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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 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	**IDAHO DAIRYMEN'S ASSOCIATION'S COMBINED PETITION FOR RECONSIDERATION AND PETITION FOR HEARING REGARDING THE DIRECTOR'S MAY 2, 2005 ORDER**

COMES NOW Petitioner Idaho Dairymen's Association, by and through undersigned counsel of record, and pursuant to Idaho Code Sections 67-5246(4) and 42-1701A(3), and IDAPA Sections 37.01.01.740.02(a) and (b), submits this Combined Petition requesting reconsideration of the Director's May 2, 2005 Order, and requesting a hearing.

This Combined Petition reinforces and restates the Idaho Dairymen's Association's position as presented in its May 3, 2005 Combined Petition.

I.
BACKGROUND

On January 14, 2005, the Department of Water Resources was served with a letter and a petition from the A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, Northside Canal Company, and Twin Falls Canal Company (collectively referred to as the "Surface Water Coalition" or the "SWC"). The letter and petition sought administration and curtailment of ground water rights within Water District No. 120, the American Falls Ground Water Management Area, and areas of the Eastern Snake Plain Aquifer ("ESPA") not within organized water districts or ground water management areas, junior in priority to the water rights held by members of the SWC.

On February 14, 2005, the Director issued an Order providing an initial response to the SWC's letter and petition. That February 14, 2005 Order designated the SWC's delivery call as a contested case, and granted the Idaho Ground Water Appropriators, Inc.'s ("IGWA") petition to intervene. The Order also stated that the Director would make findings regarding the extent of the SWC's likely injury, if any, subsequent to April 1, 2005 after the U.S. Bureau of Reclamation and the Army Corps of Engineers released their joint operation forecast of inflows from the Upper Snake River basin for the period between April 1 and July 31, 2005.

On February 17, 2005, the Idaho Dairymen's Association ("IDA") filed its Petition to Intervene in this matter. On April 6, 2005, the Director issued an Order granting the IDA's petition, among other things, finding that IDA members hold water rights that might be

subject to curtailment as a result of the SWC's delivery call. As such the Director found that the IDA, on behalf of its members, has a direct and substantial interest in these proceedings that likely would not be represented by the parties already part of these proceedings.

On April 19, 2005 the Director issued his Order stating his findings of fact and conclusions of law regarding the determination and extent of the SWC's likely injury, and the merits of the SWC's delivery call. The April 19, 2005 Order quantified the SWC members' likely injury during the 2005 irrigation season, and called for the curtailment of certain ground water users absent those users' creation and filing of approved mitigation plans for the 2005 irrigation season.

On May 2, 2005, the Director issued a subsequent Order amending the Director's April 19, 2005 Order, clarifying Finding No. 127. This May 2, 2005 Order additionally revises Finding Nos. 124 through 127, and No. 129; makes additional Finding Nos. 138 through 131; corrects number of Conclusions of Law Nos. 47 through 53; and lastly, revises portions of Paragraph No. 9 in the Amended Order

II.
CONTESTED POINTS REGARDING THE DIRECTOR'S APRIL 19, 2005 ORDER

A. Factual Issues

In response to the SWC's delivery call, the IDA submitted dairy surveys to its members in order to compile data regarding its members' uses of their commercial/stockwater water rights. *Affidavit of Bob Naerebout* ("Naerebout Aff.") at ¶ 2. The data compiled from the surveys was then submitted for further analysis to Brockway Engineering, PLLC, and also to Mr. Bob Ohlensehlen of Nutrient Management Solutions, LLC. *Id.* at ¶ 3. These firms then analyzed the data in terms of spring and stream reach gain depletions attributable to IDA member use of

their commercial/stockwater rights, as well as in terms of member consumptive water use and return to the system, respectively. *Id.*

The data elicited through the IDA member surveys, and the results extrapolated from that raw data by Brockway Engineering and Nutrient Management Solutions, LLC, present additional factual information crucial to the Director's curtailment determination, and the IDA requests that a hearing be held so that its consultants can present this critical information for the Director's consideration. *Id.* at ¶ 4.

1. Brockway Engineering Modeling Results

Using the ESPA Enhanced Ground Water Model, Brockway Engineering inputted the data generated by the IDA member surveys and geographic location data in order to determine the total spring and stream reach gain depletions attributable to IDA members' commercial/stockwater water right use within the ESPA. The results of those model runs show, on a spring by spring and reach by reach basis, that the total depletive impact of IDA member commercial/stockwater use throughout the ESPA amounts to 7,753 acre-feet of water annually ("AFA"). Of that 7,753 AFA depletion, 5,754 AFA is attributable to the Hagerman Springs complex downriver from the geographic area that is subject to the SWC's delivery call. Thus, subtracting out the irrelevant depletions to the Hagerman Springs complex for purpose of the SWC's call, IDA member depletion pertinent to SWC's delivery call amounts to only 1,999 AFA.

That 1,999 AFA depletion amounts to: (1) only 0.165 percent of the 1.21 million AFA average depletions in the ESPA attributable to ground water use within Water Districts 120 and 130; (2) 0.32 percent of the predicted reach gain to the Snake River between the Near Blackfoot Gage and the Minidoka Gage if all ground water use were curtailed within Water

Districts 120 and 130; and (3) 1.5 percent of the Director's predicted 2005 irrigation season material injury to the SWC members.

2. IDA Member Commercial/Stockwater Use And Return Analysis

In addition to the Brockway data noted above, Nutrient Management Solutions, LLC used the data produced by the IDA surveys to analyze IDA member use of their commercial/stockwater water rights, the nature of those uses, and the end results of those uses. The Nutrient Management Solutions study noted that IDA members within Water Districts 120 and 130 divert a total of 15,091 AFA from the ESPA to fulfill their commercial/stockwater rights. Of that 15,091 AFA, 8,832 AFA is used for animal drinking water, and the remaining 6,259 AFA is used as dairy barn water (water used for purposes other than herd watering).

Of the 8,832 AFA used for animal watering, 1,512 AFA, known as "cow water," is discharged back into the North Side Canal Company system.[1] Thus, the net consumptive use of water for animal watering equals 7,320 AFA (8,832 AFA animal water, less 1,512 AFA returned cow water). Regarding the barn water component of the IDA members' use, 2,316 AFA is available for irrigation uses after its initial use as barn water. Thus, the net consumptive use of water for barn water purposes is 3,943 AFA (6,259 AFA barn water, less 2,316 AFA subsequently available for irrigation).[2] Therefore, in sum, the true consumptive use of water by IDA members in Water Districts 120 and 130 is not 15,091 AFA, rather their true consumptive

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[1] "Cow water" is water that is derived when water is removed from milk during the processing of the milk into cheese, or when milk is concentrated for other purposes.

[2] Both return components, the 1,512 AFA of returned cow water, and the 2,316 AFA of returned barn water, are amounts of water that have already accounted for evaporative losses. Further, the barn water return of 2,316 AFA also accounts for an irrigation system efficiency of 80%.

use amounts to 11,263 AFA (15,091 AFA initially diverted, less 3,828 AFA returned to the system).

3. Summary

The Director has failed to take into account the *de minimis* nature of IDA member commercial/stockwater uses, and has failed to credit IDA members for the water that they return to the system after its initial use. Despite these *de minimis* uses of ESPA water, IDA members contribute a disproportionately large amount to Idaho's gross agricultural profits. Put another way, curtailing ground water use of IDA members would greatly reduce state economic gains, much more so than could be possibly offset by increased profits potentially realized by members of the SWC through their use of the water they seek through their call.

Likewise, while curtailment of this *de minimis* IDA member use of ESPA water will result in nearly no appreciable gain to surface water flows due to the infinitesimal depletions caused, the curtailment will lead to hundreds of millions of dollars in lost agricultural revenue from dairy farm milk sales. These losses do not include community losses through lost jobs, taxes, and ancillary spending/purchases associated with the dairy industry. These losses also do not account for ripple effects that will be felt throughout the milk processing industries as well.

The IDA requests a hearing regarding these matters in order to exercise its rights to bring this evidence forward via proper expert testimony regarding not only the water use factors discussed herein, but also to provide testimony regarding the far reaching economic impacts that will be felt should IDA member ground water use be curtailed.

B. Legal Issues

1. Prior Appropriation and Conjunctive Management

While a cornerstone of Idaho's prior appropriation doctrine is priority (first in time is first in right), the Idaho Constitution, Idaho Code, Idaho case law, and Idaho Department of Water Resources rules make clear that priority is not the only consideration to be made during a curtailment decision. For example, Article XV, Section 1 of the Idaho Constitution provides that appropriation of waters of the state is a public use, subject to the regulations and control of the state in the manner prescribed by law. *See also* Article XV, Section 7's call for "optimum development of water resources in the public interest."

Idaho Code Section 42-226 states that while "first in time is first in right" does apply to ground water resources, such application is limited to "reasonable exercise" of the right. In other words, a reasonable exercise of the first in time is first in right doctrine "shall not block full economic development of underground water resources." *Id.*

The Department's conjunctive management rules provide that, "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water. . ." IDAPA 37.03.11.020.03.

Lastly, the Idaho Supreme Court has noted the constitutionally enunciated policy of promoting optimum development of water resources in the public interest, and that it is state policy that water be put to its "maximum use and benefit." *Parker v. Wallentine*, 103 Idaho 506, 511-513 (1982), *citing Poole v. Olaveson*, 81 Idaho 495, 502 (1960); *Bower v. Moorman*, 27 Idaho 162 (1915); *see also*, Article XV, Sec. 7 of the Idaho Constitution.

Thus, the Director is charged with balancing the interests of IDA members with those of SWC members, and not simply with basing any curtailment decision upon strict priority.

2. Futile Call Doctrine

Curtailment of IDA member uses would violate the Department's futile call rules. As stated, IDA member use of ESPA water amounts to 0.165 percent of the 1.21 million AFA average ground water depletions in the ESPA attributed to ground water users within Water Districts 120 and 130.[3] Curtailment of that *de minimis* amount of water use would result in little increase, and likely no measurable increase, to the stream reach flows in the Snake River pertinent to the SWC's delivery call. On the other hand, such curtailment will lead to harsh economic consequences. IDAPA Section 37.03.11.010.08 provides that calls be denied when for physical and hydrologic reasons, delivery cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior priority ground water rights or calls that would result in a waste of the resource. There is no evidence that curtailing ground water use by members of the IDA under their commercial/stockwater rights within the ESPA will remedy the Director's predicted 2005 irrigation season material injury to SWC members this year.

3. Animal Cruelty

The Director's April 19, 2005 Order's mandated curtailment of certain ground water users, particularly the uses of IDA members, will cause the termination of consumptive

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[3] The 1.2 million AFA is found at Findings of Fact number 77 of the April 15, 2005 Order where the Director notes that 429,300 AFA represents 66 percent of the total average annual ground water depletions in Water District 120, and that 195,500 AFA represents 35 percent of the total average annual ground water depletions in Water District 130. Thus, 100 percent of the total average annual ground water depletions in Water District 120 equals 650,454 AFA, and 100 percent of the total average annual ground water depletions in Water District 130 equals 558,571 AFA. 1.21 million AFA equals the combination of the total depletions in Water Districts 120 and 130.

water delivery to approximately 217,441 dairy cattle within the ESPA. Naerebout Aff. at ¶ 5. Cutting off this water supply will result in the rapid suffering and death of these animals. Consequently, the Director of the Idaho Department of Water Resources will be an accomplice, accessory, or the *de facto* violator of Idaho's animal cruelty provisions, Title 25, Chapter 35 of Idaho Code.

III.
CONCLUSION

For the foregoing, Petitioner Idaho Dairymen's Association respectfully requests reconsideration of the Director's May 2, 2005 Order, as well as seeking that a hearing be held regarding the matters contained within the same.

DATED this 13th day of May, 2005.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm

By _____
Andrew J. Waldera – Of the Firm
Attorneys for Idaho Dairymen's Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of May, 2005, I caused a true and correct copy of the foregoing **IDAHO DAIRYMEN'S ASSOCIATION'S BRIEF IN SUPPORT OF JOINT PETITION FOR RECONSIDERATION AND PETITION FOR HEARING REGARDING THE DIRECTOR'S MAY 2, 2005 ORDER** to be served by the method indicated below, and addressed to the following:

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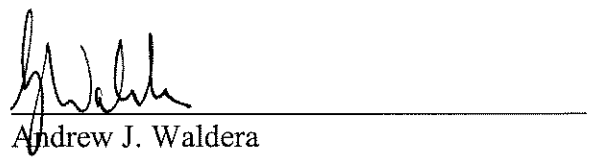

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