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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 NO. 36-07071	**PETITION FOR HEARING ON JULY 29, 2005 ORDER AND INDEPENDENT HEARING OFFICER**

John W. Jones, Jr. ("Jones") , and the Thousand Springs Water Users Association ("TSWUA") (collectively "Petitioners") by and through their attorneys, Ringert Clark Chartered, file this Petition for a hearing on the Director's July 29, 2005 Order in response to Jones' demand for administration of water rights in Water District 130 pursuant to Idaho Code § 42-607 in order to supply Jones' prior water right. The Petitioners reserve the right to file with a district court an original action or actions to contest the determinations and actions of the Order.

Interests of TSWUA and Its Members

TSWUA is an Idaho non-profit corporation formed to promote the common interests of its members in restoring their water supplies in the Thousand Springs and the hydraulically connected Eastern Snake Plain Aquifer (ESPA). TSWUA's address is P.O. Box 178, Hagerman, Idaho 83332.

ORIGINAL

TSWUA's members own water rights to springs and spring-fed streams in Water District 130 and 36A with priorities ranging from the 1880s to the present. Many of TSWUA's members own water rights to Billingsley Creek and to springs tributary to Billingsley Creek. Collectively, they own in excess of 3,900 cfs of water rights for aquaculture, irrigation, hydropower, domestic and other authorized beneficial uses.

TSWUA's members are affected and aggrieved by the Director's Order. The Order sets forth procedures, standards, analyses, findings of fact and conclusions of law that the Director applies generally, in the administration of spring and ground water rights in Water Districts 130 and 36A. The Director's determination that junior ground water diversions have an "insignificant effect" on springs discharging in the Thousand Springs to Malad Gorge spring reach, and that Jones' demand is therefore "futile" directly affects all TSWUA members with spring water rights within this "reach."

Initial Grounds For Contesting the Order

This Petition states the initial grounds the Petitioners have identified to date for contesting the Order. The Petitioners reserve the right to amend these grounds, and present additional grounds, for contesting the Order through the customary opportunities to submit statements of issues, and to present evidence and argument and submit briefing on all issues that are raised during hearing. Given the length and complexity of the Order, these opportunities to identify and refine issues during the course of this proceeding are essential to adequate development of the record and due process.

A. The Order Does Not Provide For the Administration of Water Rights as Required by Idaho Law

The Order does not provide for the efficient administration of water rights or the distribution of water to Jones as required by the Idaho constitution and title 42, Idaho Code. Instead, the Director's Order subordinates the prior appropriation doctrine and his duties under chapter 6, title 42, Idaho Code, to the Director's view of conjunctive management under the IDWR's Conjunctive Management Rules. The Director fails to acknowledge that the Idaho Supreme Court and the SRBA District Court have observed that the Conjunctive Management rules do not provide for administration of water rights on the basis of prior appropriation as required. *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 423, 568 P.2d 568 (1997); *Basin-Wide Issue 5: Order on Cross Motions for Summary Judgment* 26, 29-30. The Director has failed to heed these warnings and review and modify the rules to conform to the prior appropriation doctrine and administration as required under Idaho law. As a consequence, the Conjunctive Management Rules, as written and as applied by the Director in the Order, violate the Petitioners' water rights and the Idaho constitutional, statutory and common law governing the Idaho Department of Water Resources ("IDWR") duty to distribute water rights in a water district.

Jones' April 12, 2005 letter demands that the Water Master perform her duties to administer water rights as required by I.C. § 42-607. Jones' letter does not invoke or refer to the Conjunctive Management Rules. In order to apply the rules, the Director improperly construed Jones' demand as a water delivery call under those rules.

The Director's treatment of Jones' water right and his response to Jones' delivery demand are contrary to his treatment of other, similarly situated senior water users seeking distribution of water.

Applying the Conjunctive Management Rules, the Director applies different standards to the administration of junior ground water rights than the Director applies to the administration of surface water rights. The Director's application of these different standards favors and protects junior ground water users from curtailment that would be subject to curtailment under the standards the Director applies to the administration of surface water rights. This unequal application and administration of the law contravenes Jones water right, the Director's duties, and Idaho law.

The Water Master for Water District 130 is required by chapter 6, Title 42 of the Idaho Code, specifically I.C. § 42-607, to curtail junior water rights in times of shortage in order to supply water to senior water rights. It has been established as a matter of law through the Snake River Basin Adjudication (SRBA) that all ground water rights and surface water rights in Basin 36 are to be administered as connected sources in accordance with the prior appropriation doctrine. *Partial Decree For Connected Sources in Basin 36.* The Director is required to curtail all junior groundwater rights, unless those right holders can show by clear and convincing evidence that such curtailment would be futile. The Director's order does not adhere to this mandatory administrative process. The Director has no authority to interpose a futile call defense on behalf of junior ground water users as a surrogate for distributing water in accordance with the priorities of decreed water rights, which must, by the SRBA Court's decree, be administered together.

B. A Decreed Water Right Is A Quantity Entitlement, Which The Director Cannot Modify For Purposes of Administration

The Director mischaracterizes the nature and effect of Jones' water right (Findings of Fact 49 and 50) and fails to recognize that the decreed quantities of Jones' water right define Jones' entitlement and are binding upon the Director for purposes of distribution of water pursuant to chapter 6, Title 42, Idaho Code. Jones perfected and verified his water right according the appropriation and adjudication procedures of Title 42, Idaho Code. The water right is recognized and protected under Idaho law as valuable property. The rate of diversion established by this water right is a quantity entitlement. The Director has no authority to suggest that Jones or any other TSWUA member is entitled to a lesser quantity during portions of the year based on assumed "seasonal" or "intra-year variations" in spring flows at the time Jones appropriated his water right.

While the Director reexamines and reduces Jones' water right for purposes of administration, the Director fails to reexamine the past or present beneficial use and water rights of junior ESPA ground water users whose diversions diminish Jones' water supply. This failure constitutes selective, discriminatory, and unequal application and administration of the law in contravention of Jones' water right, the Director's duties and Idaho law.

C. IDWRs Ground Water Model Does Not Provide A Sufficient Basis For The Director's Refusal To Administer Junior Ground Water Rights

The Director relies on the purported results of computer model simulations to conclude that ground water pumping from the ESPA has an "insignificant effect" on Jones' water right, and that Jones' demand for administration is therefore "futile." As previously discussed, the Director improperly uses the model to interpose a futile call defense on behalf of junior ground water users, instead of administering water rights in accordance with the SRBA Court's decrees.

The Director's Order fails to adequately explain the basis or derivation of his conclusion that ground water pumping from the ESPA has an "insignificant effect" on water rights in the Thousand Springs to Malad Gorge spring reach. The Director's summary, oblique references to and reliance upon the purported results of computer model simulations improperly shifts to the Petitioners the burden of analyzing this complicated "tool" to show that the priorities of their water rights are not "futile" as against junior ESPA ground water rights.

Due to the complexity of the model and the Director's reliance upon it in refusing to administer junior ESPA ground water rights, the Petitioners anticipate that a significant amount of time will be required for discovery, to analyze the model and the Director's findings and conclusion based on the model, and prepare the Petitioners' response.

However, it is evident that the purported model simulations produce contradictory results, and contradict historic observed and measures spring flows and observed effects of ground water pumping on springs in the Thousand Springs to Malad Gorge reach including Billingsley Creek and Jones' tributary spring sources.

The Petitioners are informed and believe that the model may, at best, provide insight for planning purposes on the regional relationships between ESPA depletions and inputs and spring flows. However, the model does not provide sufficient, clear and convincing evidence to overcome the SRBA court's determination of hydraulic connection, and its order that ESPA ground water rights be administered as connected to spring rights in accordance with the prior appropriation doctrine.

The Petitioners contest the assertion in FOF 19 that: "The Department is implementing full conjunctive administration of rights to the use of hydraulically-connected surface and ground waters

within the [ESPA] consistent with Idaho law and available information." The Petitioners believe that the Director is improperly using IDWR's ground water model referenced in FOFs 19 and 20 to justify non-administration of many out-of-priority, junior ESPA ground water diversions in contravention of the SRBA's court's mandate, Jones and TSWUA members' water rights, and Idaho constitutional, statutory and common law.

One clear error in the Director's use of the model is reliance on the 10% uncertainty in the model's results as a basis for excluding from administration junior ESPA ground water rights that the model predicts would have a 10% or less effect on spring flows. Obviously, such uncertainty is equally likely to result in an overstatement or an understatement of the effects of ESPA ground water withdrawals on spring flows. Therefore, the uncertainty should not be used as a basis to include or exclude any water rights from administration.

Relief Requested

The Order should be rescinded and the Director should order the curtailment of all ESPA water rights that are junior to Jones' water right no. 36-07071. This curtailment should continue until there is a continuous flow of 73.05 cfs to Jones' diversion.

Independent Hearing Officer

The Petitioners hereby asserts their right, pursuant to Idaho Code § 67-5252 (1) to disqualification of the Director, without cause, as the presiding officer in the hearing on this matter.

The Petitioners further seek blanket disqualification for cause, pursuant to Idaho Code § 67-5252 (2) of all IDWR employees as the presiding officer in the hearing on this contested case. The Petitioners are entitled to a hearing conducted by a person who will be objective and unbiased, and will hear the evidence and arguments with an open mind. IDWR employees who report to the

Director cannot be objective or unbiased, or have an open mind, in a hearing in which the Director's findings of fact, conclusions of law, and actions are contested. Many IDWR employees have likely been involved in preparing the Director's order, precluding their objective review of the evidence and arguments that will be presented. Such employees will also likely be fact witnesses.

As a result, IDWR employees cannot provide the Petitioners a meaningful opportunity to be heard, consistent with the Petitioners' due process rights. The Petitioners therefore request appointment of a sufficiently qualified hearing officer that is not an IDWR employee and has no contractual relationship with IDWR other than as a hearing officer.

Dated this 12th day of August, 2005.

RINGERT CLARK, CHARTERED

By: _____
Daniel V. Steenson
Ringert Clark Chartered
Attorneys for Petitioner

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 12th day of August, 2005 by the following method:

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Magic Valley GWD 809 E. 1000 N. Rupert, ID 83350-9537	[X] U.S. First Class Mail, Postage Prepaid [ ] U.S. Certified Mail, Postage Prepaid [ ] Federal Express [ ] Hand Delivery [ ] Facsimile [ ] Electronic Mail
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