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DEPARTMENT OF WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF CREATING THE)
OAKLEY VALLEY AREA WATER)
DISTRICT, WATER DISTRICT NO. 140,)
FOR THE ADMINISTRATION OF)
WATER RIGHTS IN ADMINISTRATIVE)
BASIN 45)
)
)
)
_____)

**A&B IRRIGATION DISTRICT'S
RESPONSE TO "DRAFT"
AMENDED FINAL ORDER
CREATING WATER DISTRICT NO.
140**

COMES NOW, Intervenor, A&B IRRIGATION DISTRICT ("A&B"), by and through its counsel of record, Barker Rosholt & Simpson LLP, and pursuant to the Idaho Department of Water Resources' ("Department") request¹, hereby submits the following response to the *Draft Amended Final Order Creating Water District No. 140* issued to the parties by email from Tim Luke on November 19, 2007.

INTERVENOR'S INTEREST

A&B Irrigation District is a duly organized irrigation district under the laws of the State of Idaho, with its principal office located at 414 11th St., in Rupert, Idaho. A&B holds various senior ground water rights, including water right #36-2080, and surface water rights to the Snake River, including irrigation storage rights in the United States Bureau of Reclamation's Minidoka

¹ Tim Luke email reference.

and Palisades Projects (American Falls and Palisades Reservoirs). A&B diverts surface water from the Snake River in Water District 01 and ground water from the Eastern Snake Plain Aquifer (“ESPA”) in Water District 130, directly north of the Department’s proposed Water District 140. A&B has filed water delivery calls for its senior ground water right and surface water rights with the Department.

A&B’s petition for intervention in this matter was granted by the Director on September 13, 2007. A&B’s interest in this matter concerns the original order’s references to the ESPA and the requests from other water users in Basin 45 to eliminate all references to the ESPA. As evident by the *Draft Amended Order*, A&B’s concerns are well founded.

SWID PETITION FOR RECONSIDERATION

Southwest Irrigation District, Goose Creek Irrigation District, and 13 individual water users (hereinafter collectively referred to as “SWID”) filed a petition for reconsideration of the Director’s December 28, 2006 *Final Order Creating Water District No. 140* on January 9, 2007. SWID’s protested, among other things, the Director’s references to the ESPA in the order. SWID stated that “any reference to the Eastern Snake Plain aquifer and the boundaries outlined on attachment A are more complicated than described in the referenced USGS Professional Paper and the dash line on the attachment”. *SWID Petition* at 2. SWID then requested “that any reference to the Eastern Snake Plain Aquifer be eliminated from the final Order as it was not discussed, requested to be determined by the Director or in any manner a basis to create Water District No. 140”. *SWID Petition* at 3.

The Eastern Snake Plain Aquifer (“ESPA”) has been defined as the aquifer underlying the Eastern Snake River Plain as delineated in the report “Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake Plain, Idaho.” USGS Professional Paper 1408-F,

1992. The Department has designated the ESPA as an “area of common ground water supply” pursuant to its *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11 *et seq.*) (Rule 50).

SWID essentially objects to the ESPA’s boundary as defined by the Department’s Conjunctive Management Rules (“CMRs”). While a comprehensive review of the correct boundary of the ESPA should be undertaken by the Department, particularly in reference to any new information on the aquifer that has been compiled since 1992, it is beyond the scope of the Director’s creation of Water District 140. In other words, SWID must challenge Rule 50 if it seeks to challenge the definition of the ESPA’s boundary for purposes of administration of junior priority ground water rights that are within the ESPA and Water District 140.

The Director’s references to the ESPA, as well as conjunctive administration, consistent with other orders creating water districts that encompass parts of the ESPA (e.g. 100, 110, 120, and 140), were a necessary part of the State’s motion for interim administration before the SRBA Court, and are important to notify certain water right holders in the district of the necessity for administration to satisfy senior priority water rights. Consequently, the Department’s *Draft Amended Order*, which arbitrarily and without any factual or legal justification, eliminates all references to the ESPA, should be revised consistent with the original final order. A&B offers the following response and comments on the Department’s *Draft Amended Order*.

RESPONSE

Introductory Paragraphs

Paragraph 5

It was A&B’s understanding that draft language for an amended order would be circulated for review by the Department to A&B’s and SWID’s counsel. The Department’s

Draft Amended Order apparently represents that draft language. The statement in the draft order that “the Director would amend the Final Order Creating Water District No. 140 in order to address the specific concerns raised by the Southwest-Goose Creek Petitioners” implies a specific result regarding the amended final order. If the language was not agreed upon by the parties it was A&B’s understanding that a hearing on SWID’s petition would proceed.

Findings of Fact

Paragraphs 1 - 24

A&B does not dispute the Department’s proposed language in these paragraphs.

Paragraph 25 (cross-reference to paragraphs 25-30 in the December 28, 2006 Final Order)

A&B disputes the Department’s elimination of the references to the ESPA and the Department’s ground water model. Rule 50 of the Conjunctive Management Rules defines the ESPA as an area of “common ground water supply” for administration purposes and adopted the geographic boundaries used in the USGS Professional Paper 1408-F. Water right holders that divert water from the ESPA and that are located in Water District 140 should be notified of this fact through the Department’s order, including the general geographic location of the ESPA in relation to the district. In addition, the reference is consistent with other orders creating water districts that cover parts of the ESPA (e.g. 120 and 130).

The reference that the Department uses a calibrated ground water model to determine effects on the ESPA and hydraulically connected reaches of the Snake River should be reinserted. The Department’s stated fact that “[r]esults from the Department’s calibrated ground water model indicate that diverting ground water from that portion of Basin 45 overlying the ESPA for consumptive uses affects flows in the Neeley to Minidoka reach of the Snake River, as well as ground water levels in the ESPA north of the Snake River” should be reinserted as well.

The Department has used and continues to use the enhanced ESPAM Ground Water Model (Version 1.1) for purposes of water right administration, including responses to water delivery calls that have been made by various senior surface water right holders across the ESPA.

Conjunctive administration was one of the bases for the State’s motion for interim administration in Basin 45 before the SRBA Court. *See Brief in Support of Motion for Order of Interim Administration for Water Rights in Basin 45* at 3-5 (“The purpose of this motion is to combine ground water rights and surface water rights in Basin 45 into a water district or districts so that they may be administered conjunctively.”). The State further claimed that such administration, including conjunctive administration, was “reasonably necessary to prevent injury to senior water rights in Basin 45”. *See id.* at 7. Since the ESPA overlays part of Water District 140, and conjunctive administration of water rights was one of the reasons to create the district, it is appropriate to reference the aquifer where conjunctive administration is necessary.

Accordingly, the references to the ESPA in paragraph 27 and paragraphs 25, 26, and 28 from the original final order should be reinserted.

As the remaining language in Paragraph 25, A&B takes no position regarding the proposed changes.

Paragraphs 26 – 27

A&B takes no position regarding the proposed changes.

Paragraph 28

The reference to the ESPA as it relates to the identified CGWAs should be reinserted.

Paragraphs 29 – 32

A&B takes no position regarding the proposed changes.

Paragraphs 33 – 38

The Department should reinsert or reincorporate the findings regarding the available water supply and senior priority water rights from sources that are hydraulically connected to the ESPA (paragraphs 40 and 41 of original final order). The administration of ground water rights within the portion of Basin 45 overlying the ESPA is necessary for the protection of prior surface and ground water rights. A&B takes no position regarding the remaining proposed changes in these paragraphs.

Conclusions of Law / Order

Paragraphs 1 – 11, 13 – 20 / Order Paragraphs 1 – 2, 4 – 6

A&B does not dispute the proposed conclusions.

Paragraph 12 / Order Paragraph 3

Although A&B does not have any information at this time regarding the Director's proposed conclusion, A&B requests the Director to review the status of the water rights from the "geothermal sources located in the Goose Creek and Trapper Creek drainages above the Oakley Reservoir". If these sources are designated as "separate streams" from the SRBA Court, A&B does not dispute the Director's conclusion. However, if not, A&B submits the Director has no authority to include this conclusion since it in effect would have a "separate streams" designation for these sources wherein the SRBA Court may have already decreed them with the "connected sources" general provision.

CONCLUSION

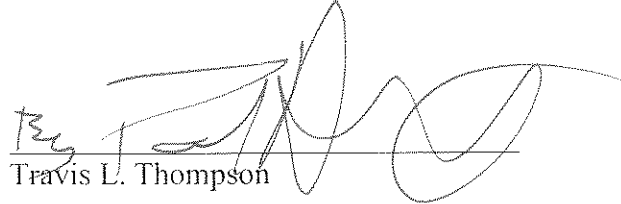
A&B respects SWID's position that it does not want the determinations regarding the ESPA's boundary in the Department's final Water District 140 Order to have a "res judicata" effect on that issue in the future. However, this issue concerns Rule 50 of the Department's

Conjunctive Management Rules, which has been in place since 1994. The Department made specific findings regarding the ESPA and the need for conjunctive administration in the original order dated December 28, 2006. There is no basis to remove those finding now.

The Department's *Draft Amended Order* should be modified to include the previous findings regarding the ESPA.

Dated this 3rd day of December 2007.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Attorneys for A&B Irrigation District

CERTIFICATE OF SERVICE

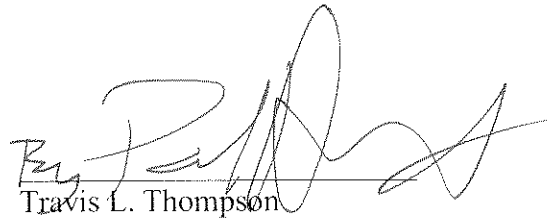
I HEREBY CERTIFY that on 3rd day of December, 2007, I served a true and correct copy of the foregoing *A&B Irrigation District's Response to "Draft" Amended Final Order Creating Water District No. 140* upon the following by U.S. Mail, postage prepaid:

Original:

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