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DEPARTMENT OF
WATER RESOURCES

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For the U.S. Department of the Interior, Bureau of Reclamation

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF GROUND WATER DISTRICTS' APPLICATION FOR APPROVAL OF MITIGATION PLAN FOR THE AMERICAN FALLS REACH OF THE SNAKE RIVER	))))))))	**RECLAMATION'S MOTION TO DISMISS MITIGATION APPLICATION OR IN THE ALTERNATIVE TO REQUEST HEARING TO BE RESET**

COMES NOW, the U.S. Bureau of Reclamation (Reclamation) and hereby moves for an order dismissing the *Application for Approval of Mitigation Plan AFR (AMP)* submitted by the American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, and South West Irrigation District (Applicants).

Reclamation files this motion with its protest of the above-captioned case in order to protect its water rights and interests as provided in its protest. *See* Reclamation's Protest, *In the Matter of Ground Water Districts' Application for Approval of Mitigation Plan For the American Falls Reach of the Snake River* (filed Mar. 21, 2005).

Reclamation respectfully submits, as explained below, that the hearing in the above-

captioned matter should be vacated and rescheduled to occur at least 10 days after the date of protest in accordance with the provisions of Idaho Code §§ 42-222(5) and 42-203A. As it stands now, the Idaho Department of Water Resources (IDWR) has not complied with the *minimum* due process requirements under Idaho law.

In addition, the *AMP* is legally defective, facially and substantively, under IDWR's Rules of Conjunctive Management.[1] Since the *AMP* is substantively defective, if IDWR accepts it for hearing, the hearing will be only a means "to cure" a defective plan. And it is questionable that a hearing could remedy the numerous issues that render the plan flawed.

Moreover, if IDWR were to "approve" the *AMP* as written, the *AMP* will not provide Reclamation sufficient procedural and substantive due process notice prior to affecting Reclamation's property interests that are at stake in this proceeding. As a consequence, IDWR must dismiss the *AMP* and require it to be resubmitted once it satisfies the requirements of the Conjunctive Management Rules to ensure a fair and meaningful process.

Alternatively, if its motion to dismiss is denied, Reclamation requests that IDWR reset the hearing to occur after a "material injury" determination is made in the surface delivery call as explained below.

BACKGROUND

On February 8, 2005, Applicants filed the "Mitigation Plan" for approval under the IDWR's Conjunctive Management Rules, IDAPA 37.03.11. Applicants' members are ground water pumpers located within ground water districts within the Eastern Snake Plain Aquifer

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[1]The United States does not waive any rights or defenses with regard to the Conjunctive Management Rules.

(ESPA). *Id. at 2.* The purpose of the Mitigation Plan is to allow diversion and beneficial use of Applicants' ground water rights, which otherwise might be curtailed upon a determination of material injury to senior surface water rights, within the Near-Blackfoot to Minidoka reach of the Snake River. *See Ground Water Districts' Mitigation Plan for American Falls Reach of the Snake River* at 1.

On January 14, 2005, 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 (Surface Coalition) sought administration of water rights by priority within Water District No. 120 and sought a delivery of water to their senior natural flow and storage rights pursuant to Idaho law (Delivery Call). The Idaho Ground Water Appropriators, Inc., (IGWA) filed a petition to intervene in that proceeding on February 3, 2005, which IDWR granted on February 14, 2005. Idaho Power Company, Idaho Dairyman's Association, and Reclamation all have filed petitions to intervene in the call for water right administration for priority.

The Director of IDWR issued an initial order on February 14, 2005, in response to the Surface Coalition's Delivery Call. In that order the Director initiated a contested case proceeding and ordered that he will consider the Delivery Call as a "call for administration and curtailment of junior priority ground water rights in Water Districts No. 120 and 130 that are alleged to be causing injury to the senior surface water rights of the Surface Water Coalition." IDWR Order, *In the Matter of the Distribution of Water to Various Water Rights Held by or For the Benefit of A&B Irr. Dist., American Falls Res. Dist. #2, Burley Irr. Dist.,Milner Irr. Dist., Minidoka Irr. Dist., North Side Canal Co., and Twin Falls Canal Co.* (Feb. 14, 2005).

IDWR published its "Notice of Application for Approval of Mitigation Plan" on March 3-10 in the *Time-News*. In the newspaper notice, the Director stated that protests are due on or before March 21, 2005, and that the hearing is tentatively scheduled for March 22-25, 2005.

MOTION TO DISMISS THE *AMP*

A. IDWR Will Exceed its Statutory Authority if the Hearing Commences Immediately After the Protest.

Reclamation moves to dismiss the *AMP* pursuant to IDAPA 37.01.01.260 and Conjunctive Management Rule IDAPA 37.03.11.43. The hearing on the Mitigation Plan must occur at a *minimum* 10 days after the date of protest as required by I. C. §§ 42-222(5) and 42-203A. Since the protest deadline was March 21, 2005, a hearing cannot commence any earlier than April 1, 2005. If this ten-day time frame is not afforded to Reclamation for hearing preparation, then IDWR has not complied with the *minimum* due process that Idaho law mandates for a protestant's benefit. As a consequence, if IDWR approves the Mitigation Plan, a court may nonetheless void the *AMP* for exceeding its minimum statutory time for a hearing. *Friends of Farm to Market v. Valley County, Idaho Board of Commissioners,* 137 Idaho 192, 46 P.3d 9 (2002)(a court may overturn a board's decision where its findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon an unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious or an abuse of discretion).

B. IDWR Has Also Not Complied with Other Idaho Procedural And Substantive Due Process Requirements.

Reclamation also asserts that the *AMP* fails to meet the substantive requirements for "Mitigation Plans" under IDWR's Conjunctive Management Rules. If IDWR adopts the mitigation plan, Reclamation will be denied both procedural and substantive due process rights to which it is entitled.

Reclamation holds state licensed water rights:[2] 01-211A, 01-214A, 01-217, 01-218, 01-219, 01-2016, 01-4024, 01-4025, 01-2040, 01-284, 01-2064, 01-2068, 01-4052, 01-4055, 01-4056, 01-4057, 01-10042, 01-10043, 01-10044, 01-10045, and 01-10053 that would be affected by the *AMP*. *See Reclamation Protest* (filed Mar. 21, 2005). Article 1, Section 13 of the Idaho Constitution protects Reclamation's right to be heard before its interests are adjudged by a state agency. *Duggan v. Potlatch Forests,* 92 Idaho 262, 441 P.2d 172 (1968) *quoting Lovell v. Lovell,* 80 Idaho 251, 328 P.2d 71 (1958). State law requires, therefore, not only that IDWR conduct a fair decision making process and have a fair hearing procedure, *Gay v. County Commissioners,* 103 Idaho 626, 651 P.2d 560, 562-63 (Id Ct. App. 1982)(right to present and rebut evidence are fundamental elements of procedural due process), but that IDWR ensures that Reclamation receives notice and an opportunity to be heard at a "meaningful time and in a meaningful manner," *State v. Rhoades,* 121 Idaho 63, 72, 822 P.2d 960, 969 (1991) *and Castanada v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1988); and *see Farris v.*

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[2]Congress directed Reclamation through Section 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372 & 383, to follow state law "in the control, use, and distribution" of its developed irrigation supply. As a result, Reclamation applied for and received state based licenses from the IDWR, or its predecessor the Idaho Reclamation Service, and Reclamation seeks to protect its water rights under state law. However, Reclamation does not waive any claims or defenses it may have under federal law by proceeding through state law contested case processes.

Twin Falls, 81 Idaho 583, 347 P.2d 996 (1959)(substantive due process requires of proceedings that deprive one of life, liberty or property to not be so inadequate to be characterized as arbitrary).

As Reclamation will show, the *AMP* is defective on its face and, as a consequence, it sets the stage for a procedurally and substantively unfair hearing. IDWR's Conjunctive Management Rules require that when a mitigation plan is submitted, it must: "identify the water rights for which benefit the mitigation is proposed" and "identify the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of any such supplies." IDAPA 37.03.11.43.01(b) and (c). The rules state that "this information allows the Director *to evaluate the factors* set forth in Rule Subsection 043.03." *Id.* at 43.01(d)(emphasis added).

The *AMP* does not identify the water rights that will benefit from the mitigation proposed, nor does it identify the water rights proposed to be used for mitigation. If the Director cannot evaluate the factors on its face because the *AMP* lacks that information, Reclamation cannot be expected to present evidence at a hearing to overcome or rebut the nonexistent information.

The Conjunctive Management Rule 43 requires the Director to evaluate 15 delineated factors (*see below*) with respect to the water rights to be mitigated and those that will be benefitted. *Id.* The fifteen factors in Rule 43.03 that are required to be addressed are:

> a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.
>
> b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan

must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan.

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal.

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors.

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use.

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.

I. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.

j.. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply.

m. Whether the mitigation plan provides for further participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan.

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies.

o. Whether the petitioners and respondents have entered into an agreement on an

acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

IDAPA 37.03.11.43.03(a)-(o).

However, if the *AMP* describes no water rights, the Director cannot reasonably evaluate the submitted mitigation plan to determine what effects it will have as required by the rule. Likewise, Reclamation cannot stand ready to present evidence to clarify, confirm, or rebut that which does not exist. Furthermore, the *AMP* provides no substantive notice to Reclamation with regards to most of the enumerated factors. The *AMP* provides:

- no confirmation that water rights have been utilized in compliance with Idaho Law as required by factor (a);
- no details on the time and place and replacement of water to ensure the depletive effects of the ground water withdrawals are offset against the water available in the surface or ground water source at such time and place necessary to satisfy the rights of diversion as required by factor (b);
- no greater coverage than for a one year period, despite factor (c) requiring that the plan cover the entire "time of shortage," thus failing to prevent or to mitigate material injury now being suffered and expected to be suffered by Reclamation.
- no new aquifer recharge as required by factor (d), although the *AMP* expects to piggyback off the state's aquifer recharge plan;
- no new hydrologic model as suggested by factor (e), although it uses IDWR's model for hydrologic purposes, but the Applicants then fail to use IDWR's model to identify any impacts/benefits that would occur that are greater than the first year's improvements to the AFR reach associated with curtailment;
- no information on accepted "aquifer characteristics" as required by factor (f) except as may be incorporated into IDWR's model;
- no calculation as to the "consumptive use component" of ground

water diversions as required by factor (g);

- no certainty as to replacement water sources as required by factor (h) (the *AMP* does not have their proposed water sources or the means to utilize their replacement water sources under contract);

- no information on whether any of the water rights in the *AMP* will enlarge the rate of diversion, seasonal quantity, or time of diversion under any water right being proposed for mitigation as required by factor (I);

- no information on whether the *AMP* is consistent with the conservation of water resources, the public interest or injures other water rights, or if the *AMP* would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge as factor (j) requires;

- no information on the "mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply" as required by factor (l);

- no information on whether Applicants intend to divide the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies as suggested by factor (n);

Since the Applicants have not provided the information required under either Rule 43.01 or 43.03, IDWR should not accept the *AMP* for processing. Without this information, any requirement that Reclamation confirm, clarify, or rebut the *AMP* at hearing (and with no information at hand to prepare for hearing), leaves Reclamation at an extreme disadvantage with no meaningful and fair opportunity to protect its property interests prior to IDWR approving and implementing the *AMP*. As a result, IDWR must dismiss the *AMP* because it is wholly inadequate for processing under Idaho's Conjunctive Management Rules and Idaho's due process requirements.

C. The Conjunctive Rules Require That Material Injury Must Be Determined First in the Delivery Call

According to IDWR's Conjunctive Management Rules, a junior ground water user may submit a "Mitigation Plan" or a document that "identifies actions and measures to prevent, or compensate holders of senior-priority water rights for **material injury** caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply." IDAPA 37.03.11.10.15 (emphasis added). The Director of IDWR may approve the plan if it is in compliance with Conjunctive Management Rule 43, *id.*, and if the Director has already made a determination of "material injury" to a senior water user consistent with Idaho law "as set forth in Conjunctive Management Rule 42." IDAPA 37.03.11.10.14 (definition of Material Injury). Rule 42 sets out eight different factors that the Director must consider in determining whether a holder of a water right is suffering material injury. IDAPA 37.03.11.42.01

The Conjunctive Management Rules provide, however, that ***once*** a delivery call is made, it takes precedence over other proceedings. The rules state that:

> **When a delivery call is made by the holder of a senior-priority water right** (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, **the Director, through the watermaster, shall**:
>
> > a. **Regulate the diversion and use of water** in accordance with the priorities of rights of the various surface or ground water users....

IDAPA 37.03.11.40.01(a)(emphasis added). Thus, Rule 40, by the use of the word ***shall,*** requires

the Director of IDWR to regulate "the diversion and use of water according to priorities." The only exception to this regulation is if the Director decides to phase in curtailment to lessen the economic impact or to approve a mitigation plan that has addressed the "material injury" that has occurred. IDAPA 37.03.11.40.01(a)&(b).

The contested case proceeding in the Surface Water Coalition's Delivery Call precedes that of the mitigation plan. The Surface Coalition filed a letter on January 14, 2005 requesting administration of water rights by priority. The Applicants filed *the AMP* on February 8, 2005 for approval. Under IDWR's Conjunctive Management Rules, the Director has no discretion to consider the Mitigation Plan prior to deciding the Delivery Call. He must first address the Surface Water Coalition's Delivery Call and determine if they are suffering material injury. If there is material injury occurring, the Director of IDWR can either phase in curtailment or approve a mitigation plan that remedies the injury that is occurring to the senior water rights.

CONCLUSION AND REQUEST FOR RELIEF

Reclamation requests a hearing on its motion to dismiss. Reclamation also requests that, as explained herein, IDWR should dismiss the *AMP* to: 1) ensure that Reclamation is provided a fair and meaningful opportunity to protect its water rights, and 2) to allow the Director time to determine the extent of "material injury" occurring to Reclamation's water rights prior to processing the *AMP*.

For IDWR to do otherwise, and to process or approve the *AMP* first, places the cart before the horse. When water supplies are inadequate to meet senior water rights, the prior appropriation doctrine requires either curtailment of water rights or a definitive mitigation plan

that mitigates the material injury occurring to the senior rights. However, the *AMP* proposes to continue pumping based upon inadequate and deficient information, and wishes to either provide replacement water at a time when no water is available for that use, or to curtail its acreage for a limited amount of days without providing any certainty that the Applicants are actually mitigating the length and time needed to address the material injury caused by the rest of year pumping.

Respectfully Submitted,

Kathleen Marion Carr
For the U.S. Bureau of Reclamation

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of March 2005, I served a true and correct copy of the foregoing **RECLAMATION'S MOTION TO DISMISS MITIGATION APPLICATION OR IN THE ALTERNATIVE TO REQUEST HEARING TO BE RESET** on the following by the method indicated:

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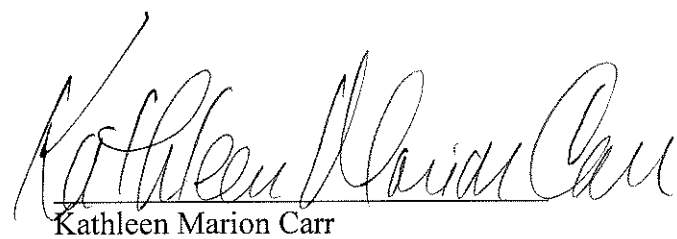

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