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DEPARTMENT OF WATER RESOURCES

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 and IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHTS NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARM)	**IGWA'S POST-HEARING MEMORANDUM REGARDING DIRECTOR'S ORDER APPROVING IGWA'S 2005 SUBSTITUTE CURTAILMENTS** **(BLUE LAKES DELIVERY CALL)** **(CLEAR SPRINGS DELIVERY CALL, SNAKE RIVER FARM)**

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 ("MVGWD") and North Snake Ground Water District ("NSGWD") (collectively the "Ground Water Districts"), hereby submits its post-hearing memorandum to the Director of the Idaho Department of Water Resources ("Director") for consideration in connection with IGWA's pending Petition for Reconsideration of the Director's Order Approving IGWA's 2005 Substitute

Curtailments. The Director heard testimony on this matter from several witnesses on June 5, 2006, and has permitted the parties to submit post-hearing briefing.

I.
INTRODUCTION

In the spring of 2005, Blue Lakes Trout Farm and Clear Springs Foods (collectively the "Calling Parties") made separate delivery calls to the Director. In response, the Director issued two emergency orders finding that diversions of ground water by certain of the Ground Water Districts' members likely were causing material injury to the Calling Parties' spring water rights. In each of these orders, the Director provided that the Ground Water Districts, in lieu of involuntary curtailments, could submit a plan of alternate means to reduce depletions to the aquifer in amounts the Director calculated would provide water to the Calling Parties.

IGWA, on behalf of its Ground Water District members, submitted its plans for providing replacement water to the Calling Parties during the 2005 irrigation season. IGWA proposed to voluntarily curtail irrigation of any kind on some parcels ("voluntary curtailments") and to provide a surface water supply for irrigation of acres previously irrigated with ground water ("conversions" or "conversion projects"). The Director ultimately approved these replacement water plans.

In a concerted effort to avoid involuntary curtailments of their ground water rights, numerous Ground Water District members implemented voluntary curtailments and conversions during the 2005 irrigation season, at significant expense. Over the course of the 2005 irrigation season, Department staff, and the Water District 130 Watermaster, Cindy Yenter, conducted on-site field investigations in an effort to determine the extent to which the mitigation measures proposed by the Ground Water Districts for 2005 were being implemented.

On December, 12, 2005, and January 13, 2006, Ms. Yenter submitted two reports to the Director summarizing her findings with respect to the Ground Water Districts' 2005 voluntary curtailments and converted acres. (These reports are Exhibits 1 and 2 in the June 5, 2006, hearing record.) As to the voluntary curtailments, Ms. Yenter recommended to the Director that the Department not recognize any mitigation credit for curtailment of ground water diversions to acres falling into certain identified categories, such as those acres that the Ground Water Districts irrigated with surface water in 2005, but which were not part of a formal conversion project, and those acres lying under pivot endguns that were shut off in 2005. Exhibit 1. As to the Ground Water Districts' conversion projects, Ms. Yenter recommended to the Director that the Department recognize mitigation credit for 18,939.5 acre-feet of conversion project deliveries, despite the fact that the Ground Water Districts purchased and arranged for delivery though the North Side Canal Company ("NSCC") system some 40,925 acre-feet of surface water in 2005.[1]

On April 29, 2006, the Director issued his orders approving the substitute curtailment measures and setting forth how much mitigation credit would be recognized for 2005. IGWA timely petitioned for reconsideration of the April 29, 2006 Order, and requested a hearing. The Director held a hearing on June 5, 2006. IGWA offered live testimony from Cindy Yenter (IDWR), Tim Luke (IDWR), Dr. Allan Wylie (IDWR), Rex Minchey (NSGWD), Dean Stevenson (MVGWD) and Charles M. Brendecke (hydrology expert). Counsel for the Calling

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[1] The Ground Water Districts purchased a total of 40,925 acre-feet of storage water in 2005—26,537 acre-feet was diverted for conversion projects and the remaining 14,388 acre-feet were diverted to the Sandy Pipeline and Ponds. Exhibit 3. All of this water was diverted into the North Side Canal from Milner Lake, yet only 31,481 acre-feet of this total were delivered by the North Side Canal to conversion projects and the Sandy Pipeline and Ponds. Exhibit 3. This left 9,444 acre-feet of water that was diverted into the North Side Canal from Milner Lake, but was not delivered to the conversion projects or the Sandy Pipeline and Ponds. Exhibit 3.

11,068 acre-feet of the 31,481 acre-feet in total deliveries were delivered into the Sandy Pipeline and Ponds. Exhibit 3. The remaining 20,413 acre-feet of water were delivered to conversion projects in 2005, with the Department giving credit for 18,939.5 acre-feet of deliveries to conversions. Exhibit 2.

Parties were present, and had opportunities to cross-examine IGWA's witnesses, but did not call any additional witnesses to testify. The Director provided the parties the opportunity to submit post-hearing briefing.

II.
ARGUMENT

Based on information submitted to the Department with the replacement water plans, and testimony at the June 5 hearing, the Ground Water Districts should receive 2005 mitigation credit for: (1) seepage losses from the North Side Canal, (2) all ground-water-supplied acres that were left dry in 2005 regardless of whether those acres were irrigated in 2004, (3) those ground-water-supplied acres voluntarily curtailed in 2005, which still managed to grow a mature crop solely due to rain water, (4) those ground-water-supplied acres that used surface water irrigation in 2005, but were not part of a recognized conversion project; and (5) acres under turned off endguns/ pivot corners left dry/ parcels under one acre in size. The Ground Water Districts also should receive recharge credit for excess water deliveries calculated as recharge in the model cells where the excess deliveries actually occurred rather than distributed throughout the NSCC service area.

A. Seepage losses

The Ground Water Districts acquired approximately 40,925 acre-feet of storage water for mitigation purposes in WD 130 in 2005. Exhibit 3. The record demonstrates that all of this water was diverted into the North Side Canal from Milner Lake, but that only 31,481 acre-feet of this total were delivered to the NSGWD conversion projects and the Sandy Pipeline Ponds. Exhibit 3. This left 9,444 acre-feet of water that was diverted into the North Side Canal from Milner Lake, but was not delivered to the conversion projects or the Sandy Pipeline and Ponds.

Exhibit 3. This 9,444 acre-feet of purchased and diverted water was not accounted for in the Director's April 29 Orders or in the Department's pre-order analysis. Exhibits 1 and 2.

This 9,444 acre-feet represents a 30% carriage or seepage charge imposed by the NSCC against all water diverted at Milner and delivered through its system (31,481 acre-feet delivered x .30 = 9,444 acre-feet). For NSCC to be able to deliver 31,481 acre-feet to the conversion projects and the Sandy Pipeline Ponds, the Ground Water Districts were required to provide, at the headgate of the North Side Canal, a total of 40,925 acre-feet of storage, at a cost of approximately $8-11/acre-foot. Rex Minchey testimony, tr. p. 147 Ls. 15-20. Therefore, not including any wheeling charges imposed by NSCC (Minchey testimony, tr. p. 150 Ls. 17-21), the Ground Water Districts expended about $90,000 (9,444 acre-feet x $9.50/acre-foot) for storage water that seeped into the aquifer for which the Ground Water Districts currently are receiving no mitigation or replacement water credit of any kind from the Department.

Despite this lack of mitigation credit, it is undisputed that all waters in the NSCC canals are commingled. Cindy Yenter testimony, tr. p. 26 Ls. 5-13; Tim Luke testimony, tr. p. 87 Ls. 13-23; p. 93 Ls. 20-24; Charles Brendecke testimony, tr. p. 200 L. 21 – p. 201 L. 5. Likewise, there was no disagreement that a particular person's water allocation into the canal does not ride or float on top of the other water in the canal in such a way that it is not susceptible to seepage losses. Luke testimony, tr. p. 93 Ls. 20-24; Brendecke testimony, tr. p. 201 L. 20 – p. 202 L. 2. The witnesses also were in agreement that a 30% seepage loss from a canal on the Eastern Snake Plain is well within the range of expected losses. Exhibit 8; Yenter testimony, tr. p. 27 Ls. 3-6; Allan Wylie testimony, tr. p. 116 Ls. 1-11; Brendecke testimony, p. 199 L. 1 – p. 200 L. 12.

Furthermore, none of the information available to the Department suggests that the unaccounted for 9,444 acre-feet of diverted, but not delivered, water was delivered to other users

on the NSCC system or spilled back to the Snake River. Yenter testimony, tr. p. 27 L. 15 – p. 28 L. 2; Brendecke testimony, tr. p.196 Ls. 15-21; p. 200 L. 13 – p. 201 L. 8. Indeed, testimony about the historical quantity of NSCC spills demonstrates that no significant portion of the 9,444 acre-feet is likely to have spilled in 2005. Exhibit 8; Brendecke testimony, tr. p. 197 L. 18 – p. 201 L. 8. The most plausible disposition of the water is that it was recharged to the aquifer as canal seepage.

While the Department maintains that it needs information from the Ground Water Districts about the amount of seepage resulting from their specific diversions into the North Side Canal (June 7, 2005, Order [Blue Lakes]), it is Dr. Charles Brendecke's opinion that it is infeasible for the Department to require the Ground Water Districts to measure how their specific diversions into the North Side Canal are affected by seepage from the canal. Brendecke testimony, tr. p. 202 L. 20 – p. 204 L. 19. In his words: "it's just not feasible…[The Ground Water Districts] could not differentiate the loss associated with the water that they've provided for delivery to conversions from any of the other losses, or any other water that's being lost in the canal." Brendecke testimony, tr. p. 204 Ls. 11-19.

Added to this equation is the fact that the Department previously has overseen aquifer recharge programs whereby water was diverted into canals in close proximity to the ESPA, including the North Side Canal, for the specified purpose of seeping water from the canals into the ESPA. Luke testimony, tr. p. 89 Ls. 4-19. Yet, the Department has maintained thus far that the Ground Water Districts are not entitled to <u>any</u> recharge credit for water they have caused to seep from the same canal system.

Finally, the Department's own ESPA groundwater model, relied upon in part by the Department administering surface and ground water rights, takes account of and calculates

seepage losses from local canals in predicting the interaction of ESPA flows. Wylie testimony, tr. p. 116 L. 15 – p. 117 L. 15. The Department's model specifically calculates seepage from the North Side Canal at 30% losses based on data provided to the Department by the NSCC. Wylie testimony, tr. p. 128 L. 22 – p. 129 L. 15. If the 30% seepage loss estimate and the data supporting it is sufficient for the Department's own model calibration, then they also should be sufficient for estimating credits to be given to the Ground Water Districts' diversions into the same system. This is particularly so, considering this estimate is well within the range of losses on other ESPA canal systems. Exhibit 8; Yenter testimony, tr. p. 27 Ls. 3-6; Allan Wylie testimony, tr. p. 116 Ls. 1-11; Brendecke testimony, p. 199 L. 1 – p. 200 L. 12.

For the foregoing reasons, the Director should conclude that the Ground Water Districts are entitled to recharge credit for the 9,444 acre-feet of water they caused to be diverted into the North Side Canal, that were not accounted for in the Director's April 29 Orders.

B. Voluntary curtailment acres that were not irrigated in 2004

Data before the Department as of June 5, 2006 shows that NSGWD members voluntarily curtailed irrigation under valid ground water rights on 8,562 acres in 2005 (Exhibit 1, p. 4), while MVGWD members voluntarily curtailed irrigation under valid ground water rights on 12,542 acres in 2005. Exhibit 1, p. 4. Of this approximately 21,000 acres of combined curtailments, the Department recognized mitigation credit for only 6,786 acres, or roughly one-third of the total submitted. April 29 Order, ¶ 20.

Approximately 5,200 acres of submitted lands were not given mitigation credit because the Department concluded they had not been irrigated in 2004 and they were not in a mitigation plan in 2004.[2] Exhibit 1, p. 4 and Attachment A; Yenter testimony, p. 31 Ls. 9-17. However, it

[2] In determining whether submitted acres were eligible for curtailment credit, the Department staff did not investigate whether those acres had been irrigated with ground water in 2001, 2002, or 2003. Yenter testimony, p.

is undisputed that ground water wells left unpumped for multiple consecutive years produce significantly greater reach gain benefits to springs tributary to the ESPA than wells that have been curtailed for only a single irrigation season. Exhibit 6; Wylie testimony, tr. p. 120 Ls. 9-24; Brendecke testimony, tr. p. 191 L. 2 – p. 192 L. 5. Joint administration of connected groundwater and surface water rights is simply not the same as administration between surface water rights in the same stream. Yenter testimony, p. 34 L. 19 – p. 35 L. 5. Yet, the Department has excluded from consideration those acres submitted by the Ground Water Districts that were not irrigated in 2004. The illogical nature of this exclusion was made clear during the testimony of Tim Luke:

> Q: If the wells that were not pumped in 2004, and whose acreages, therefore, were ineligible, were turned back on tomorrow and then shut off next year, would they come back into eligibility next year because they had been pumped this year?
>
> A: Is that just a hypothetical question?
>
> Q: That is a hypothetical question, that's right.
>
> A: Assuming that we were looking at a mitigation plan next year?
>
> Q: Yes.
>
> A: I think that would be consistent with the Order.

Luke testimony, tr. p. 94 L. 16 – p. 95 L. 2. The Department additionally concedes that, under certain conditions, wells left dry in 2004 and 2005 (and not receiving any mitigation credit in 2005), could potentially be turned back on this year or in coming years. Yenter testimony, tr. p. 33 Ls. 13-21. This may be exactly what occurs if members of the Ground Water District realize that this is the only way to bring these acres back into consideration for mitigation. Minchey

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32 Ls. 1-6. Therefore, the record does not indicate whether some of those submitted acres were part of conversion projects initiated between 2001-2003, (i.e., were not irrigated with ground water in 2004 because they were in earlier conversion projects). Yenter testimony, tr. p. 35 L. 23 – p. 40 L. 1.

testimony, tr. p. 158 L. 18 – p. 160 L. 8; Dean Stevenson testimony, tr. p. 176 L. 25 – p. 177 L. 23. Thus, as a matter of hydrologic fact (the longer the curtailment the greater the reach gain effects) and as a matter of policy (avoiding disincentives to ongoing voluntary curtailment of valid ground water rights), the Department decision not to recognize credit for continued dry up in 2005 of ground water irrigated acres that were not irrigated in 2004 is arbitrary and capricious.

The Director should recognize mitigation credit for any acres with valid ground water rights that Ground Water District members left dry in 2005, regardless of whether those acres were irrigated in 2004.[3]

C. Crops grown without irrigation in 2005

Many farmers in the Ground Water Districts already had planted crops by the time the Director's delivery call orders came out in 2005. Stevenson testimony, tr. p. 173 L. 24 – p. 174 L. 11. In the spring and early summer of 2005, unusually wet conditions persisted and caused some crops to fully mature without any irrigation. Yenter testimony, tr. p. 40 L. 22 – p. 41 L. 4; Minchey testimony, tr. p. 157 Ls. 16-23; Stevenson testimony, tr. p. 173 L. 20 – p. 174 L. 11. These circumstances understandably caused the Department some reason for uncertainty in determining whether such acres could be credited as voluntary curtailments, where submitted as such. Yenter testimony, tr. p. 41 L. 8 – p. 42 L. 4.

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[3] IGWA acknowledges that the Director's May 19, 2005 Order provided that the Ground Water Districts could submit a plan to forego consumptive use off certain ground water rights in 2005, "so long as full beneficial use was made under the forgone rights in the prior year or use under the rights was foregone in the prior year for purposes of mitigation for which credits for mitigation to the Devil's Washbowl to Buhl Gage spring reach have not otherwise been granted."

However, IGWA does not agree that only those ground water rights pumped in 2004 should be eligible for credit toward 2005 mitigation. As the Director heard at the June 5 hearing, leaving a dry well dry is as important, if not more so, than turning off a new well. Exhibit 6; Wylie testimony, tr. p. 120 Ls. 9-24; Brendecke testimony, tr. p. 191 L. 2 – p. 192 L. 5. Therefore, IGWA asks the Director to consider the true effects of leaving wells dry for consecutive years versus one irrigation season.

Despite this uncertainty, individual parcel owners apparently were not contacted in an effort to gather further information about the irrigation practices that occurred on such fields. Minchey testimony, tr. p. 157 L. 19 – p. 158 L. 7; Stevenson testimony, tr. p. 173 L. 24 – p. 175 L. 2.

Accordingly, IGWA requests that the Department ensure that all of the voluntarily curtailed acres, even where a crop grew naturally due to rainwater, are fully credited.

D. Acres using surface water, but not in a formal conversion project

NSGWD submitted acres for mitigation credit that used surface water irrigation in 2005, but which were not part of an identified NSGWD conversion project (so-called "independent conversions"). Yenter testimony, tr. p. 37 L. 16 – p. 39 L. 6; Minchey testimony, tr. p. 153 L. 15 – p. 154 L. 3. The Department categorically excluded over 3,400 acres of the Ground Water Districts' submitted mitigation acres, in part because the Department claims it could not determine exactly how much ground water had been used on these acres in prior years, i.e., how much conversion from ground water to surface water actually took place in 2005. Exhibit 1, Attachment A; Yenter testimony, tr. p. 38 L. 22 – p. 40 L. 13. The Ground Water Districts are currently attempting to gather information from its members to document prior ground water use on these acres.

Suffice it to say, in these independent conversion cases, the only consideration with respect to whether credit should be recognized should be whether the farmer in question can document that he or she used less (or no) ground water on those lands in 2005 when compared with prior years. To the extent that NSGWD provides such information to the Department, mitigation credit for 2005 should be revised to reflect these independent conversions.

E. Pivot corners/ endguns/ small acreages

The Director's April 29 Orders apparently excluded from mitigation consideration approximately 253 acres of voluntary curtailment parcels submitted by the Ground Water Districts on the ground that they consisted of pivot corners, were under endguns that were shut off in 2005, and/or were parcels under one acre in size. Exhibit 1, Attachment A; Yenter testimony, tr. p. 61 L. 4 – p. 62 L. 11; p. 64 L. 11 – p. 65 L. 8.

While the Department gave mitigation credit for some pivot corners, it denied credit for other pivot corners formerly irrigated with endguns. Yenter testimony, tr. p. 65 Ls. 1-8. Credit was denied for these dry pivot corners even though they each may constitute a curtailment of multiple acres. Yenter testimony, tr. p. 65 Ls. 1-8. This decision was made despite the Department's recognition that even the smallest amount of voluntary curtailment has a positive effect on the ESPA water budget. Wylie testimony, tr. p. 123 Ls. 4-9.

The asserted rationale for denying mitigation credit for endguns that were shut off in 2005 was that this would not result in less water being pumped onto those fields—i.e., that more water would just come out the nozzles that remain open on the pivot. Yenter testimony, tr. p. 62 L. 15 – p. 64 L. 6. However, at the June 5 hearing, the Ground Water Districts' presented testimony from witnesses—i.e., their members who actually operate and monitor these irrigation systems on a daily, if not hourly, basis—regarding the effect of turning off endguns. Both Mr. Minchey and Mr. Stevenson testified that shutting off an endgun on a pivot causes less total water to come out of that pivot because the other nozzles on the pivot have regulated flows that do not increase with increased pressure. Minchey testimony, tr. p. 160 L. 9 – p. 161 L. 3; Stevenson testimony, tr. p. 178 L. 6 – p. 179 L. 9. Resolution of this conflicting testimony is left to the Director's discretion, as he is the hearing officer that heard this testimony, but IGWA

believes the testimony of Mr. Minchey and Mr. Stevenson are more credible given their status as practicing farmers with actual experience operating the kinds of pivots and endguns used by ground water users in their communities.

In any event, regardless of how much ground water might be diverted with endguns on or off, Ms. Yenter testified that consumptive use of ground water is decreased when an endgun is turned off where the endgun provided the only source of water for a specific corner. Yenter testimony, tr. p. 63 Ls. 5-12. Reduced consumptive use associated with non-irrigated acres should be the controlling consideration when evaluating mitigation credit for voluntary curtailments. If less ground water is being consumed, then it follows that the ESPA benefits.

As to parcels less than one acre in size, Ms. Yenter described the Department's reasons for denying mitigation credit as follows: "They were just too small and our resolution was too gross. We just couldn't get down that small....We just didn't include it." Again, this decision was made despite the fact that the Department recognizes that all voluntary curtailments, no matter the size, benefit the ESPA. Wylie testimony, tr. p. 123 Ls. 4-9.

IGWA submits that all of these endgun parcels, pivot corners and small acreages were demonstrable sacrifices made by the Ground Water Districts undertaken expressly to provide replacement water to the Calling Parties. The Department should give mitigation credit for their collective effects on the ESPA.

F. Measuring devices

In assessing the amount of mitigation or replacement water credit to be recognized for conversion acres, the WD 130 Watermaster expressed some concerns about the accuracy of measuring devices in place on some parcels. Yenter testimony, tr. p. 53L. 10 – p. 55 L. 11. In some cases, farmers were instructed to install new measuring devices so that ground water or

surface water usage could be accurately accounted. Yenter testimony, tr. p. 54 L. 25 – p. 55 L. 11. In some of instances where farmers were told to install new measuring devices, the farmer did so, but the parcel was not revisited to determine whether credit could be given based on the installation of the new devices. Minchey testimony, tr. p. 154 L. 19 – p. 155 L. 19.

The Department should recognize mitigation credits for all conversions where appropriate measuring devices were in place in the 2005 irrigation season.

G. Excess deliveries.

The Department recognized a "recharge" credit for all water deliveries in excess of 4 acre-feet per acre. April 29 Orders, ¶ 14. However, the Department did not credit this recharge at the location of the excess deliveries, but instead distributed these excesses proportionally "throughout the service area of the North Side Canal and input to the ESPA ground water model as recharge." April 29 Orders, ¶ 14.

This protocol was chosen even though the Department measured these excesses at the points of delivery. Luke testimony, tr. p. 99 Ls. 4-15; Wylie testimony, tr. p. 122 L. 22 – p. 123 L. 3. Apparently, the decision to apply the excesses across the entire service area was also made despite the contrary recommendation of the Department's own modeling expert, Dr. Allan Wylie. Wylie testimony, tr. p. 122 Ls. 8-16. In Dr. Wylie's view, better modeling results are achieved by entering the excess water at the locations where such excesses were applied to the ground. Wylie testimony, tr. p. 122 L. 22 – p. 123 L. 3. IGWA agrees.

Accordingly, recharge credits for excess deliveries should be modeled by inputting the excess water at the location of such deliveries, and not distributed over the entire NSCC service area. This will give a more accurate picture of how those excess deliveries actually benefit the ESPA and reach gains.

III.
CONCLUSION

For the foregoing reasons, IGWA requests that the Director reconsider his April 29, 2006, Orders approving IGWA's 2005 substitute curtailments in both the Blue Lakes and Clear Springs Foods delivery call matters. IGWA requests that the Director reassess whether mitigation credit should be given to the Ground Water Districts based on the above considerations, including seepage losses from the North Side Canal and all acres left dry in 2005, irrespective of whether those same acres were dry in 2004 or were in a mitigation plan.

DATED this 19th day of June, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June 2006, 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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