Recommitment with Instructions to Special Master Cushman* (Nov. 23, 1999)).

It is apparent that water quantity can be reduced based on a waste analysis without resulting in a permanent reduction of the water right through partial forfeiture. Only if the waste occurs for the statutory period can forfeiture be asserted. However, whether the senior's right is permanently reduced through partial forfeiture or is only temporarily reduced though administration in times of shortage <u>and</u> the reduction leaves the senior

with an insufficient water supply to satisfy present needs, the property right is nonetheless diminished.

### B. The historically developed burdens and presumptions.

On rehearing, the parties identify those cases that address the burdens of proof and evidentiary standards applicable to disputes between competing water users under Idaho law. A review of these cases is worthwhile.

The early case of *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904) addressed a dispute between surface water users on a common source, the Big Lost River. The case was commenced by certain senior water appropriators to enjoin certain junior water appropriators from diverting water to the alleged injury of the seniors' rights of use. With respect to the applicable burdens of proof and evidentiary standards, the Court instructed that once the senior appropriators' rights of use are established, the burden shifts to the junior to prove by clear and convincing evidence that his use will not injure the seniors' rights of use:

> So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. The subsequent appropriator, who claims that such diversion will not injure the prior appropriator below him, **should be required to establish that fact by clear and convincing evidence**.

*Id.* at 307, 77 P. at 647 (emphasis added).

In *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908) the Idaho Supreme Court again addressed a dispute between surface water users. With respect to the applicable burdens of proof and evidentiary standards, the Court instructed, consistent with *Moe*, that the burden is on the party alleging that his appropriation will not injure a prior appropriator's right of use to prove the same by clear and convincing evidence:

> It seems self-evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and, where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or

prejudice a prior appropriator, he should, as we observed in *Moe v. Harger*, 10 Idaho, 305, 77 Pac. 645, **produce 'clear and convincing evidence** showing that the prior appropriator would not be injured or affected by the diversion.' The burden is on him to show such facts.

*Id.* at 149, 96 P. at 571–72 (emphasis added).

*Neil v. Hyde*, 32 Idaho 576, 186 P. 710 (1920) and *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921) likewise involved disputes between surface water users on common sources. The junior appropriators in those cases argued that their use did not injure the senior users. The Idaho Supreme Court directed in both cases that the burden of proof rested on the junior appropriators to show that their use did not injure the seniors, and held that the juniors in both cases failed to carry their burden.[1] *Neil*, 32 Idaho at 587, 186 P. at 713; *Jackson*, 33 Idaho at 528, 196 at 217.

A different issue than those addressed by the Court in the above-mentioned cases arose in the context of a dispute between two groups of artesian groundwater users in *Jones v. Vanausdeln*, 28 Idaho 743, 156 P. 615 (1916). In that case, the ultimate issue was one of hydrologic connectivity; that is, whether the respective artesian basins from which plaintiffs and defendants received their water were hydraulically connected:

> The ultimate fact in issue was whether the [defendants'] wells drew their supply from the same underground flow as [plaintiffs'] wells, thereby causing a diminution in the flow of the [plaintiffs'] wells.

*Id.* at 751, 156 P. at 618. The district court denied plaintiffs' request that the defendants' use be enjoined on the grounds that no subterranean connection existed between the respective artesian basins and that, as a result, the two groups received their water from separate and unconnected sources. *Id.* at 747–48, 156 at 616. The Idaho Supreme Court confirmed, providing that when the issue is whether two sources are hydraulically connected, the burden of proof is on the senior appropriator to establish that such a connection exists before a junior's use will be enjoined. *Id.* at 749, 156 at 617.

The Idaho Supreme Court again took up a dispute between various artesian groundwater users in *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931) ("*Silkey I*") and Silkey v. Tiegs, 54 Idaho 126, 28 P.2d 1037 (1934) ("*Silkey II*"). In that case, the district

[1] Although the Court directed that the burden of proof rested with the junior appropriators, in neither case did the Court specify the applicable evidentiary standard the juniors had to meet.

court adjudicated the rights of the parties, entered a decree curtailing the rights of several of the junior appropriators at the request of the senior appropriator and retained jurisdiction over the case to adjust the allowance of water permitted each user if necessary. *Silkey I*, 51 Idaho at 348–49, 5 P.2d at 1051. Unlike *Jones*, connectivity of source was not the ultimate issue in *Silkey*. Indeed, the district court found, and the Idaho Supreme Court affirmed, that "the waters flowing from the artesian well of each party is derived from the same source, and the supply of said wells constitutes one interdependent and connected source of supply." *Id.* at 348, 5 P.2d at 1051.

The appeal in *Silkey II* arose when the junior appropriators curtailed in *Silkey I* moved the district court under its retained jurisdiction to modify its earlier decree to permit them to use more water. *Silkey II*, 54 Idaho at 127, 28 P.2d at 1037. The junior appropriators argued that such additional use would not deplete the amount of water available to the senior appropriator. *Id.* The Idaho Supreme Court affirmed the district court's denial of the junior appropriators' motion, holding that the juniors failed to sustain their burden of proving that their use would not injure the senior's use:

> The burden was on appellants herein to sustain their motion by direct and convincing testimony, this language in Moe v. Harger, 10 Idaho, 302, 77 P. 645, 646, being particularly apt: "This court has uniformly adhered to the principle, announced both in the Constitution and by the statute, that the first appropriator has the first right; and it would take more than a theory, and in fact clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application, and so generally and uniformly applied by the courts.

*Id.* at 128–29, 28 P.2d at 1038. Consistent with *Moe*, the Court again made clear that the standard of proof was clear and convincing evidence if the juniors wished to prove that their use would not injure the senior appropriator.

The case history can be reconciled. *Jones* instructs that the initial burden rests upon the senior appropriator to establish that he and the junior appropriator receive water from the same hydraulically connected source. Once it is determined that the senior and junior derive water from a common source, as was the case in all of the above-mentioned cases except for *Jones*, the burden rests on the junior appropriator to prove by clear and convincing evidence that his use will not injure the senior's right of use. One leading

commentator on the subject has summarized the application of the burdens of proof as follows:

> [W]hen a senior appropriator seeks to enjoin a junior diversion, the senior – the person seeking judicial intervention to change an existing situation – must prove the water sources for the two diversions are connected. But once hydrologic connection is shown, it becomes probable that the junior diversion interferes with the senior right, if the senior's source is fully appropriated by rights prior to the junior diversion. Then the junior appropriator – the person arguing against probabilities – must show his particular water use somehow does not cause interference.

Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L.Rev. 63, 92–93 (1987).

It is significant that this Court established the hydrologic connection in ***Memorandum Decision and Order of Partial Decree*** in Basin Wide Issue No. 5 "Connected Sources General Provision" for the Snake River Basin. Among other things, the general provision identifies hydraulically connected ground and surface sources in the Snake River Basin for the purposes of administration and defining the legal relationship between connected sources. In pertinent part, the general provision provides as follows:

> Except as otherwise specified above, all other water rights within Basin __ will be administered **as connected sources** of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

(emphasis added). A *Partial Decree for Connected Sources* is issued for each basin within the Snake River Basin. Thus, unless water rights are listed as "otherwise specified" in the *Partial Decree for Connected Sources* for a given basin that the source from which a junior appropriator receives his water shall be administered separately from all other water rights in the Snake River Basin, the issue of whether or not the senior and junior divert water from a common source has already been answered in the positive. This is also consistent with the provisions of the Ground Water Act, IC. § 42-237a.g. which requires the Director to determine areas of the state having a common ground water supply. When it is determined that the area having a common ground water supply affects the flow of water in any stream in an organized water district, then the Director includes the stream in the water district. Conversely, when it is determined that the area having a common ground water supply does not affect the flow of a stream in an

organized water district, then the Director incorporates the area in a separate district. Under such circumstances, the senior appropriator's burden of proof to establish a common source is satisfied.

The burden is then on the junior right holder to show by clear and convincing evidence that his use will not injure the senior's right. One way in which this may be demonstrated is by showing that the senior's present water use does not require the full decreed quantity. A clear and convincing standard is consistent with the historically recognized burdens of proof and also insures that any amount determined to be sufficient to accomplish the present use is in fact sufficient.

### C. The significance of the decree issued in a general adjudication in a delivery call.

The Ground Water Users argue the purpose and significance of a partial decree issued in a general adjudication differs substantially from its purpose and significance in delivery call proceedings. Specifically, the Ground Water Users assert the adjudication only establishes the historical maximum quantity that can be put to beneficial use. They argue that a delivery call proceeding, in contrast, requires that the Director examine the senior's current beneficial use requirements which may vary from the decreed quantity. The argument is that the decree is only conclusive as to historical maximum beneficial use for the water right and has little or no relevance as to present beneficial use requirements for the same right. This Court agrees that an appropriator's present water requirements can vary from the quantity reflected in the decree after taking into account such considerations such as post decree factors. However, the Ground Water User's characterization of decrees minimizes their intended purpose, undermines the certainty of the decrees and disregards that the issues that can be raised in a general adjudication pertaining to the quantity element extend beyond the maximum quantity that was historically put to beneficial use.

#### 1. Idaho law contemplates certainty and finality so that water rights can be administered according to the decrees.

Idaho Code § 42-1420 provides: "[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system. . . ." In *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998), the Idaho Supreme Court pronounced that "[f]inality in water rights is essential." Further, "[a] decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for the source of the water. . . . If the provisions define a water right, it is essential that the provisions are in the decree, *since the water master is to distribute water according to the adjudication decree.*" *Id.* (citations omitted) (emphasis added). Clearly Idaho law contemplates certainty and finality of water right decrees for effective administration. Absent a higher evidentiary standard, any certainty and finality in the decree is undermined.

The position advocated by the Ground Water Users would significantly minimize the purpose and utility of the decree in times of shortage and any reliance on the decree for effective administration, particularly in a water district, is undermined. If the sole purpose of the decreed quantity is to identify the maximum quantity when sufficient water is available, the result is that the decreed quantity has little probative or presumptive weight and litigation over the senior's present needs would be a virtual necessity in every delivery call. This is contrary to the holding in ***AFRD #2***, which provides that: "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 . . . . The presumption under Idaho law is that the senior is entitled to his decreed water right, but there may be some post-adjudication factors which are relevant to how much water is actually needed." *Id.* at 877-78, 154 P.3d at 448-49

**2. The quantity element is a quantitative determination of beneficial use.**

The argument against applying the clear and convincing standard erroneously assumes that the decreed quantity element is not a quantitative determination of beneficial use. The argument assumes that the Department's role in the SRBA is to recommend water rights based on established historical maximum beneficial use rather than present beneficial use requirements. For example, the Ground Water Users assert

that recommendations for previously decreed and licensed rights were recommended based on the previously decreed or licensed quantity. As such, the last field examination for the right could have taken place as long ago when the right was previously decreed or licensed. Since that time, the right holder could have made efficiencies to the conveyance system thereby requiring less water than was decreed or licensed. An example is converting from gravity irrigation to sprinkler irrigation or a tiled ditch system. As a result, the Ground Water Users argue that the decreed quantity in the SRBA may not reflect the quantity of water that is actually put to beneficial use. The Ground Water Users also argue that the quantity element is a maximum which provides for the highest degree of flexibility to provide for the most water intensive use within the scope of the purpose of use. For example, a quantity sufficient to allow an irrigator to rotate crops allows for growing the most water intensive crop in the hottest part of the irrigation season.

The argument ignores both the purpose of the decree as well as the scope of the issues raised in a general adjudication. This Court previously discussed the Department's statutory directive in issuing licenses and recommendations which limit the quantity to the amount of water beneficially used. ***Order*** at 28-30. Idaho Code § 42-220 provides:

> [W]hen water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to use more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the [Department] in granting such license *and to the court in making such decree*, that a greater amount is necessary. . . .

I.C. § 42-220 (emphasis added). Idaho Code § 42-1420 provides "the decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system." As such, the appropriate time for contesting the Department's recommendation as to quantity was in the adjudication. I.C. § 42-1420.

Case law also supports the proposition that the quantity element in a decree represents a quantitative determination of beneficial use. Issues over excess quantity arise in proceedings relating to the adjudication of rights. In *Abbott v. Reedy*, 9 Idaho 577, 75 P. 764 (1904), in an adjudication to determine the respective rights on Soldier Creek in Blaine County, the Idaho Supreme Court held:

It is true that he said he had been using about two inches per acre, but the law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it. The inquiry was, therefore, not what he had used, but how much was actually necessary. There was a clear and substantial conflict in the evidence as to the quantity of water per acre necessary for the successful irrigation of appellant's lands.

*Id.* at 578, 75 P. at 765. The issue arose in the context of an adjudication as opposed to a delivery call proceeding.

The case of *Farmers Cooperative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 102 P. 481 (1909), involved the adjudication of water rights on the Boise River. At issue was whether the quantity decreed for certain classes of rights exceeded the duty of water for the purpose of use of the rights. In deciding whether or not to grant a new trial on the issue, the Court relied on the following:

In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use of application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water.

*Farmers* at 535-36, 102 P. 483-89. Again, the issue arose in the context of an adjudication as opposed to a delivery call proceeding. *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 F. 30 (D. Idaho 1917), involved an action to quiet title of water rights held on Goose Creek in Idaho and Nevada. In applying Idaho law, the Court held:

Much is said about the duty of water. . . .The Land and Stock Company insists that the duty of water should still be measured by the old method of irrigation of pasture and the native grasses for the production of hay, which was by the flooding system, that allowed the water to cover the surface of the soil, and actually to remain thereon for considerable periods of time. This method is being disapproved of in more recent years as wasteful and not an economical use. No person is entitled to more water

> than he is able to apply to a reasonable an economical use. True, it may be that good results are obtainable from the former method, but that does not augur that just as good results may not be secured by a much more moderate use, which would leave a large quantity of water for others, who need it as much as the Land & Stock Company.

*Id.* at 33-34.

In *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918), one of the issues before the Idaho Supreme Court was the sufficiency of the evidence supporting the adjudicated quantity of a beneficial use claim, the Court reasoned:

> 'The quantity of water decreed to an appropriator, in an action wherein priority of appropriation is the issue, should be upon the basis of cubic feet per second of time of the water actually applied to a beneficial use, and should be definite and certain as to the quantity appropriated and necessarily used by the appropriator.'

*Id.* at 15, 178 P.at 86. (quoting *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912)). Further:

> Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to the amount actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed.

*Id.* at 15. Kinney on Irrigation provides with respect to economic use and the suppression of waste:

> [T]he Courts have been and are now being called upon to fix by decrees the duty of water for certain tracts of land. . . . In fixing the duty of water for a certain tract of land, such an amount per acre should be awarded, within the lawful claim of the prior appropriator, as is essential or necessary for the proper irrigation of the land on which the water is used, and upon which the duty is being fixed; which water, when economically applied without waste, will result in the successful growing of crops on the land. Further than this, as far as the rights of the prior appropriator are concerned, the courts should not and can not lawfully go, where the result would be in cutting down the quantity of water to which the prior appropriator is entitled and reasonably needs for his purpose and the awarding of a certain amount of his water to subsequent appropriators.

2 Kinney on Irrigation and Water Rights § 905 at 1595-96 (2nd ed. 1912).

The Ground Water Users assume that the quantity element of decreed water rights is not reflective of present needs, or is "bloated" (i.e. in excess of the quantity needed) or at a minimum always represents a quantity which provides for the highest degree of flexibility in order to allow for the most water intensive use within the scope of the purpose of use. The argument oversimplifies what takes place in the SRBA. Water rights are claimed based on permits and licenses, prior decrees in both private and general adjudications), beneficial use, posted notice, and adverse possession, mesne deed conveyances, splits of property and appurtenant rights etc. As a result, the quantity claimed for one water right may include excessive water for a particular purpose while for another water right the quantity may provide for little or no flexibility. Therefore the amount of excess water, if any, or the degree of flexibility built into the quantity element of partial decree issued in the SRBA could be in actuality "all over the map."

The Director's recommendation as to quantity, whether or not an in-depth field investigation was conducted in preparing the recommendation, is by no means the final word on the matter. The quantity recommendation is subject to objections by the claimant and any other party to the adjudication. If such an objection is made it may be litigated and determined by the Court. Issues such as waste (i.e. reasonableness of conveyance works), duty of water, partial forfeiture, and excessive conveyance loss can and have been litigated in the SRBA whether or not they were considered in the Director's recommendation. If the Director makes a recommendation based on a prior license where the delivery system that has since changed (i.e. gravity to sprinkler), third parties can object and assert partial forfeiture of any quantity no longer put to beneficial use. Accordingly, the degree to which the quantity element is scrutinized varies among the decrees issued in the SRBA. Nonetheless, parties were provided the opportunity to raise and litigate issues affecting quantity. Consequently, the partial decree issued in the SRBA is consistent with Idaho law and represents a quantitative determination of beneficial use.

The result is that the issues litigated and evidence presented in support of the quantity element in the adjudication can be exactly the same as the issues presented and the evidence relied upon in conjunction with the delivery call. As such, depending on the

particular case, the argument that the issues are distinguishable because the issue in the adjudication is historical maximum beneficial use and in a delivery call only present need is at issue may be a difference in label only.

## III. CONCLUSION

In sum, the application of a clear and convincing standard to the determination that a senior can get by with less water than decreed is consistent with the established presumptions and standards of proof. The standard reconciles giving the proper presumptive weight to the quantity decreed while at the same time allowing the Director to take into account such considerations as post-decree factors and in particular waste under the CMR. The standard avoids putting the senior right holder in the position of re-defending or re-litigating that which was already established in the adjudication. It avoids the risk that an erroneous determination will leave the senior short of water to which he was otherwise entitled, thereby promoting certainty and stability of water rights. The standard provides for effective timely administration by reducing contests to the sufficiency of the Director's findings. The Director's determination in an organized water district will be difficult to challenge by either the senior or junior sought to be enjoined. The alternative is a system which lacks certainty in water rights. For these reasons the Court affirms its prior decision on this issue and **denies** the *Petitions for Rehearing.*

DATED: November 2, 2010

ERIC J. WILDMAN
DISTRICT JUDGE

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of November, 2010, she caused a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING on the persons listed below by mailing in the United States mail, first class, thereto to the parties at the indicated address:

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Chris M. Bromley
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Randall C. Budge
Candice M. McHugh
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Sarah A. Klahn
WHITE & JANKOWSKI LLP
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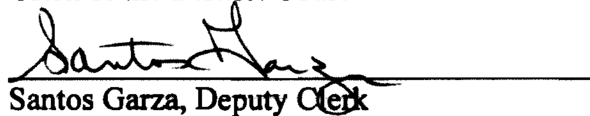
DUANE SMITH
Clerk of the District Court



Santos Garza, Deputy Clerk

FILED
CASE

2010 NOV 23 PM 3:28

DUANE CLERK
DEPUTY

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,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FAMRS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, and STAN D. NEVILLE,

Intervenors.

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

Subcase No.: 2009-000647

**JUDGMENT**
**I.R.C.P. 54(a)**



SCANNED

Pursuant to this Court's *Memorandum Decision and Order on Petition for Judicial Review* entered by this Court in the above-captioned matter on May 4, 2010, and this Court's subsequent *Memorandum Decision and Order on Petitions for Rehearing* entered on November 2, 2010,

THE FOLLOWING ARE HEREBY ORDERED, ADJUDED, AND DECREED:

1. The decision of the Director that the 1951 Idaho Ground Water Act applies to the administration of pre-enactment water rights is **affirmed**.

2. The decision of the Director that A & B Irrigation District was entitled to less water than that decreed to it in the SRBA is **remanded** for the limited purpose of having the Director apply the appropriate evidentiary standard of clear and convincing evidence to the existing record. No further evidence is required.

3. The decision of the Director that A & B Irrigation District has not been required to exceed reasonable pumping levels is **affirmed.**

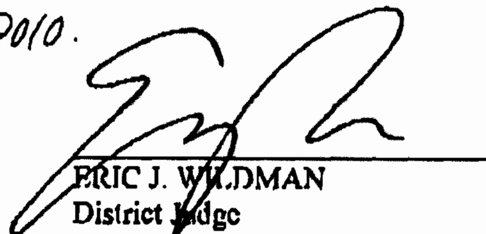
4. The decision of the Director to evaluate material injury to the 36-2080 water right based on depletion to the cumulative quantity as opposed to determining injury based on depletions to individual points of diversion is **affirmed**.

5. The decision of the Director to require A & B Irrigation District to take reasonable sets to move water from performing to underperforming areas or alternatively demonstrate physical or financial impracticability is **affirmed.**

6. The decision of the Director not to designate the Eastern Snake Plain Aquifer as a Ground Water Management Area is **affirmed**.

7. The Director did not fail to issue a final order in compliance with Idaho Code § 67-5248.

Dated November 23, 2010.



ERIC J. WILDMAN
District Judge

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23RD day of November, 2010, she caused a true and correct copy of the foregoing: JUDGMENT on the persons listed below by mailing in the United States mail, first class, thereto to the parties at the indicated address:

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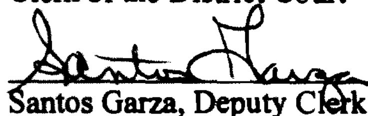


Santos Garza, Deputy Clerk

FILED-D
CASE #

2010 NOV 23 PM 3:29

DUANE ... CLERK
, DEPUTY

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,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FAMRS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, and STAN D. NEVILLE,

Intervenors.

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

Subcase No.: 2009-000647

**ORDER AMENDING CAPTION *NUNC PRO TUNC***



SCANNED

On September 9, 2009, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a *Notice of Appearance* in the above-captioned matter. On September 24, 2009, Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., David Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville and Stan D. Neville filed a *Notice of Appearance* in the above-captioned matter. On September 25, 2009, the City of Pocatello filed a *Notice of Appearance* in the above-captioned matter. These persons and entities were not made named parties in the *Petition for Judicial Review* filed by the Petitioner in this matter.

Until now, these persons' and entities' participation in this matter has not been properly reflected in the caption. After reviewing the applicable Idaho Rules of Civil Procedure and Idaho Appellate Rules, this Court will treat the *Notices of Appearance* as *Motions to Intervene* in the above-captioned matter, and will treat the above-mentioned persons and entities as Intervenors.[1]

This Court finds, following a review of the file, that IGWA, Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., David Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, Stan D. Neville and the City of Pocatello are real parties in interest to this proceeding, and that the same have interests that could be affected by the outcome of this proceeding in the form of water rights. This Court further finds that no party has objected to these persons and entities participating in this proceeding. Therefore, in exercising its discretion, this Court finds that IGWA, Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., David Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, Stan D. Neville and the City of Pocatello properly participated in this matter as Intervenors.

In order to correct this procedural irregularity in future cases the Court has amended its standard scheduling order to include the following:

> **Appearances by persons or entities who were a party to the underlying administrative proceeding but who were not made a**

[1] The parties should note that in this instance the Court is treating the *Notices of Appearance* as *Motions to Intervene* for housekeeping purposes. In doing so, it is the Court's intent to have the record in this matter clearly reflect which persons and/or entities are participants in this action. It is also the Court's intent to have the caption of this matter properly reflect all those parties who are participating in this action and to identify in what capacity those parties are participating (i.e., Petitioner, Respondent, or Intervenor).

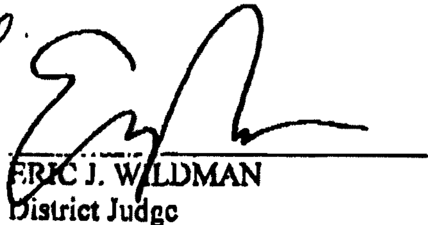
**named party in the *Petition for Judicial Review*:** Where a person or entity who was a party to the underlying administrative proceeding is not made a named party in the *Petition for Judicial Review*, and is not otherwise a Petitioner, such person or entity may file a *Notice of Appearance* in this matter within fourteen (14) days from the date the person or entity is served with a copy of the *Petition for Judicial Review*. This Court will treat the *Notice of Appearance* as a *Motion to Intervene* and will treat the party filing the *Notice of Appearance* as an Intervenor. Under such circumstances, the Court will automatically issue an order granting the *Motion to Intervene* unless one or more parties to the action files an opposition to the *Motion* within 10 days of the filing of the *Notice of Appearance*. A person or entity not a party to the underlying administrative proceeding who desires to participate in this action, and is not otherwise a Petitioner, must proceed in accordance with Idaho Appellate Rule 7.1.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. IGWA, Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., David Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, Stan D. Neville and the City of Pocatello properly participated in this matter as Intervenors.

2. The caption used in this proceeding is hereby amended to include IGWA, Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., David Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, Stan D. Neville and the City of Pocatello as Intervenors as shown above.

Dated November 23, 2010.



ERIC J. WILDMAN
District Judge

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23RD day of November, 2010, she caused a true and correct copy of the foregoing: ORDER AMENDING CAPTION on the persons listed below by mailing in the United States mail, first class, thereto to the parties at the indicated address:

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P.O. Box 83720
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Denver, CO. 80202

DUANE SMITH
Clerk of the District Court

Santos Garza, Deputy Clerk

FILED ... CASE # ...

2010 DEC 14 AM 10:50

DUANE ... CLERK ... DEPUTY

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Attorney General

**CLIVE J. STRONG**
Deputy Attorney General
Chief, Natural Resources Division

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Attorneys for Respondents-Appellants

**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,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL

**Case No. CV-2009-647**

**IDWR'S AMENDED NOTICE OF APPEAL**

**(Filing Fee: Exempt)**



SCANNED

SCHWENDIMAN FARMS, INC., DAVID )
SCHWENDIMAN FARMS, INC., DARRELL )
C. NEVILLE, SCOTT C. NEVILLE, and STAN )
D. NEVILLE, )
)
Intervenors. )
)
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 )
)

TO: THE ABOVE NAMED RESPONDENT, A&B IRRIGATION DISTRICT; THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, the IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, INTERIM DIRECTOR ("Appellants"), appeal against the above named respondents to the Idaho Supreme Court from the district court's MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING, entered in the above entitled action on the 2nd day of November, 2010, the Honorable Judge Eric J. Wildman presiding. On November 23, 2010, Judge Wildman issued a JUDGMENT pursuant to Idaho Rule of Civil Procedure 54(a).[1]

2. Appellants have a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 is an appealable order pursuant to Rule 11(f), Idaho Appellate Rules.

3. Appellants' preliminary statement of the issues it intends to assert on appeal, which under Rule 17, Idaho Appellate Rules, does not prevent Appellants from asserting other issues, is as follows:

a. If the Director determines in a conjunctive management delivery call that the senior water users' current beneficial use can be met with an amount of water that is less than the maximum decreed or licensed quantity, must the Director

[1] On December 10, 2010, IDWR filed its original notice of appeal with this Court. It was brought to IDWR's attention that paragraph 1 mistakenly referred to an order issued by the Honorable Judge John M. Melanson in an unrelated water delivery call proceeding. The purpose of the Amended Notice of Appeal is to correct paragraph 1.

support his determination by clear and convincing evidence or preponderance of the evidence?

4. No order has been entered sealing all or any part of the record in the above entitled action.

5. No transcript is requested.

6. Appellants do not request that any documents be included in the clerk's record other than those automatically included under Rule 28, Idaho Appellate Rules.

7. Appellants request that the agency record, in addition to all exhibits and transcripts, be copied and sent to the Supreme Court.

8. I certify:

a. No reporter has been served because no transcript is requested.
b. The estimated transcript fee has not been paid because no transcript is requested.
c. That Appellants and the State of Idaho are exempt from paying the clerk of the above entitled court the estimated fee for preparation of the clerk's record pursuant to Idaho Code § 67-2301 and Idaho Appellate Rule 23.
d. That Appellants and the State of Idaho are exempt from paying the appellate filing fee pursuant to Idaho Code § 67-2301 and Idaho Appellate Rule 23.
e. That service has been made upon all parties required to be served pursuant to Rule 20, Idaho Appellate Rules.

DATED this 13th day of December, 2010.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General

CHRIS M. BROMLEY
Deputy Attorney General

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December, 2010, I caused to be served a true and correct copy of the foregoing IDWR's AMENDED NOTICE OF APPEAL to the following parties by the indicated methods:

| | |
|---|---|
| Deputy Clerk<br>Clerk of Minidoka County Court<br>715 G Street<br>P.O. Box 368<br>Rupert, ID 83350<br>Fax: (208) 436-5272 | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☐ Email |
| John K. Simpson<br>Travis Thompson<br>Paul L. Arrington<br>Sarah W. Higer<br>BARKER ROSHOLT & SIMPSON LLP<br>113 Main Avenue West, Suite 303<br>P.O. Box 485<br>Twin Falls, ID 83303-0485<br>jks@idahowaters.com<br>tlt@idahowaters.com<br>pla@idahowaters.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |
| Randy C. Budge<br>Candice M. McHugh<br>RACINE OLSON NYE BUDGE BAILEY<br>P.O. Box 1391<br>Pocatello, ID 83201<br>rcb@racinelaw.net<br>cmm@racinelaw.net | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |
| A. Dean Tranmer<br>City of Pocatello<br>P.O. Box 4169<br>Pocatello, ID 83201<br>dtranmer@pocatello.us | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |

| | |
|---|---|
| Sarah A. Klahn<br>Mitra M. Pemberton<br>WHITE & JANKOWSKI LLP<br>511 Sixteenth Street, Suite 500<br>Denver, CO 80202<br>sarahk@white-jankowski.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |
| Jerry R. Rigby<br>Rigby Andrus and Moeller<br>25 N 2nd East<br>Rexburg, ID 83440<br>jrigby@rex-law.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |

CHRIS M. BROMLEY
Deputy Attorney General

2010 DEC 13 AM 10:33

DEPUTY

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Attorney General

**CLIVE J. STRONG**
Deputy Attorney General
Chief, Natural Resources Division

**GARRICK L. BAXTER, ISB #6301**
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Attorneys for Respondents-Appellants

**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, )
and )
THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL )

**Case No. CV-2009-647**

**IDWR'S NOTICE OF APPEAL**

**(Filing Fee: Exempt)**

SCHWENDIMAN FARMS, INC., DAVID )
SCHWENDIMAN FARMS, INC., DARRELL )
C. NEVILLE, SCOTT C. NEVILLE, and STAN )
D. NEVILLE, )
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Intervenors. )
)
IN THE MATTER OF THE PETITION FOR )
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DISTRICT FOR THE DELIVERY OF )
GROUND WATER AND FOR THE )
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MANAGEMENT AREA )
)

TO: THE ABOVE NAMED RESPONDENT, A&B IRRIGATION DISTRICT; THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, the IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, INTERIM DIRECTOR ("Appellants"), appeal against the above named respondents to the Idaho Supreme Court from the district court's AMENDED ORDER ON PETITIONS FOR REHEARING; ORDER DENYING SURFACE WATER COALITION'S MOTION FOR CLARIFICATION, entered in the above entitled action on the 9th day of September, 2010, the Honorable Judge John M. Melanson presiding.

2. Appellants have a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 is an appealable order pursuant to Rule 11(f), Idaho Appellate Rules.

3. Appellants' preliminary statement of the issues it intends to assert on appeal, which under Rule 17, Idaho Appellate Rules, does not prevent Appellants from asserting other issues, is as follows:

a. If the Director determines in a conjunctive management delivery call that the senior water users' current beneficial use can be met with an amount of water that is less than the maximum decreed or licensed quantity, must the Director support his determination by clear and convincing evidence or preponderance of the evidence?

4. No order has been entered sealing all or any part of the record in the above entitled action.

5. No transcript is requested.

6. Appellants do not request that any documents be included in the clerk's record other than those automatically included under Rule 28, Idaho Appellate Rules.

7. Appellants request that the agency record, in addition to all exhibits and transcripts, be copied and sent to the Supreme Court.

8. I certify:

a. No reporter has been served because no transcript is requested.
b. The estimated transcript fee has not been paid because no transcript is requested.
c. That Appellants and the State of Idaho are exempt from paying the clerk of the above entitled court the estimated fee for preparation of the clerk's record pursuant to Idaho Code § 67-2301 and Idaho Appellate Rule 23.
d. That Appellants and the State of Idaho are exempt from paying the appellate filing fee pursuant to Idaho Code § 67-2301 and Idaho Appellate Rule 23.
e. That service has been made upon all parties required to be served pursuant to Rule 20, Idaho Appellate Rules.

DATED this 10th day of December, 2010.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General

CHRIS M. BROMLEY
Deputy Attorney General

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December, 2010, I caused to be served a true and correct copy of the foregoing IDWR's NOTICE OF APPEAL to the following parties by the indicated methods:

| | |
|---|---|
| Deputy Clerk<br>Clerk of Minidoka County Court<br>715 G Street<br>P.O. Box 368<br>Rupert, ID 83350<br>Fax: (208) 436-5272 | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☐ Email |
| John K. Simpson<br>Travis Thompson<br>Paul L. Arrington<br>Sarah W. Higer<br>BARKER ROSHOLT & SIMPSON LLP<br>113 Main Avenue West, Suite 303<br>P.O. Box 485<br>Twin Falls, ID 83303-0485<br>jks@idahowaters.com<br>tlt@idahowaters.com<br>pla@idahowaters.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |
| Randy C. Budge<br>Candice M. McHugh<br>RACINE OLSON NYE BUDGE BAILEY<br>P.O. Box 1391<br>Pocatello, ID 83201<br>rcb@racinelaw.net<br>cmm@racinelaw.net | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |
| A. Dean Tranmer<br>City of Pocatello<br>P.O. Box 4169<br>Pocatello, ID 83201<br>dtranmer@pocatello.us | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |

| | |
|---|---|
| Sarah A. Klahn<br>Mitra M. Pemberton<br>WHITE & JANKOWSKI LLP<br>511 Sixteenth Street, Suite 500<br>Denver, CO 80202<br>sarahk@white-jankowski.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |
| Jerry R. Rigby<br>Rigby Andrus and Moeller<br>25 N 2nd East<br>Rexburg, ID 83440<br>jrigby@rex-law.com | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Overnight Mail<br>☐ Facsimile<br>☒ Email |

CHRIS M. BROMLEY
Deputy Attorney General

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
Sarah W. Higer, ISB #8012
**BARKER ROSHOLT & SIMPSON LLP**
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Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

*Attorneys for Petitioner A&B Irrigation District*

FILED CASE #

2010 DEC 29 AM 10: 08

DUANE ... CLERK
... DEPUTY

**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,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, AND STAN D. NEVILLE,

Intervenors.

CASE NO. CV 2009-000647

Fee Category L.4 - $101.00

**NOTICE OF APPEAL**



SCANNED

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 )

TO: THE ABOVE NAMED RESPONDENTS, INTERIM DIRECTOR GARY SPACKMAN AND THE IDAHO DEPARTMENT OF WATER RESOURCES, AND THE PARTIES' COUNSEL OF RECORD IDENTIFIED ON THE CERTIFICATE OF SERVICE; AND THE CLERK OF THE ABOVE ENTITLED DISTRICT COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, A&B IRRIGATION DISTRICT ("Appellant") appeals against the above named respondents to the Idaho Supreme Court from the district court's *Memorandum Decision and Order on Petition for Judicial Review*, entered in the above entitled action on May 4, 2010, the Honorable Eric J. Wildman presiding. Judge Wildman entered a *Judgment* pursuant to I.R.C.P. 54(a) on November 23, 2010.

2. The above named Appellant has a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 is an appealable order pursuant to Rule 11(f), I.A.R.

3. The Appellant's preliminary statement of issues it intends to assert on appeal, which under I.A.R. 17, does not prevent the Appellant from asserting other issues, is as follows:

a. Whether the Director erred in concluding that A&B's senior ground water right with a September 9, 1948 priority date was subject to the provisions of Idaho's Ground Water Act adopted ex post facto in 1951 and amended several times thereafter, contrary to the express provisions of the Act which provide that: "This act shall not affect the rights to the use of ground water in this state acquired before its enactment."

b. Whether, if A&B's senior ground water right is subject to the provisions of Idaho's Ground Water Act, the Director erred in finding that A&B has not been required to pump water beyond a "reasonable ground water pumping level" notwithstanding the evidence in the record and the fact no objective pumping level has ever been set by IDWR or the Director contrary to the Legislature's directive set forth in Idaho Code § 42-226.

4. No order has been entered sealing any portion of the record.

5. The Appellant requests that the transcript of the administrative proceedings held before the Idaho Department of Water Resources be made a part of the record on appeal. The Appellant currently possesses a copy of the transcript, as it was previously prepared in conjunction with the district court's judicial review of this action. A copy of the transcript may be obtained from M&M Court Reporting, phone number 1-800-234-9611.

6. The Appellant requests that the agency record, including the exhibits, be copied and sent to the Supreme Court.

7. I certify:

a. That a copy of this notice of appeal has been served on the reporter.

b. That the fee required for the preparation of the reporter's transcript was paid in conjunction with the district court's judicial review of this action.

c. That the estimated fee for preparation of the clerk's record has been paid.

d. That the appellant filing fee has been paid.

e. That service has been made upon all parties to be served pursuant to Rule 20.

**DATED** this 28th day of December, 2010.

**BARKER ROSHOLT & SIMPSON LLP**

Travis L. Thompson

*Attorneys for Petitioner A&B Irrigation District*

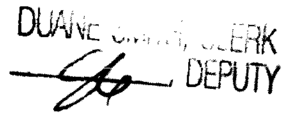
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of December, 2010, I served true and correct copies of the *Notice of Appeal* upon the following by the method indicated:

| | |
|---|---|
| Deputy Clerk<br>Minidoka County District Court<br>715 G Street<br>P.O. Box 368<br>Rupert, Idaho 83350<br>Fax: (208) 436-5272 | ✓ U.S. Mail, Postage Prepaid<br>____ Hand Delivery<br>____ Overnight Mail<br>____ Facsimile<br>____ Email |
| Garrick Baxter<br>Chris Bromley<br>Deputy Attorneys General<br>Idaho Department of Water Resources<br>P.O. Box 83720<br>Boise, Idaho 83720-0098<br>garrick.baxter@idwr.idaho.gov<br>chris.bromley@idwr.idaho.gov | ✓ U.S. Mail, Postage Prepaid<br>____ Hand Delivery<br>____ Overnight Mail<br>____ Facsimile<br>✓ Email |

| | | |
|---|---|---|
| Jerry R. Rigby<br>Rigby Andrus & Rigby Chtd.<br>25 N 2nd East<br>Rexburg, Idaho 83440<br>jrigby@rex-law.com | Randall C. Budge<br>Candice M. McHugh<br>Racine Olson<br>P.O. Box 1391<br>201 E. Center Street<br>Pocatello, Idaho 83204-1391<br>rcb@racinelaw.net<br>cmm@racinelaw.net | Sarah A. Klahn<br>Mitra Pemberton<br>White & Jankowski LLP<br>511 Sixteenth Street, Suite 500<br>Denver, Colorado 80202<br>sarahk@white-jankowski.com<br>mitrap@white-jankowski.com |
| A. Dean Tranmer<br>City of Pocatello<br>P.O. Box 4169<br>Pocatello, Idaho 83201<br>dtranmer@pocatello.us | | |

Travis L. Thompson



FILED-
CASE #

2010 DEC 30 PM 2:35

DUANE ... CLERK
DEPUTY

A. Dean Tranmer ISB # 2793
City of Pocatello
P. O. Box 4169
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(208) 234-6149
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Sarah A. Klahn, ISB #7928
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
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(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

Attorneys for the City of Pocatello

**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 RESEROUCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,

Respondents,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, and STAN D. NEVILLE,

Intervenor-Appellants.

Case No. CV 2009-647

CITY OF POCATELLO'S NOTICE OF APPEAL

Fee category: Exempt



SCANNED

| 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 GROUND WATER MANAGEMENT AREA | ) |
| --- | --- |

TO: THE ABOVE-NAMED RESPONDENTS, A&B IRRIGATION DISTRICT, GARY SPACKMAN, IN HIS CAPACITY AS INTERIM DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES, AND THE IDAHO DEPARTMENT OF WATER RESOURCES, IDAHO GROUND WATER APPROPRIATORS, AND THE PARTIES' ATTORNEYS AS IDENTIFIED ON THE CERTIFICATE OF SERVICE BELOW; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, THE CITY OF POCATELLO ("Appellant") appeals against the above named respondents to the Idaho Supreme Court from the District Court's final *Judgment I.R.C.P. 54(a)* ("*Judgment*"), entered in the above entitled action on November 23, 2010, the Honorable John M. Melanson presiding[1]. The *Judgment* incorporates the Court's *Memorandum Decision and Order on Petition for Judicial Review* entered on May 4, 2010, and the Court's subsequent *Memorandum Decision and Order on Petitions for Rehearing* entered on November 2, 2010.

2. The Appellant has a right to appeal to the Idaho Supreme Court, and the *Judgment* is appealable pursuant to Rule 11(f) of the Idaho Appellate Rules.

3. The Appellant intends to assert the following preliminary issues on appeal, provided this list of issues shall not prevent the Appellant from asserting other issues on appeal:

a. Whether the Court erred in finding that, when A&B initiated its delivery call, the Director was limited to evaluating material injury solely by reference to the rates or quantities in the underlying decree, or whether the Director's broad discretion to administer water rights properly allowed him to evaluate injury by reference to other facts and information.

b. Whether the Court erred in finding a senior appropriator is per se entitled to his decreed amount of water, and that junior appropriators carry the burden of proof in a delivery call proceeding to prove lack of injury to senior water rights.

[1] The Court also entered an *Order Amending Caption Nunc Pro Tunc* on November 23, 2010, finding, *inter alia*, that the City of Pocatello is a real party in interest in the above-captioned proceeding and that that City has interests that may be affected by its outcome.

c. Whether the Court erred in concluding that the Director's finding that a senior right holder can be satisfied with less than his decreed quantity must be supported by "clear and convincing" evidence rather than a preponderance of the evidence.

d. Whether the Court erred in presuming that a partial decree is a measure of the water necessary for an appropriator's beneficial use, rather than a maximum quantity of water that an appropriator may put to beneficial use.

e. Whether the Court erred in failing to properly apply the Idaho Administrative Procedure Act to determine whether the Director's finding of no injury is supported by substantial evidence.

4. No order has been entered sealing any portion of the record.

5. The Appellant requests that all pleadings and attachments filed in this case plus all other documents in the clerk's record automatically included under Rule 28 of the Idaho Appellate Rules be made part of the record.

a. The Appellant requests that the transcript of the administrative proceedings held before the Idaho Department of Water Resources be made a part of the record on appeal. The Appellant currently possesses a copy of the transcript, as it was previously prepared in conjunction with the District Court's judicial review of this action. A copy of the transcript may be obtained from Idaho Department of Water Resources.

6. The Appellant requests that all of the exhibits included in the agency record be copied and sent to the Supreme Court.

7. I certify:

a. That a copy of this notice of appeal has been served on the reporter.

b. That the fee required for the preparation of the reporter's transcript was paid in conjunction with the District Court's judicial review of this action.

c. That the estimated fee for preparation of the clerk's record has been paid.

d. That Appellant is exempt from the filing fee pursuant to Idaho Code section 67-2301.

e. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

Respectfully submitted, this 29th day of December, 2010.

CITY OF POCATELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

By ______________________
A. Dean Tranmer

WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

By ______________________
Sarah A. Klahn

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of December, 2010, a copy of **City of Pocatello's Notice of Appeal** in **Case No. CV 2009-647** was served by Federal Express to Minidoka County District Court and via U.S. mail, postage pre-paid and addressed to the following:

Sarah A. Klahn, White & Jankowski, LLP

| | | |
|---|---|---|
| Deputy Clerk<br>Minidoka County District Court<br>715 G Street<br>PO Box 368<br>Rupert ID 83350<br><br>Telephone: 208-436-9041<br>Facsimile: 208-436-5272 | Garrick Baxter<br>Chris Bromley<br>Deputy Attorneys General<br>Idaho Dept of Water Resources<br>PO Box 83720<br>Boise ID 83720-0098<br><br>garrick.baxter@idwr.idaho.gov<br>chris.bromley@idwr.idaho.gov | John K. Simpson<br>Travis L. Thompson<br>Barker Rosholt & Simpson<br>113 Main Ave West Ste 303<br>PO Box 485<br>Twin Falls ID 83303-0485<br><br>facsimile 208-735-2444<br>jks@idahowaters.com<br>tlt@idahowaters.com |
| Jerry R. Rigby<br>Rigby Andrus and Moeller<br>25 N 2nd East<br>Rexburg ID 83440<br><br>jrigby@rex-law.com | Randy Budge<br>Candice M. McHugh<br>Racine Olson Nye Budge & Bailey<br>201 E Center St<br>PO Box 1391<br>Pocatello ID 83204-1391<br><br>rcb@racinelaw.net<br>cmm@racinelaw.net | A.Dean Tranmer, Esq.<br>City of Pocatello<br>PO Box 4169<br>Pocatello ID 83201<br><br>dtranmer@pocatello.us |

Courtesy copy to court reporters:

M&M Court Reporting Service, Inc.
PO Box 2636
Boise ID 83701-2636

ORIGINAL

Randall C. Budge (ISB #1949)
Candice M. McHugh (ISB #5908)
Thomas J. Budge (ISB #7465)
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
101 S. Capitol Boulevard, Suite 208
Boise, Idaho 83702
(208) 395-0011 – Telephone
(208) 433-0167 – Facsimile

*Attorneys for Idaho Ground Water Appropriators, Inc.*

FILED-C... CASE #...
2011 JAN -4 PM 3:30
DUANE ... CLERK
... DEPUTY

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

| | |
|---|---|
| A & B IRRIGATION DISTRICT,<br><br>Petitioner, Petitioner on Appeal<br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,<br><br>Respondents, Petitioners on Appeal<br><br>and<br><br>THE IDAHO GROUND WATER APPROPRIATORS, INC., and THE CITY OF POCATELLO,<br><br>Intervenors – Petitioners on Appeal, and<br><br>FREMONT-MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, AND STAND D. NEVILLE,<br><br>Intervenors. | Case No. CV-2009-647<br><br>**GROUND WATER USERS' NOTICE OF APPEAL**<br><br>**FEE CATEGORY: 1**<br><br>**FEE AMOUNT: $101** |



SCANNED

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

TO: THE ABOVE-NAMED RESPONDENTS, A&B IRRIGATION DISTRICT, AND THE IDAHO DEPARTMENT OF WATER RESOURCES, CITY OF POCATELLO, AND THE PARTIES' ATTORNEYS AS IDENTIFIED ON THE CERTIFICATE OF SERVICE BELOW; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, IDAHO GROUND WATER APPROPRIATORS, INC. ("IGWA" or "Ground Water Users") for and on behalf of its members, appeals against the above named respondents to the Idaho Supreme Court from the District Court's *Judgment* dated November 23, 2010, Honorable Eric J. Wildman presiding. The *Judgment* incorporates the Court's *Memorandum Decision and Order on Petition for Judicial Review* dated May 4, 2010 and the Court's *Memorandum Decision and Order on Petitions for Rehearing* dated November 2, 2010.

2. The Appellants have a right to appeal to the Idaho Supreme Court, and the *Judgment* is appealable pursuant to Rule 11(f) of the Idaho Appellate Rules.

3. The Appellants intend to assert the following preliminary issues on appeal, provided this list of issues shall not prevent the appellant from asserting other issues on appeal:

   a. Whether the District Court erred in holding that a senior is presumed to suffer material injury any time he receives less than the maximum amount of water authorized under the water right, unless and until junior users prove otherwise by "clear and convincing" evidence.

4. No order has been entered sealing any portion of the record.

5. The Appellant requests that the transcript of the administrative proceedings held before the Idaho Department of Water Resources be made a part of the record on appeal. The Appellant currently possesses a copy of the transcript, as it was previously prepared in conjunction with the District Court's judicial review of this action. A copy of the transcript may be obtained from Idaho Department of Water Resources.

6. The Appellant requests that all pleadings, briefs, and attachments filed in this case plus all other documents in the clerk's record automatically included under Rule 28 of the Idaho Appellate Rules be made part of the record.

7. The Appellant requests that all of the exhibits included in the agency record be copied and sent to the Supreme Court.

8. I certify:

a. That a copy of this notice of appeal has been served on the reporter.

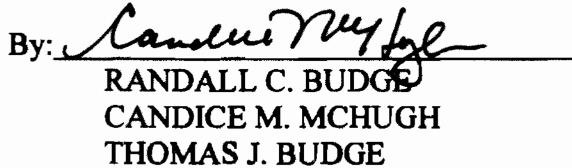
b. That the fee required for the preparation of the reporter's transcript was paid in conjunction with the District Court's judicial review of this action.

c. That the estimated fee for preparation of the clerk's record has been paid.

d. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED, this 3rd day of January, 2011.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED



By: ______________________
RANDALL C. BUDGE
CANDICE M. MCHUGH
THOMAS J. BUDGE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3rd day of January, 2011, the above and foregoing document was served in the following manner:

| | |
|---|---|
| Deputy Clerk<br>Clerk of Minidoka County Court<br>715 G Street<br>PO Box 368<br>Rupert, ID 83350 | ☐ U.S. Mail/Postage Prepaid<br>☐ Facsimile 208-436-5272<br>☒ Overnight Mail<br>☐ Hand Delivery<br>☐ E-mail |
| Garrick L. Baxter<br>Chris Bromley<br>Deputy Attorneys General<br>Idaho Department of Water Resources<br>P.O. Box 83720<br>Boise, Idaho 83720-0098<br>Garrick.baxter@idwr.idaho.gov<br>chris.bromley@idwr.idaho.gov | ☐ U.S. Mail/Postage Prepaid<br>☐ Facsimile<br>☐ Overnight Mail<br>☒ Hand Delivery<br>☒ E-mail |
| Travis L. Thompson<br>Paul L. Arrington<br>Barker Rosholt<br>P.O. Box 2139<br>Boise, Idaho 83701-2139<br>tlt@idahowaters.com<br>pla@idahowaters.com | ☒ U.S. Mail/Postage Prepaid<br>☐ Facsimile<br>☐ Overnight Mail<br>☐ Hand Delivery<br>☒ E-mail |
| Sarah A. Klahn<br>White & Jankowski LLP<br>511 Sixteenth Street, Suite 500<br>Denver, CO 80202<br>sarahk@white-jankowski.com | ☒ U.S. Mail/Postage Prepaid<br>☐ Facsimile<br>☐ Overnight Mail<br>☐ Hand Delivery<br>☒ E-mail |
| A. Dean Tranmer<br>City of Pocatello<br>PO Box 4169<br>Pocatello, ID 83201<br>dtranmer@pocatello.us | ☒ U.S. Mail/Postage Prepaid<br>☐ Facsimile<br>☐ Overnight Mail<br>☐ Hand Delivery<br>☒ E-mail |

| | |
|---|---|
| Jerry R. Rigby<br>Rigby Andrus and Moeller<br>25 N 2nd East<br>Rexburg, ID 83440<br>jrigby@rex-law.com | ☒ U.S. Mail/Postage Prepaid<br>☐ Facsimile<br>☐ Overnight Mail<br>☐ Hand Delivery<br>☒ E-mail |

# In the Supreme Court of the State of Idaho

FILED-DIST... CASE...
2011 JAN 12 AM 10:56
DUANE SMITH, CLERK
_____, DEPUTY

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.

A & B IRRIGATION DISTRICT,

Petitioner-Respondent,

v.

IDAHO DEPARTMENT OF WATER RESOURCES, GARY SPACKMAN,

Respondent-Appellant,

v.

IDAHO GROUND WATER APPROPRIATORS, INC., CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,

Intervenors-Respondents.

ORDER CONSOLIDATING APPEALS

Supreme Court Docket No. 38382-2010
Minidoka County Docket No. 2009-647

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.

A & B IRRIGATION DISTRICT,

Supreme Court Docket No. 38403-2010
Minidoka County Docket No. 2009-647

SCANNED

Petitioner-Appellant, )
)
v. )
)
IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his official capacity as Interim Director of the IDAHO DEPARMTNE OF WATER RESOURCES, )
)
Defendants-Respondents. )
)
and )
)
THE IDAHO GROUND WATER APPROPRIATORS, INC.; THE CITY OF POCATELLO; FREMONT MADISON IRRIGATION DISTRICT; ROBERT & SUE HUSKINSON; SUN-GLO INDUSTRIES; VAL SCHWENDIMAN FARMS, INC.; DAVID SCHWENDIMAN FARMS, INC; DARRELL C. NEVILLE; SCOTT C. NEVILLE; STAN D. NEVILLE, )
)
Intervenors. )

It appearing that these appeals should be consolidated for all purposes for reasons of judicial economy; therefore, good cause appearing,

IT HEREBY IS ORDERED that appeal No. 38382 and 38403 shall be CONSOLIDATED FOR ALL PURPOSES under No. 38382, but all documents filed shall bear both docket numbers.

IT FURTHER IS ORDERED that the District Court Clerk shall prepare a CLERK'S RECORD, which shall include the documents requested in the Notices of Appeal, together with a copy of this Order.

DATED this 7th day of January 2011.

For the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk

FILED-DISTRICT COURT
CASE
2011 FEB 14 AM 11:21
CLERK
DEPUTY

**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,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FAMRS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, and STAN D. NEVILLE,

Intervenors.

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

Subcase No.: 2009-000647

**ORDER GRANTING MOTION TO ENFORCE IN PART AND DENYING MOTION TO ENFORCE IN PART**



SCANNED

I.

## FACTUAL AND PROCEDURAL BACKGROUND

1. On May 4, 2010, the Court entered a *Memorandum Decision and Order on Petition for Judicial Review* in the above-captioned matter. The *Memorandum Decision* affirmed the *Final Order* of the Director on all issues raised on judicial review save one.

2. With respect to the issue of the proper evidentiary standard to be applied to a determination in the context of a delivery call that a senior water user can get by with less water than decreed to it in the SRBA, the Court remanded the same to the Director for the following limited purpose:

> The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A & B's 36-2080 exceeds the quantity being put to beneficial use for purpose of determining material injury. The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.

*Memorandum Decision*, p. 49 ("*Order of Remand*").

3. The Court subsequently entered an *Order* denying the *Petitions for Rehearing* filed in this matter, and on November 23, 2010, the Court entered a Rule 54(a) *Judgment*.

4. Between December 13, 2010 and January 3, 2011, *Notices of Appeal* were filed by the Idaho Department of Water Resources ("IDWR" or "the Department"), A&B Irrigation District ("A&B"), the City of Pocatello, and the Idaho Ground Water Appropriators, Inc. ("IGWA"). One of the issues raised on appeal is the propriety of this Court's decision to remand the case for the limited purpose described above.

5. On January 31, 2011, A&B filed a *Motion to Enforce Orders*, requesting that the Court issue an order and/or writ compelling the Director to comply with the Court's remand and to consider A&B's proposed "interconnection" feasibility study in connection with the remand.

6. IDWR and IGWA timely filed *Memorandums in Opposition to Motion Enforce*.

7. A hearing on the *Motion to Enforce* was held on February 7, 2011.

II.

## MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held on February 7, 2011. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or February 8, 2011.

III.

## DISCUSSION

In its *Motion to Enforce*, A&B requests that this Court issue an order and/or writ compelling the Director to comply with this Court's remand and apply the evidentiary standard of clear and convincing evidence to the record in this case. A&B further requests that this Court "order the Director to consider A&B's proposed 'interconnection' feasibility study in conjunction with the ordered remand." Each will be addressed in turn.

### A. The notices of appeal filed in this case do not divest the Court of jurisdiction to enter an order enforcing its *Order of Remand*.

The Department contends that this Court was divested of jurisdiction to enter an order enforcing its *Order of Remand* as a result of the notices of appeal filed by it and other parties. This Court disagrees.

Idaho Appellate Rule 13(a) provides that upon the timely filing of a notice of appeal, "all proceedings and execution of all judgments or orders in a civil action in the district court, shall be automatically stayed for a period of fourteen (14) days." Once the automatic stay expires however, the district court retains those powers enumerated in Rule 13(b) notwithstanding the pendency of an appeal. The Rule 13(b) powers are reserved to the district court unless one of the parties moves for, and is granted, a discretionary stay by either the district court or the Idaho Supreme Court. I.A.R. 13(b) & (g). The ability to enforce a judgment or order is one the powers retained by a district court during the pendency of an appeal. I.A.R. 13(b)(13).

In this case, A&B's *Motion to Enforce* was filed with this Court following the expiration of the fourteen day automatic stay provided for in Rule 13(a). The record in

this case does not contain any order staying enforcement of the *Order of Remand* pending appeal, nor has the Department requested such a stay before this Court or before the Idaho Supreme Court. Since no stay has been entered, and because the automatic stay period has expired, this Court has the jurisdiction and authority under Rule 13(b)(13) to enforce its *Order of Remand*.

The Department argues that the case of *H&V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors*, 133 Idaho 646, 747 P.2d 55 (1988) ("*H&V*") precludes this Court from enforcing its *Order of Remand*. In *H&V*, the State Board of Professional Engineers and Land Surveyors ("Board") entered an order revoking the licenses of several engineers. *Id.* at 647, 747 P.2d at 56. On judicial review the district court remanded the case to the Board for additional proceedings, requiring that the Board articulate the specific standards used in imposing its discipline. *Id.* at 648, 747 P.2d at 57. The district court's decision was appealed to the Idaho Supreme Court. Meanwhile, the Board acted on remand and issued an order amending its findings. The district court subsequently considered the amended findings of the Board and affirmed the Board's discipline of the engineers. *Id.*

An issue arose regarding the district court's ability to consider and act upon the order issued by the Board on remand given the pendency of the appeal. The Idaho Supreme Court addressed the issue as follows:

> *Absent from the limited enunciated exceptions to Rule 13* is any provision which authorizes the district court, after remanding the case for further proceedings, to consider and act upon additional Findings of Fact from the Board where, in the interim, appeal of the remand was perfected in this court.

*Id.* (emphasis added). The Court held that "the district court was without jurisdiction to affirm the disciplinary order imposed by the Board after having initially ordered a remand, from which order the engineers perfected their appeal." *Id.* at 649, 747 P.2d at 58.

Contrary to the argument of the Department, the *H&V* case does not control the facts and circumstances presented here. The issue presented here is not whether this Court, in the confines of this case, can consider and act upon a final order issued by the

Director on remand in light of the pendency of an appeal.[1] The issue is whether this Court can enforce its *Order of Remand* in light of the pendency of an appeal.[2] The plain language of Idaho Appellate Rule 13(b)(13) answers this inquiry in the affirmative and expressly authorizes the Court to enforce its *Order of Remand* during the pendency of an appeal.

Given that this Court has the authority to enforce its *Order of Remand*, and given the fact that the Department has not requested a stay of enforcement in this matter, the Court finds that the Director shall forthwith comply with this Court's *Order of Remand*.

**B. A&B's request that the Director consider its proposed "interconnection" feasibility study in conjunction with the ordered remand is beyond the scope of the remand.**

Upon remand, this Court did not contemplate that the Director would take new evidence when undertaking the limited *Order of Remand*. Indeed, in the *Order of Remand* this Court determined that the case would be remanded "for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record" and instructed that "no further evidence is required." The evidence A&B seeks to introduce to the Director regarding the interconnectivity of its system is outside the scope of the *Order of Remand*. This Court does not have jurisdiction in this case, and under these circumstances, to order that an action be taken outside the scope of the *Order of Remand*. I.A.R. 13.

The result reached here is consistent with the *Order Granting In Part Motion to Enforce Orders* issued by District Court Judge John M. Melanson in Gooding County Case CV 2008-444. *Order Granting In Part Motion to Enforce Orders*, p.4, Gooding County Case No. 2008-444 (May 11, 2010). In that case, the case was remanded to the

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[1] It is apparent to this Court that in the *H&V* case no new petition for judicial review was filed seeking judicial review of the final order issued by the Board on remand. Rather, the district court improperly considered and acted upon the order issued by the Board on remand in the confines of the same case in which the remand was ordered, and in which an appeal was pending.

[2] This issue was not addressed in the *H&V* case. It should be noted that the Idaho Supreme Court in *H&V* did not hold that the Board erred in acting upon the order of remand during the pendency of the appeal, or that the Board erred by issuing an order on remand amending its findings during the pendency of the appeal.

Director for the limited purpose of applying the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury analysis. *Order on Petition for Judicial Review*, p.58, Gooding County Case No. CV 2008-444 (June 19, 2009). The Petitioner in that case subsequently filed a *Motion to Enforce*, arguing among other things that the Director had a duty to take and consider certain evidence on remand. The district court disagreed, finding that the evidence proposed by Petitioner was outside the scope of the remand:

> The Director is not obligated to take additional evidence in order to apply the correct burdens of proof and evidentiary standards on remand. The evidence [Petitioner] seeks to introduce at the mitigation plan hearing is outside the scope of this Court's previous ***Orders*** on remand. This Court's ***Orders*** are currently on appeal to the Idaho Supreme Court and under Idaho Appellate Rule 13(b)(13), this Court has jurisdiction "to take any action or enter any order required for the enforcement of any judgment, order or decree." While this Court has jurisdiction to enforce its ***Orders*** on remand, this Court does not have jurisdiction to order action be taken outside the scope of the prior ***Orders***.

*Order Granting in Part Motion to Enforce Orders*, p.4, Gooding County Case No. CV 2008-444 (May 11, 2010). The above-quoted holding of the district court in the 2008-444 case is on point with the facts of this case.

A similar situation recently arose before this Court in Ada County Case No. CV WA 2010-19823. In that case, the Petitioner filed a *Verified Complaint, Declaratory Judgment Action and Petition for Writ of Mandate* ("*Complaint*"), requesting that this Court compel the Director "to consider updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on [Petitioner's] water rights." The *Complaint* was filed with this Court as a result of the Director's decision to refrain from considering the evidence presented by Petitioner in the remand from the district court in the 2008-444 case. This Court denied the Petitioners' request on multiple grounds, including that the actions requested by Petitioner were outside the scope of the remand in that case. *Order Denying Petition for Peremptory Writ of Mandate*, pp.4 -5, Ada County Case No. CV WA 2010-19823 (Oct. 29, 2010).

Therefore, this Court finds that it lacks the jurisdiction to compel the Director to consider A&B's proposed "interconnection" feasibility study in conjunction with the ordered remand.

## IV.

## ORDER

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

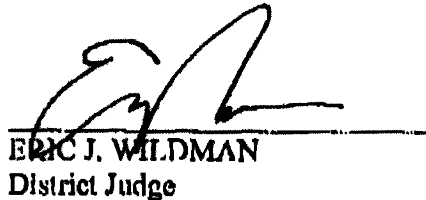
1. A&B's *Motion to Enforce Order* is hereby **granted in part and denied in part.**

2. A&B's request that the Department and the Director comply with this Court's *Order of Remand* is **hereby granted.** The Director shall forthwith comply with the remand instructions set forth in the *Memorandum Decision and Order on Petition for Judicial Review* issued by this Court in the above-captioned matter on May 4, 2010, and which provides:

> The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A & B's 36-2080 exceeds the quantity being put to beneficial use for purpose of determining material injury. The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.

3. A&B's request that this Court compel the Director to consider its proposed "interconnection" feasibility study in conjunction with the ordered remand is **hereby denied.**

Dated 2/14/2011.



ERIC J. WILDMAN
District Judge

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14TH day of February, 2011, she caused a true and correct copy of the foregoing ORDER GRANTING MOTION TO ENFORCE IN PART AND DENYING MOTION TO ENFORCE IN PART on the persons listed below by mailing in the United States mail, first class, thereto to the parties at the indicated address:

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Travis L. Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON
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Twin Falls, ID. 83303-0485

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Phillip J. Rassier
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Candice M. McHugh
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Sarah A. Klahn
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511 Sixteenth St. Suite 500
Denver, CO. 80202

DUANE SMITH
Clerk of the District Court

Santos Garza, Deputy Clerk

# In the Supreme Court of the State of Idaho

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A & B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA.

---

A & B IRRIGATION DISTRICT,

Petitioner-Respondent,

v.

IDAHO DEPARTMENT OF WATER RESOURCES, GARY SPACKMAN,

Respondent-Appellant,

v.

IDAHO GROUND WATER APPROPRIATORS, INC., CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,

Intervenors-Respondents.

ORDER CONSOLIDATING APPEALS

Supreme Court Docket No. 38382-2010
Minidoka County Docket No. 2009-647

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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.

---

A & B IRRIGATION DISTRICT,

Supreme Court Docket No. 38403-2010
Minidoka County Docket No. 2009-647

Petitioner-Appellant,

v.

IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his official capacity as Interim Director of the IDAHO DEPARMTNE OF WATER RESOURCES,

Defendants-Respondents.

and

THE IDAHO GROUND WATER APPROPRIATORS, INC.; THE CITY OF POCATELLO; FREMONT MADISON IRRIGATION DISTRICT; ROBERT & SUE HUSKINSON; SUN-GLO INDUSTRIES; VAL SCHWENDIMAN FARMS, INC.; DAVID SCHWENDIMAN FARMS, INC; DARRELL C. NEVILLE; SCOTT C. NEVILLE; STAN D. NEVILLE,

Intervenors.

---

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GOUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA.

---

A & B IRRIGATION DISTRICT,

Petitioner-Respondent,

v.

IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his official capacity as interim director of the IDAHO DEPARTMENT OF WATER RESOURCES,

Supreme Court Docket No.38421-2010
Minidoka County Docket No. 2009-647

Respondents-Respondents on Appeal,

and

CITY OF POCATELLO,

Intervenor-Appellant,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervenor-Respondent,

and

FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,

Intervenors.

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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.

---

A & B IRRIGATION DISTRICT,

Petitioner-Respondent,

v.

IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent-Respondent on Appeal,

and

Supreme Court Docket No.38422-2010
Minidoka County Docket No. 2009-647

GARY SPACKMAN, in his official capacity as interim director of the IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervenor-Appellant,

CITY OF POCATELLO,

Intervenor-Respondent,

and

FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,

Intervenors.

It appearing that these appeals should be consolidated for Clerk's Record only; therefore, good cause appearing,

IT HEREBY IS ORDERED that appeal No. 38382, 38403, 38421 and 384223 shall be CONSOLIDATED FOR CLERK'S RECORD ONLY under No. 38382, but all documents filed shall bear all docket numbers.

IT FURTHER IS ORDERED that the District Court Clerk shall prepare a CLERK'S RECORD, which shall include the documents requested in the Notices of Appeal, together with a copy of this Order.

IT FURTHER IS ORDERED that BRIEFING shall proceed separately

DATED this 24 day of February 2011.

For the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk

# In the Supreme Court of the State of Idaho

2011 MAR -1

| | | |
|---|---|---|
| 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. | ) | |
| ----------------------------------------------------- | ) | |
| A & B IRRIGATION DISTRICT, | ) | **AMENDED** |
| Petitioner-Respondent, | ) | ORDER CONSOLIDATING APPEALS |
| v. | ) | Supreme Court Docket No. 38382-2010<br>Minidoka County Docket No. 2009-647 |
| IDAHO DEPARTMENT OF WATER RESOURCES, GARY SPACKMAN, | ) | |
| Respondent-Appellant, | ) | |
| v. | ) | |
| IDAHO GROUND WATER APPROPRIATORS, INC., CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE, | ) | |
| Intervenors-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. | ) | Supreme Court Docket No. 38403-2010 |
| ----------------------------------------------------- | ) | Minidoka County Docket No. 2009-647 |
| A & B IRRIGATION DISTRICT, | ) | |

Petitioner-Appellant,

v.

IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his official capacity as Interim Director of the IDAHO DEPARMTNE OF WATER RESOURCES,

Defendants-Respondents.

and

THE IDAHO GROUND WATER APPROPRIATORS, INC.; THE CITY OF POCATELLO; FREMONT MADISON IRRIGATION DISTRICT; ROBERT & SUE HUSKINSON; SUN-GLO INDUSTRIES; VAL SCHWENDIMAN FARMS, INC.; DAVID SCHWENDIMAN FARMS, INC; DARRELL C. NEVILLE; SCOTT C. NEVILLE; STAN D. NEVILLE,

Intervenors.

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IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GOUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA.

---

A & B IRRIGATION DISTRICT,

Petitioner-Respondent,

v.

IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his official capacity as interim director of the IDAHO DEPARTMENT OF WATER RESOURCES,

Supreme Court Docket No.38421-2010
Minidoka County Docket No. 2009-647

Respondents-Respondents on Appeal,

and

CITY OF POCATELLO,

Intervenor-Appellant,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervenor-Respondent,

and

FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,

Intervenors.

---

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.

---

A & B IRRIGATION DISTRICT,

Petitioner-Respondent,

v.

IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent-Respondent on Appeal,

and

Supreme Court Docket No.38422-2010
Minidoka County Docket No. 2009-647

GARY SPACKMAN, in his official capacity as interim director of the IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervenor-Appellant,

CITY OF POCATELLO,

Intervenor-Respondent,

and

FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,

Intervenors.

It appearing that these appeals should be consolidated for Clerk's Record only; therefore, good cause appearing,

IT HEREBY IS ORDERED that appeal No. 38382, 38403, 38421 and 38422 shall be CONSOLIDATED FOR CLERK'S RECORD ONLY under No. 38382.

IT FURTHER IS ORDERED that the District Court Clerk shall prepare a CLERK'S RECORD, which shall include the documents requested in the Notices of Appeal, together with a copy of this Order.

IT FURTHER IS ORDERED that BRIEFING shall proceed separately

DATED this 25th day of February 2011.

For the Supreme Court

Dorothy Beaver for

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE

OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

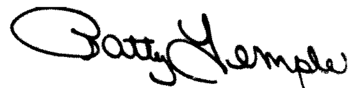
* * * * *

| | |
|---|---|
| **IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATIONOF A GROUND WATER MANAGEMENT AREA** | ) |
| **A&B IRRIGATION DISTRICT,** | ) |
| **Petitioner-Respondent,** | ) |
| **v.** | ) **Supreme Court Docket No. 38382-2010** |
| **THE IDAHO DEPARTMENT OF WATER RESOURCES, GARY SPACKMAN, Respondent-Appellant,** | ) **Minidoka County Docket No. 2009-647** |
| **v.** | ) |
| **THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENEIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,** | ) **CLERK'S CERTIFICATE TO RECORD** |
| **Intervenors-Respondents,** | ) |

State of Idaho )
) ss.
County of Minidoka )

I, DUANE SMITH, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, do hereby certify that the above and foregoing record in the above-entitled case was compiled and bound under my direction, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by counsel.

I FURTHER CERTIFY that the Notice of Appeal was filed on the 14th day of December, 2010



Clerk of the District Court

By:
Santos Garza, Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE

OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

* * * * *

| | |
|---|---|
| **IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATIONOF A GROUND WATER MANAGEMENT AREA** | ) |
| **A&B IRRIGATION DISTRICT,** | ) |
| **Petitioner-Respondent,** | ) |
| **v.** | ) **Supreme Court Docket No.** <u>**38382-2010**</u> |
| **THE IDAHO DEPARTMENT OF WATER RESOURCES, GARY SPACKMAN,** **Respondent-Appellant,** | ) **Minidoka County Docket No.** **2009-647** |
| **v.** | ) |
| **THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENEIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,** | ) **CLERK'S CERTIFICATE OF SERVICE** |
| **Intervenors-Respondents,** | |

I , Santos Garza, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, do hereby certify that I have personally served or mailed by United States Mail, postage prepaid, one copy of the Clerk's Record to each of the parties or their attorney of record as follows:

John K. Simpson
Travis L. Thomson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON
P.O. BOX 485
Twin Falls, ID. 83303-0485

Phillip J. Rassier
Chris M. Bromley
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID. 83720-0098

Randall C. Budge
Candice M. McHugh
RACINE OLSON NYE BUDGE & BAILEY
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P.O. Box 4169
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Sarah A. Klahn
WHITE & JANKOWSKI LLP
511 Sixteenth St. Suite 500
Denver, CO. 80202

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in Rupert, Idaho, the 3 day of March, 2011.

PATTY TEMPLE
Clerk of the District Court

By: [signature]
Santos Garza, Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE

OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

* * * * *

<table>
<tr><td>IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATIONOF A GROUND WATER MANAGEMENT AREA</td><td>)<br>)<br>)<br>)<br>)<br>)</td><td></td></tr>
<tr><td>A&B IRRIGATION DISTRICT,<br><br>Petitioner-Respondent,<br><br>v.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES, GARY SPACKMAN,<br>Respondent-Appellant,<br><br>v.</td><td>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)</td><td>Supreme Court Docket No.<br><u>38382-2010</u><br><br>Minidoka County Docket No.<br>2009-647</td></tr>
<tr><td>THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT HUSKINSON, SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENEIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, STAN D. NEVILLE,<br><br>Intervenors-Respondents,</td><td>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)</td><td>CLERK'S CERTIFICATE<br>RE: EXHIBITS</td></tr>
</table>

STATE OF IDAHO )<br>) ss.<br>County of Minidoka )

I, DUANE SMITH, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, do hereby certify that I am sending the following exhibits.

**CD of Agency Record with exhibits**

That the Exhibits are on file in my office and are part of the record on appeal in the above-entitled cause and are being sent to the Clerk of the Supreme Court with the Clerk's Record on Appeal, as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Rupert, Idaho, this ____ day of March, 2011.

Patty Temple<br>Clerk of the District Court

By: /s/ Santos Garza<br>Santos Garza, Deputy Clerk