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**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

| | |
|---|---|
| IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY<br><br>HEARING ON DIRECTOR'S MAY 2, 2005 AMENDED ORDER | **SURFACE WATER COALITION'S PETITION FOR RECONSIDERATION OF *THIRD SUPPLEMENTAL ORDER AMENDING REPLACMENT WATER REQUIREMENTS FINAL 2005 & ESTIMATED 2006*** |

A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Company (collectively hereafter referred to as the "Surface Water Coalition" or "Coalition"), by and through counsel of record, hereby petitions the Director to reconsider the June 29, 2006 *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006*.

## BACKGROUND

On June 2, 2006, the Gooding County District Court found the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("Rules") (IDAPA 37.03.11) to be unconstitutional. *See AFRD #2 et al. v. IDWR et al.* (Case No. CV-2005-600).[1] On June 9, 2006 the City of Pocatello moved for a stay of this proceeding noting that the Court's Order "presents the question of whether the Director can and should proceed to a hearing in this matter, because the hearing is based upon the CMR." *Pocatello Motion* at 2. On June 12, 2006 IGWA filed a response supporting Pocatello's motion. On June 13, 2006 the Coalition filed a response noting that it did not oppose staying the administrative case for the hearing on the Director's May 2, 2005 *Amended Order*. Reclamation joined in the Coalition's response. IGWA then responded to the Coalition's response and claimed that "all current proceedings should be stayed" noting that the "Department's approach to these matters is called into question by Judge Wood's recent order." *IGWA Reply* at 2. On June 14, 2006 the Coalition sent the Director a letter requesting the following:

> Accordingly, the Coalition hereby reaffirms its prior request that the Department, Director and watermasters perform their legal duties to administer

[1] Due to the length of the Court's order (127 pages), the Coalition is not submitting a copy with this petition. However, the Coalition notes that the order is publicly available both at the Gooding County Courthouse and on the Department's website at http://www.idwr.idaho.gov/Calls/Water%20Call%20Lawsuits/default.htm. The Coalition requests the Department to include a copy of the order in the record for this administrative case.

> hydraulically connected ground water rights according to priority. The Coalition further requests that the Director take steps to manage the ESPA in a comprehensive manner that looks beyond a single irrigation season. Any administrative action must be analyzed in conformance with recent judicial action voiding the Department's Rules.
>
> * * *
>
> As you are aware from prior requests, timing is critical for purposes of properly distributing water to the Coalition members' senior water rights and for planning to meet landowners' and shareholders' summer irrigation demands. Any additional delay in administering water rights in 2006 stands to leave the Coalition members' senior water rights unfulfilled, as happened in 2005.

*Coalition June 14, 2006 Letter* at 3, 4.

On June 14, 2006 the Director issued an *Order Regarding Pocatello's Motion for Stay and Fourth Amended Scheduling Order.* In analyzing Pocatello's motion for stay, the Director stated that "entry of a stay at this juncture would be premature because a final judgment in [*AFRD #2 et al. v. IDWR et al.*] has not been entered by the court." *June 14, 2006 Order* at 2. The Director denied Pocatello's motion without prejudice, extended the deadlines in the administrative case by thirty days, and noted that "[i]f circumstances in the judicial action change, and upon motion by the parties, the Director should revisit staying the administrative proceeding." *Id.* at 5, 6.

On June 29, 2006 the Director issued the *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006.* In the June 29, 2006 Order the Director stated the following with respect to the Gooding County District Court litigation over the Department's conjunctive management rules:

> While on June 2, 2006, Judge Barry Wood of the Fifth Judicial District of the State of Idaho issued his *Order on Plaintiffs' Motion for Summary Judgment* (American Falls Reservoir District #2 et al. v. Idaho Department of Water Resources and Karl J. Dreher in his official capacity as Director, Case No. CV-2005-0000600, it is not possible at this time to anticipate whether and how such judgment may affect this proceeding.

*June 29, 2006 Order* at 5.

On June 30, 2006 the Gooding County District Court entered its *Judgment Granting Partial Summary Judgment* in Case No. CV-2005-600. *See* Exhibit A. The Judgment reaffirmed the Court's June 2, 2006 Order that declared the Department's Rules unconstitutional. The Court's judgment was certified as final on July 11, 2006. *See* Exhibit B.

## ARGUMENT

### 2005 Administrative Proceeding

**The Administrative Hearing and Fourth Amended Scheduling Order Must Be Stayed or Vacated and the Director Must Reconsider the June 29, 2006 Order.**

The Gooding County District Court invalidated the Department's conjunctive management rules on June 2, 2006. A judgment has been entered and certified. Consequently, the Director's May 2, 2005 *Amended Order*, which purported to conduct water right administration in 2005 based upon the Rules, and the subsequent orders, including the June 29, 2006 Order, must be revisited and revised consistent with Idaho law. Although the Coalition and other parties requested a hearing on the May 2, 2005 *Amended Order*, and the Director rescheduled the administrative case on June 15, 2006, the underlying proceeding is based upon the Department's invalidated conjunctive management rules. Therefore, continuing with the present administrative case at this point, including completing discovery and expert rebuttal reports, and proceeding with a formal administrative hearing is unwarranted, a waste of the parties'' resources and contrary to Idaho law. Specifically, since the June 29, 2006 Order does not comply with Idaho's constitution and water distribution statutes, the Director has an obligation to reconsider that order consistent with the Gooding County District Court's order and judgment.

Until the Director reissues an order for 2005's water right administration that is consistent with Idaho law, the current hearing and accompanying schedule must be stayed or vacated.[2]

## 2006 Water Right Administration

### The Director Must Reconsider the June 29, 2006 Order and Administer Hydraulically Connected Junior Priority Ground Water Rights Pursuant to Idaho Law, Including the Gooding County District Court's Order and Judgment.

The Coalition members have repeatedly requested the Director and the respective watermasters to fulfill their legal duties and distribute water by priority to their senior surface water rights according to Idaho's constitution and water distribution statutes. The Gooding County District Court's recent order and judgment leave no doubt that the Director's present method for administering water rights under the Department's conjunctive management rules is unconstitutional. The Court certified the June 30, 2006 judgment as final pursuant to I.R.C.P. 54(b), at the request of the State of Idaho and based upon representations to the Court at the July 11th hearing that the Director is subject to the Court's jurisdiction and must follow the Court's judgment. Although the Court found the Department's Rules to be unconstitutional over a month ago in its June 2nd Order, a point raised in the Coalition's June 14th letter to the Director, the substance of that decision was ignored, and the Director proceeded to use the Rules in issuing a decision for 2006 water right administration (*See* June 29, 2006 Order). Now, some 40 days later, the Coalition members find themselves well into the 2006 irrigation season, and their respective landowners and shareholders have yet to receive any indication that lawful water right administration will be performed by the Director and Department this year. The Director and Department must honor their representations to the Gooding County District Court and fulfill

[2] To the extent the Director requires a new formal motion for stay regarding the contested case on the May 2, 2005 *Amended Order*, this petition may be considered as such a motion.

their legal duties to administer water rights consistent with Idaho's constitution and water distribution statutes.

As noted in the June 14th letter, the Coalition represents that the Director is in possession of the necessary information from prior submittals in the May 2, 2005 *Amended Order* administrative case, prior decrees and licenses, and from the Director's Reports for the Coalition members' water rights to begin lawful water right administration in 2006. To the extent that the Director claims that the Coalition "has not shown such need" for the water represented by their previously decreed and licensed water rights, the Coalition would refer the Director to those prior decrees and licenses and the Department's own SRBA recommendations, which are binding on the Director for purposes of administration, as well as the attached portion of an expert report completed by Charles E. Brockway of Brockway Engineering PLLC that analyzes the Coalition members' "duty of water" and water demands. *See Affidavit of Charles E. Brockway.*

The Director must reconsider the June 29, 2006 Order with respect to water right administration in 2005 and 2006. The Department's conjunctive management rules are unconstitutional and cannot be used as the basis for lawful water right administration. Timely administration is critical for irrigation purposes, and refusing to comply with the Court's Order, and now Judgment, prejudices the Coalition members and their respective landowners and shareholders.

## CONCLUSION

The Coalition requests the Director reconsider the June 29, 2006 Order with respect to 1) the administrative case covering water right administration in 2005, i.e. the hearing on the May 2, 2005 *Amended Order*; and 2) water right administration for 2006. Finally, until the prior order

is reconsidered consistent with Idaho law, the current schedule and hearing on the May 2, 2005 *Amended Order* must be stayed or vacated since there is no legal basis to proceed with a contested case that is predicated upon unconstitutional rules.

DATED this 12th day of July, 2006.

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Attorneys for A & B Irrigation District and Burley Irrigation District

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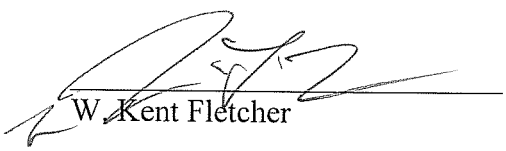

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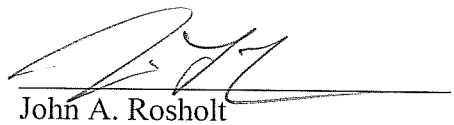

John A. Rosholt
John K. Simpson
Travis L. Thompson

## CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2006, I served a true and correct copy of the foregoing *Surface Water Coalition's Petition for Reconsideration of Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006* on the following by the method indicated:

Via Email and U.S. Mail

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# EXHIBIT "A"

FILED A.M. P.M. 9:00
JUN 30 2006
Clerk of the District Court
Gooding County, Idaho

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF GOODING**

| | |
|---|---|
| AMERICAN FALLS RESERVOIR DISTRICT #2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY,<br><br>Plaintiffs,<br><br>v.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho, and KARL J. DREHER, in his official capacity as Director of the Idaho Department of Water Resources,<br><br>Defendants. | Case No. CV-2005-0000600 |

## JUDGMENT GRANTING PARTIAL SUMMARY JUDGMENT

This Judgment Granting Partial Summary Judgment is an attempt to summarize the 127 page Order, filed June 2, 2006, on Plaintiffs' Motions for Summary Judgment

("Order"). To the extent that this Judgment is incomplete and/or at variance with any portion of the Order, the actual language of the Order is to govern.[1]

This cause, having come on for hearing upon the Complaint, Petitions for Intervention, and Motions for Summary Judgment by Plaintiffs American Falls Reservoir District #2, A & B Irrigation District, Burley Irrigation District, Minidoka Irrigation District, and Twin Falls Canal Company, and Plaintiff-Intervenors Clear Springs Foods, Inc., Thousand Springs Water Users Association, Idaho Power Company, and Rangen, Inc., the parties having been heard, and the Court being fully informed herein and having issued its June 2, 2006, Order, summarily stated this Court hereby ORDERS, ADJUDGES, DECREES AND DECLARES that, for the reasons set forth in the Order:

1. The Rules of Conjunctive Management of Surface and Ground Water Resources (hereinafter "CMR's") are constitutionally deficient for failure to integrate the required legal tenets and procedures regarding burden of proof and evidentiary standards.

2. The Director acted outside his legal authority in adopting the CMR's, which are not in accord with Idaho's version of the prior appropriation doctrine.

3. The factors and policies contained in the CMR's and to be applied by the Director can be construed consistent with the prior appropriation doctrine – albeit – with due caution as to the context in which such are used (understanding that some are not used in the context of curtailment cases).

4. The CMR's are facially unconstitutional due to the omission of necessary components of the prior appropriation doctrine, including: presumption of injury, burden of proof, objective standards for review, and failure to give due effect to the partial decree for a senior water right.

5. The CMR's exclusion of domestic water rights from ground water sources is both facially unconstitutional and is in violation of Idaho Code §§ 42-602, 42-603, and 42-607.

6. The "reasonable carryover" provision of the CMR's is unconstitutional, both facially and as threatened to be applied.

---

[1] This Court recognizes that some parties have requested this Judgment Granting Partial Summary Judgment to be issued with an I.R.C.P. 54(b) certification. Because all proceedings on the Plaintiffs' January 14, 2005 delivery call are not yet completed, this Court will not issue such a certificate without an express determination that there is no just reason for delay and upon an express direction for the entry of the judgment as a final judgment upon which an appeal may be taken. If the parties seek a certificate, a hearing will need to be held to ascertain the propriety for such a certificate. In an effort to expedite this process, and if the parties are interested, this Court has already dedicated time for such a hearing on its law and motion calendar on July 11, 2006 at 1:00 p.m in Gooding County.

7. The CMR's disparate treatment of the holders of junior ground water rights and junior surface water does not violate Equal Protection; serves a legitimate state interest; and is rationally related to that interest.

8. Under CMR's the untimely administration of water rights and in particular irrigation rights, constitutes an unconstitutional taking without just compensation.

9. Each party shall bear its own fees and costs.

IT IS SO ORDERED.

Dated: June 30, 2006

Signed: B Wood
Barry Wood, District Judge

## Certificate of Mailing

I, Cynthia R. Eagle-Ervin, Deputy Clerk, do hereby certify that the foregoing Judgment Granting Partial Summary Judgment was filed this 30th day of June, 2006 and a true and correct copy was to counsel of record this 30th day of June, 2006, US Mail, postage prepaid as follows:

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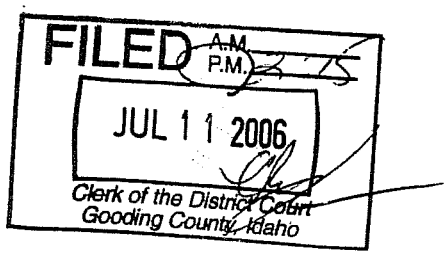
CLERK OF THE DISTRICT COURT

By: _____
Deputy Clerk

CERTIFICATE OF MAILING

# EXHIBIT "B"




IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

| | |
|---|---|
| AMERICAN FALLS RESERVOIR DISTRICT NO. 2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY,<br><br>Plaintiffs, and<br><br>RANGEN, INC., CLEAR SPRINGS FOODS, INC., THOUSAND SPRINGS WATER USERS ASSOCIATION, and IDAHO POWER COMPANY,<br><br>Intervenors,<br><br>v.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL J. DREHER, its Director,<br><br>Defendants, and<br><br>IDAHO GROUND WATER APPROPRIATORS, INC.,<br><br>Intervenors. | **Case No. CV-2005-600**<br><br>**ORDER CERTIFYING JUDGMENT GRANTING PARTIAL SUMMARY JUDGMENT UNDER RULE 54(b)** |

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED July 11, 2006.

R. BARRY WOOD
District Judge

Order certifying judgment

~~DECLARATORY JUDGMENT~~

## CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of June, 2006, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

| | |
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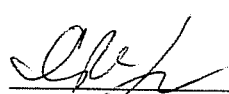

Deputy Clerk