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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 DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210 AND 36-07427	**PETITION FOR RECONSIDERATION OF DIRECTOR'S MAY 19, 2005 ORDER, REQUEST FOR HEARING, AND MOTION FOR STAY (BLUE LAKES DELIVERY CALL)**

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP and on behalf of its ground water district members, Magic Valley Ground Water District and North Snake Ground Water District (the "Ground Water Districts"), hereby petitions the Director, Idaho Department of Water Resources ("Director") for reconsideration of the Director's May 19, 2005 Order ("May 19 Order") in this matter.

IGWA also requests that the Director convene a hearing on the Blue Lakes Trout Farm, Inc. ("Blue Lakes") delivery call ("Delivery Call"). IGWA moves that the Director stay the implementation of the May 19 Order until the Director convenes and concludes the requested hearing on the merits. IDAPA 37.01.01.780.

While the Idaho Department of Water Resources ("Department") has no substantive administrative rules respecting petitions for reconsideration, Idaho case law addressing motions for reconsideration brought under Idaho Rule of Civil Procedure 11(a)(2)(B) instructs that a tribunal or decision maker "should take into account any new facts presented by the moving party that bear on the correctness" of the order. *Nationsbanc Mortgage Corp. of New York v. Cazier*, 127 Idaho 879, 884, 908 P.2d 572, 577 (Ct. App. 1995); *Coeur D'Alene Mining Co. v. First National Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

GROUNDS FOR RECONSIDERATION AND HEARING

1. In the May 19 Order, the Director erroneously concludes that the Ground Water Districts owe any amount of water to Blue Lakes as mitigation or to avoid material injury to Blue Lakes. In reaching the conclusion that junior ground water rights are subject to curtailment to fill the Blue Lakes aquaculture rights, the Director failed to consider and/or give due weight to relevant hydrologic and economic factors as required by Idaho law. Relevant hydrologic and economic factors that should have been considered include, among others, those contained in the Affidavits of Charles M. Brendecke and John Church, previously filed by IGWA with the Department on March 23, 2005 in the matter of the delivery call by the Surface Water Coalition, which also is pending before the Department. IGWA hereby incorporates these Affidavits

2. The Blue Lakes water rights are subject to a finding of forfeiture, abandonment and/or adverse possession. Available records of Blue Lakes' water diversions show that since at least 1995, Blue Lakes has not diverted a full supply of water to fill water right 36-07427, nor has Blue Lakes during that time ever instituted a delivery call to fill right 36-7427, despite the fact that procedures were in place during that period with which to do so. Five years has passed since water right 36-07427 was decreed in the SRBA, without Blue Lakes having sought

delivery of its water right. Such facts evidence forfeiture and/or an intent to abandon the water right. The May 19 Order fails to make such findings and conclusions.

3. Paragraphs 66 and 70 of the May 19 Order, which find that Blue Lakes is employing reasonable diversion, conveyance and conservation practices, appear to be based on hearsay or other information or documentation not contained or described in the May 19 Order. As such there is no evidentiary basis for a finding that Blue Lakes is employing reasonable efforts to divert water.

4. The May 19 Order fails to address the fact that Blue Lakes is diverting ground water, and that it is required to extend or advance its diversion capability to its reasonable economic reach before any delivery call to supply its rights can be honored. Similarly, the May 19 Order impermissibly proposes to curtail certain ground water users without first establishing whether doing so is consistent with law pertaining to reasonable pumping levels.

5. The May 19 Order fails to consider the fact that the Blue Lakes' water rights were established in, and relied upon, an artificially high ground water table resulting from seepage and wastewater, and that Blue Lakes may not, as a matter of law, curtail others in an attempt to maintain or replace such conditions.

6. The May 19 Order concludes that the Blue Lakes water right is being materially injured by ground water withdrawals based on diversion records dating from 1995. The Order fails to make findings concerning the amount of water *available* for diversion. Hence there is no basis to conclude that Blue Lakes diverts all water available to it, or has employed reasonable efforts to divert such available water.

7. The May 19 Order erroneously concludes that the Blue Lakes water right is being materially injured by ground water withdrawals and that curtailing ground water diversions

under junior rights will increase water available to Blue Lakes without having evaluated the extent to which increased diversions of water from wells owned by the City of Twin Falls are the proximate cause of reduced flows in the aquifer outflow known as Alpheus Creek.

8. The May 19 Order fails to consider or determine whether the use of junior ground water rights by the Ground Water Districts' members "affects, contrary to the declared policy of [full economic development], the use of the senior right." Idaho Code § 42-237b.

9. Although the Ground Water Act mandates that conjunctive administration of ground water rights to fill senior surface water rights hinges directly on the question of whether such administration is consistent with full economic development, the May 19 Order gives that factor no consideration.

10. The Director, in issuing the May 19 Order, has violated Idaho Code §§ 42-237b-d by failing to follow the statutory mandate to appoint a local ground water board and set this matter for hearing before it. While Title 42, Chapter 6 may not require the Director to appoint a local ground water board and hold a hearing for the type of administration contemplated by its provisions, a more specific statute addressing ground water—such as I.C. § 42-237b-d—controls over the more general provisions of Chapter 6. *People ex rel. Springer v. Lytle*, 1 Idaho 143 (1867); *Gooding County v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002).[1]

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[1] The Ground Water Act mandates that

> [w]henever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority. . . such person as claimant, may make a written statement under oath of such claim to the director. . . .

I.C. § 42-237b. If the Director deems the statement sufficient, he "shall issue a notice setting the matter for hearing before a local ground water board. . . ." *Id.* Chapter 6 does not contain the specific distinctions between senior and junior surface and ground water rights contained in the Ground Water Act, nor does it provide for a hearing—much less one before a ground water board.

11. The Department's Rules of Procedure or Conjunctive Management Rules must be interpreted as requiring the appointment of a local ground water board in cases like this; otherwise, they would be invalid as applied to the instant case because they fail to carry out the requirements of Idaho Code § 42-237b. *Holly Care Center v. State, Dept. of Employment*, 110 Idaho 76, 78, 714 P.2d 45, 47 (1986) ("administrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law"). The Department's rules and the Director's application of them in individual cases must conform to existing legislative enactments.

12. The May 19 Order fails to describe the accounting process or system that will be used to track future obligations and carry-forward credits.

13. Paragraph 3 at page 28 of the May 19 Order improperly limits "curtailment as mitigation" only to lands that were irrigated in the previous year. This improperly denies ground water users recognition of their valid, decreed water rights. Moreover, reach gain benefits are accruing and will continue to accrue to the Thousand Springs Reach ("TSR") from non-use of ground water on lands in 2004 and prior years. In fact, reach gain accruals may be greater where curtailment occurs for multiple years. Ground Water District members should be able to obtain mitigation credit for non-irrigation in 2005 of any licensed ground water-irrigated acre. The May 19 Order improperly fails to consider this factor.

CONCLUSION

For the foregoing reasons, IGWA petitions the Director to Reconsider the May 19 Order, and instead enter an order denying the Blue Lakes delivery call.

Pursuant to I.C. § 42-1701A(3), and having been aggrieved by the Director's May 19 Order, IGWA requests that the Director convene a hearing regarding this matter.

Pursuant to Department Rule of Procedure 780, IDAPA 37.01.01.780, IGWA moves for a stay of the Director's May 19 Order until such time as the Director convenes the statutorily mandated hearing and rules upon IGWA's Petition for Reconsideration.

If the Ground Water Districts are made to comply with the May 19 Order while their Petition for Reconsideration and request for a hearing are pending, the Ground Water Districts' members will suffer severe economic harm resulting from the unlawful curtailment of their ground water rights. Until such time as the Director has had an opportunity to fully consider the multitude of issues raised in this Petition and additional facts to be presented at hearing, any curtailment of the Ground Water Districts' water rights is premature, would proceed without due process of law, and would cause irreparable harm to the Ground Water Districts' members. Without granting the requested stay, IGWA's right to be heard on this matter would be meaningless.

DATED this 2nd day of June, 2005.

GIVENS PURSLEY LLP

By: _____
Michael C. Creamer
Attorneys for Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June 2005, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

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