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DEPARTMENT OF
WATER RESOURCES

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ORIGINAL

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02356A, 36-07210, AND 36-07427	) **STATE AGENCY GROUND WATER USERS' PETITION FOR RECONSIDERATION, HEARING, AND STAY**

The Idaho Department of Juvenile Corrections, the Idaho Department of Fish & Game, the Idaho Department of Health & Welfare, the Idaho Department of Lands, and the Idaho Transportation Department, who will be called the State Agency Ground Water Users, by and through their counsel of record, Michael S. Gilmore, Deputy Attorney General, file this Petition for Reconsideration, Hearing, and Stay from the Director's Order of May 19, 2005. The State Agency Ground Water Users have also petitioned to intervene today.

Affected Water Rights

1. This Petition is based upon the following descriptions of water rights held by the Idaho Transportation Department (ITD) and the Idaho Department of Lands (Lands) that were listed by Water District No. 130 watermaster Cindy Yenter as being subject to mandatory curtailment or required replacement water or mitigation:

(a) The Idaho Department of Lands, with lienholder Faulkner Land & Livestock Co., Inc., holds permitted ground water right No. 37-7372 for IRRIGATION and STOCKWATERING described in IDWR records as:

Priority date: 06/30/1999

Use: IRRIGATION right from March 15 through November 15 for 6.4 cfs and STOCKWATERING right from January 1 through December 31 for 0.14 cfs, for a total of 6.54 cfs.

Location of Use: T 7S R 15E Section 5 in Gooding County,

for 10 acres in lot 2 of the SWNE ¼¼,
for 30 acres in the NESW ¼¼,
for 40 acres in the NESE ¼¼,
for 10 acres in lot 1 of the SENE ¼¼,
for 40 acres in the NWSW ¼¼,
for 40 acres in the NWSE ¼¼,
for 30 acres in the SWSW ¼¼,
for 40 acres in the SWSE ¼¼,
for 30 acres in the SESW ¼¼, and
for 40 acres in the SESE ¼¼, for a total of 320 acres.

It is not apparent that this water right, particularly the stockwatering right, is the source of any material injury to the Petitioner's surface water rights.

(b) The Idaho Transportation Department holds decreed ground water right No. 37-7457 described as follows:

Priority date: 10/01/1975

Use: DOMESTIC RIGHT from 01/01 through 12/31 for 0.05 CFS and 8.6 AFA for the Carey Maintenance Shed

Location of Use: T 1S R 21E Section 22 SWSE ¼¼ in Blaine County (no acreages listed).

It is not apparent that this water right is the source of any significant depletions to the aquifer or of any material injury to the Petitioners' surface water rights.

(c) The Idaho Department of Lands and Sawtooth Sheep Co., Inc., hold decreed ground water right No. 37-8005D described in the decree and in IDWR's records as:

Priority date: 03/26/1982

Use: IRRIGATION right from 04/01 through 10/31 for 0.41 CFS and 124 AFY

Location of Use: Gooding County, Section 5, T 6S, R 15E,

for 31 acres in lot 4 of the SWNW ¼¼,
for 30 acres of the NESW ¼¼,
for 20 aces in lot 3 of the SENW ¼¼,

for 40 acres in the NWSW ¼¼,
for 37 acres in the SWSW ¼¼, and
for 19 acres in the SESW ¼¼,

and in Section 6, T 6S, R 15E,

for 19 acres in lot 1 of the SENE ¼¼,
for 40 acres in the NESE ¼¼, and
for 24 acres in the SESE,

for a total of 260 acres.

It is not apparent that this water right is the source of any material injury to the Petitioner's surface water rights.

(d) The Idaho Transportation Department holds decreed ground water right No. 37-20852 described as follows:

Priority date: 09/20/1974

Use: IRRIGATION from 04/01 through 11/01 for 0.09 CFS and 18.8 AFA

Location of Use: No place of use listed.

It is not apparent that this water right is the source of any significant depletions to the aquifer or of any material injury to the Petitioners' surface water rights.

1. Petition for Reconsideration, Hearing and Stay Regarding Lack of Notice of Alleged Depletions and of Alleged Material Injury

2. The Order, beginning Ordering Paragraph, page 28, directed the watermaster of Water District No. 130 "to issue written notices ... to the holders of consumptive rights ... that have priority dates later than December 28, 1973, including consumptive ground water rights for agricultural, commercial, industrial, municipal, or other consumptive uses, excluding ground water rights used for de minimis domestic purposes ... within the limits of ... Idaho Code § 42-111 and ground water rights for de minimis stock watering ... within the limits of ... in Idaho Code § 42-1401A(12)" to inform those persons that "their rights are subject to curtailment" unless they "submit a plan or plans to the Director to provide mitigation." Ordering Paragraph (6), page 30, provided that "diversions of ground water ... for commercial, domestic, industrial, municipal, or stockwater, shall not be subject to curtailment in 2005."

3. Water District No. 130 watermaster Cindy Yenter's letter to ITD listed the rights

described in Paragraph 1 of this Petition as subject to the Order and subject to curtailment or the requirement to provide replacement water in an approved mitigation plan. Neither the Order nor the watermaster's letter quantified IDWR's allegations of depletions or material injury for any of the four water rights at issue. See Attachment 1, which is a copy of the Watermaster's letter to ITD. Thus, the State Agency Ground Water Users are left to speculate upon IDWR's quantification of their water rights' depletions (if any) and upon IDWR's quantification of their water rights' material injury to the Petitioner (if any) and upon IDWR's quantification of the State Agency Ground Water Users' obligations to provide replacement water or mitigation (if any).

4. IDWR has not provided the State Agency Ground Water Users with notice of specific evidence that pertains to their domestic, stockwatering or small (less than 1 cfs) irrigation uses. It is a due process violation for lack of notice to the State Agency Ground Water Users for IDWR to order the State Agency Ground Water Users to curtail and/or provide replacement water on the basis of alleged depletions caused by their ground water uses unless IDWR first gives notice of its quantification of the alleged depletions of the water uses at issue and of their alleged material injury to the Petitioner and also gives the State Agency Ground Water Users a timely and meaningful opportunity to review and rebut IDWR's allegations. See Idaho Code § 67-5242(1)(c) ("all parties shall receive ... [¶] (c) a short and plain statement of the matters asserted or the issues involved"); § 67-5248(2) ("Findings of fact must be based exclusively on the evidence in the record of a contested case and on matters officially noticed in that proceeding"); § 67-5249(2)(c) ("The record shall include: ... [¶] (c) a statement of matters officially noticed, ... [¶] (f) staff memoranda or data submitted to the presiding officer or agency head in connection with consideration of the proceeding"); § 67-5251(4) ("Parties shall be notified of the specific facts or material noticed and the source thereof, including any staff memoranda and data. Notice ... must be provided before the issuance of any order that is based in whole or in part on facts or material noticed. Parties must be afforded a timely and meaningful opportunity to contest and rebut the facts or material so noticed.").

5. It is also a due process violation for the lack of notice to the State Agency Ground

Water Users for IDWR to require replacement water as part of an approved mitigation plan as an alternative to curtailment unless IDWR first gives notice of its quantification of the alleged depletions of the water rights at issue and of the alleged material injury to the Petitioner so that the State Agency Ground Water Users will be given fair notice of how much replacement water is required of them if they choose not to contest the watermaster's determinations that they are subject to the Amended Order. See statutes cited in previous paragraph.

6. The State Agency Ground Water Users petition the Director to:

(a) grant reconsideration of the application of the Order to the water rights listed in Paragraph 1 for lack of notice of the alleged depletions of those water rights and alleged material injury to the Petitioner,

(b) grant a hearing regarding the alleged depletions and alleged material injury to the Petitioner resulting from the ground water uses listed in Paragraph 1,

(c) provide IDWR's position concerning alleged depletions and alleged material injury to the Petitioner resulting from the ground water uses listed in Paragraph 1 to the State Agency Ground Water Users a reasonable time before the hearing (and not less than two weeks before the hearing), and

(d) stay the effectiveness of the Amended Order against the State Agency Ground Water Users' ground water rights listed in Paragraph 1 until:

(i) IDWR has provided the State Agency Ground Water Users with its quantification of (A) the alleged depletions of each of the water rights listed in Paragraph 1, (B) the alleged material injury to the Petitioner for each of the water rights listed in Paragraph 1, and (C) the alleged obligation to provide replacement water or mitigation for each of the water rights listed in Paragraph 1, and

(ii) IDWR has given the State Agency Water Users an opportunity for a hearing at which they can contest those allegations or can propose alternative quantifications and/or assess the amount of replacement water, if any, that they would be responsible for providing if they accepted IDWR's quantification.

2. Petition for Reconsideration, Hearing and Stay Regarding Curtailment or Replacement Water for ITD's Domestic Right

7. The Order, first Ordering Paragraph, page 28, excludes from its operation "ground water rights used for de minimis domestic purposes ... within the limits of ... Idaho Code § 42-111." In contrast, the Amended Order of May 2, 2005, Ordering Paragraph 1, issued in the Surface Water Coalition call, exempts "in-house culinary uses" from the effects of the Amended Order.

8. It is arbitrary, capricious and an abuse of discretion for IDWR to use one standard for domestic and/or culinary water rights not subject to IDWR's Order in this call and another standard for similar water rights not subject to IDWR's Amended Order in the Surface Water Coalition call.

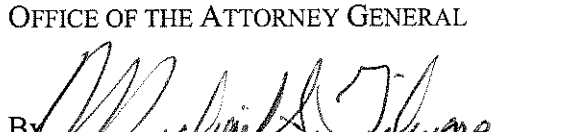
9. The State Agency Ground Water Users petition the Director to:

(a) grant reconsideration and/or grant hearing on the issue of whether ITD's water right No. 37-7457 for domestic purposes at a maintenance shed should be curtailed or forced to provide replacement water under a different standard than used for excluding de minimis water rights than the standard used in the Surface Water Coalition call, and

(b) stay the effectiveness of the Amended Order against ITD's water right No. 37-7457 until the Director's disposition of the State Agency Ground Water Users' Petition for Reconsideration or Hearing, whichever is later.

DATED this 2nd day of June, 2005.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By 
MICHAEL S. GILMORE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June, 2005, I caused to be served a true and correct copy of the foregoing via U.S. Mail to:

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BLUE LAKES TROUT FARM
PO Box 1237
Twin Falls, Idaho 83303-1237

Daniel Steenson
Charles Honsinger
RINGER CLARK
PO Box 2773
Boise, Idaho 83701-2773

North Snake Ground Water District
152 E Main Street
Jerome, Idaho 8338

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Michael S. Gilmore
Deputy Attorney General

ATTACHMENT

file

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WATER DISTRICT 130
C/O IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE ST., STE. 200
TWIN FALLS, ID 83301-3380
TELEPHONE NUMBER (208) 736-3033
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IDWR DIRECTOR
KARL J. DREHER

WATERMASTER
CINDY YENTER
Cindy.Yenter@idwr.idaho.gov

INF	DIR	MADIR	BPIRM	MABPIR	ERM	SBA	TLPS	DDIR	SB	RLA	IRM	DAG/Legal	PAO	DA	AAERO	PTA	TPA	ACT
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STATE OF IDAHO DEPT OF TRANSPORTATION
DIVISION OF HWYS
PO BOX 7129
BOISE ID 83707

RECEIVED
MAY 26 2005
ITD
LEGAL SECTION

RE: Curtailment of Ground Water Rights with Priority Dates Later than December 28, 1973, Located in Water District No. 130, Thousand Springs Area

Affected Right Nos: 37-20852, 37-7372, 37-7457, 37-8005D

Dear Water Right Holder:

The records of the Idaho Department of Water Resources (IDWR) and Water District 130 indicate that you are the holder of one or more consumptive ground water rights bearing a priority date later than December 28, 1973. **On May 19, 2005, the Director of IDWR issued an order directing the watermaster of Water District 130 to notify holders of consumptive ground water rights with priority dates later than December 28, 1973 that their water rights will be subject to curtailment unless they are participants in an approved mitigation plan or plans to offset depletions of flows to Alpheus Creek caused by their ground water pumping.**

The order was issued in response to a call for delivery of water rights held or used by the Blue Lakes Trout Farm, Inc. (Blue Lakes). These water rights authorize the diversion of water from Alpheus Creek located north of Twin Falls. The Director determined that diversion and use of ground water within Water District 130 under water rights with priority dates junior to December 28, 1973 causes material injury to Blue Lakes' December 28, 1973 priority water right. (*See* Order issued May 19, 2005, *In the Matter of Distribution of Water to Water Rights Nos. 36-2356A, 36-7210, and 36-7427).*

The order affects consumptive ground water rights bearing priority dates later than December 28, 1973, including ground water rights for irrigation, commercial, industrial, municipal, non-exempt domestic use, and other consumptive uses. Non-consumptive uses and culinary in-house uses of water are not subject to curtailment.

The Director's order also affects certain irrigation rights bearing priority dates of December 28, 1973 or earlier if those rights were decreed as "enlargement" rights in the Snake River Basin Adjudication (SRBA). An enlargement right represents a use that was enlarged from an existing valid water right without the benefit of a water right permit, but was later claimed in the SRBA and decreed by the SRBA court with a priority as of the date of enlargement but subordinated to all other valid water rights with priority dates earlier than April 12, 1994

The Director's order requires phased curtailment of ground water rights if plans for mitigation or replacement water are not submitted by 5:00 p.m., May 31, and/or not approved by the Director by June 6, 2005. Phased curtailment of ground water rights will begin on June 7, 2005 in accordance with the following schedule given in Provision 3 of the Order .

Priority Date of Ground Water Irrigation Rights	Date Ground Water Irrigation Rights to be Curtailed
July 31, 1987 and later (including enlargement rights)	June 7, 2005
February 25, 1980 and later	April 1, 2006
March 9, 1977 and later	April 1, 2007
June 10, 1975 and later	April 1, 2008
December 28, 1973 and later	April 1, 2009

To avoid curtailment, mitigation shall be provided as follows:

1) **For Ground Water Irrigation Rights**
If you own a ground water irrigation right(s) describing a point(s) of diversion within the boundaries of either the North Snake Ground Water District or the Magic Valley Ground Water District, you must participate in the mitigation plan of the district in which your ground water point(s) of diversion is located.
If you own a ground water irrigation right(s) and are not a member of a ground water district, or if your ground water point(s) of diversion are located outside the boundaries of a ground water district, you are required to participate in mitigation provided by the ground water district nearest your ground water point(s) of diversion. Right holders whose points of diversion are located outside of the boundaries of the ground water district may either join the nearest ground water district as a full member or, if not, you must participate as a non-member in the mitigation plan provided by the ground water district nearest to your point(s) of diversion.

Ground water districts or irrigation districts that represent holders of ground water rights for consumptive uses having priority dates later than December 28, 1973 must submit to the Director of IDWR by 5:00 pm on May 30, 2005, a mitigation plan or plans, a replacement water supply, or substitute curtailment of ground water rights in accordance with Provisions 1 and 3 of the Director's Order signed on May 19, 2005.

2) **For Non-Irrigation Ground Water Rights**
Holders of *consumptive** non-irrigation ground water rights (commercial, domestic, industrial, municipal, or stockwater) with priority dates later than December 28, 1973 that are not members of a ground water district or irrigation district are not subject to curtailment in 2005 but must provide one of the following actions on or before June 1, 2006 to avoid curtailment at that time:
   a) Join a ground water district as either a full member or as a non-member participant for mitigation purposes only.
   b) Obtain a water right or rights with a priority date earlier than December 28, 1973 pursuant to a water right transfer or temporary change (Section 42-222 and 42-222A, Idaho Code).
   c) Holders of ground water rights for domestic and municipal purposes may use their right of eminent domain to acquire water rights to avoid curtailment (see Article 15, Section 3 and Article 1, Section 1, Idaho Constitution).

* A *consumptive* right is one that does not meet the exemption criteria of Section 42-111, Idaho Code.

Recipients of this notice are also advised that two additional delivery calls are pending before the Director. These calls were filed by Clear Springs Foods, Inc. (Clear Springs Foods), alleging injury to water rights having priority dates of February 4, 1964 and July 8, 1969. Diversion and use of ground water under rights junior in priority to these dates may cause material injury to the Clear Springs Foods water rights, and orders issued by IDWR may require curtailment or mitigation of some or all of the same water rights determined to cause material injury to Blue Lakes. If other orders are issued that affect your water right(s), you will receive a second notice.

A copy of the order signed by the Director dated May 19, 2005 can be found on the main page of IDWR's website at: www.idwr.idaho.gov. At the website, you can also review maps showing boundaries of ground water districts, and find address and phone numbers for the districts. If you have questions concerning the order and this correspondence, please contact the Water District 130 office in Twin Falls at 208-736-3033, or contact the IDWR state office in Boise at 208-287-4800.

Sincerely,

Cindy Yenter

Cindy Yenter
Watermaster, Water District 130

cc: Karl J. Dreher, Director, IDWR