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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	**GMODELO AGRICULTURE INC.'S PETITION TO INTERVENE**

GModelo Agriculture, Inc. ("GModelo") is a corporation in good standing in the State of Idaho originating on October 18, 2001. GModelo operates a barley malting facility located on approximately 158 acres just south of Idaho Falls, Idaho, and holds the active Permit for Water Right No. 25-13978 (ground water diversion of 2.23 cubic feet per second ("cfs"), for industrial use, with a priority date of May 13, 2002). GModelo files this Petition to Intervene in

accordance with IDAPA 37.01.2 Rules 200, 230, 300, 301, 350, and 352. The grounds for this Petition are as follows:

1. On January 14, 2005, the A&B Irrigation District, the American Falls Reservoir District No. 2, the Burley Irrigation District, the Milner Irrigation District, the Minidoka Irrigation District, the North Side Canal Company, and the Twin Falls Canal Company (collectively the "Surface Water Coalition" or "SWC") filed a letter and petition with the Idaho Department of Water Resources seeking the administration and curtailment of 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 water rights held by or for the benefit of the members of the SWC. The Petition also sought designation of the entire ESPA as a Ground Water Management Area.

2. On February 14, 2005, the Director issued an Order in this matter providing an initial response to the SWC's filings. Said Order contained an "Attachment A" which depicted the general location and existing boundaries of Water District Nos. 120 and 130, as well as the location and existing boundaries of the American Falls Ground Water Management Area. The Attachment also depicted boundaries for a proposed addition to Water District No. 120, as well as areas for potential future Water Districts to be known as Water Districts Nos. 110 and 140. Said Order also noted the Director's intent to add to or create new Water Districts covering the entire ESPA, and that Water Districts covering all of the ESPA would be in place by irrigation season 2006. For the time being, the February 14, 2005 Order denied the part of the SWC's Petition seeking the designation of the entire ESPA as a ground water management area. The Order also denied the SWC's February 2, 2004 Request for Information

in which the SWC requested that the Department provide it with a list of all ground water rights, by administrative basin, located within the ESPA but that are not located within organized water districts.

3. On April 19, 2005, the Director issued a subsequent Order in this matter 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 (those with priority date rights of February 27, 1979 or later located within Water Districts 120 and 130) absent those users' creation and filing of approved mitigation plans for the 2005 irrigation season. Said Order again noted the portion of the SWC's Petition seeking the designation of the entire ESPA as a Ground Water Management Area, and it also contained the same "Attachment A" as did the February 14, 2005 Order, depicting the boundaries for a proposed addition to Water District No. 120, as well as areas earmarked for potential future Water District Nos. 110 and 140.

4. On May 2, 2005, the Director issued his latest Amended Order in this matter. The May 2, 2005 Order amended the April 19, 2005 Order, clarifying Finding No. 127. The May 2, 2005 Order additionally revised other Findings; made additional findings; corrected numbering of Conclusions Nos. 47-53; and, finally, revised portions of Paragraph No. 9. Like the February 14, 2005 and April 19, 2005 Orders before it, the May 2, 2005 Order also noted the portion of the SWC's Petition seeking the designation of the entire ESPA as a Ground Water Management Area, and it also contained the same "Attachment A," depicting the boundaries for a proposed addition to Water District No. 120, as well as areas earmarked for potential future Water District Nos. 110 and 140.

5. While GModelo's facility and point of diversion are not currently located within an organized water district or ground water management area, GModelo diverts its water from an area which may be included within the ESPA,[1] and is located within the area proposed for addition to Water District No. 120 as depicted in Attachment A to each of the February 14, 2005, April 19, 2005, and May 2, 2005 Orders. Given this, as well as the Director's intent to have all of the ESPA covered by water districts by irrigation season 2006, GModelo has a direct and substantial interest in this matter in protecting its water right against potential curtailment should the current boundaries of Water District No. 120 be expanded as proposed, as Water District Nos. 120 and 130 are currently subject to curtailment.

6. Further, as a diverter of ground water either from, or in close proximity to the ESPA, GModelo has a direct and substantial interest in monitoring SWC attempts to have the entire ESPA designated as a ground water management area. Though the Director's February 14, 2005 Order denied the SWC's requested designation at the time, such designation may be made as this matter continues to evolve before the Department.

7. As noted above, GModelo owns, uses, and relies upon a water right for ground water that could be subject to curtailment should Water District No. 120 be expanded as proposed in Attachment A to each of the February 14, 2005, April 19, 2005, and May 2, 2005 Orders. Given the SWC's January 14, 2005 letter and Petition, and the location of GModelo's diversion, GModelo has a direct and substantial interest in these proceedings because they implicate the Department's Rules and policies regarding the conjunctive management of surface and ground water resources including, but not limited to, the Rule promoting the reasonable use

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[1] The Department's "back file" regarding GModelo's water right no. 25-13978 contains an August 20, 2002 Memorandum from Department employee, Norm Young, stating that GModelo's Application for Permit is for the appropriation of ground water from the ESPA.

of surface and ground water (IDAPA 37.03.11 Rule 20.03), and that policy's ancillary requirements of senior appropriators showing sufficient material injury and also that potential curtailment does not violate the futile call doctrine.[2]

8. Idaho Code Section 67-5240 requires a hearing before the Director may order curtailment of water rights.

9. Idaho Code Section 42-237C requires a hearing when any person owning a water right for surface water use believes that the use of such right is being adversely affected by one or more users of ground water rights of later priority.

10. The due process requirements of the Idaho and United States Constitutions require a hearing before a neutral decision maker before property rights are diminished or taken, and ground water rights fall within this category of property rights.

11. The exercise of GModelo's water right does not constitute a measurable impact upon the water resource which could affect the water rights of the members of the SWC as GModelo returns 85 to 90 percent of the water it diverts as discharge back into the Snake River through the Idaho Falls sewer treatment works.[3]

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[2] Rule 20.03 – Reasonable Use Of Surface And Ground Water – provides that the Department's conjunctive management rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. 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 as described in said rule.

[3] According to the Director's May 19, 2005 Second Amended Order In The Matter of Distribution of Water to Water Right Nos. 36-15501, 36-02551, And 36-07694 (the "Rangen Call"), industrial use ground water diversion from the ESPA amount to only 0.7 percent of the

12. For the foregoing, GModelo's intervention into this proceeding is appropriate given its direct and substantial interests in this matter regarding the implication and management of ESPA ground water rights.

13. GModelo files this Petition to Intervene at least fourteen (14) days before the date set for formal hearing of this matter, and no prehearing conference has been scheduled. Thus, this Petition to Intervene is timely pursuant to IDAPA 37.01.01.352.

REQUESTED RELIEF

GModelo requests that this petition be granted, and that it be accorded full intervenor status.

DATED this 27th day of May, 2005.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

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total ground water diversions from the ESPA. Further a "significant portion" of such use is "non-consumptive." *Id.* at Finding of Fact No. 82.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2005, I caused a true and correct copy of the foregoing **GMODELO AGRICULTURE INC.'S PETITION TO INTERVENE** to be served by the method indicated below, and addressed to the following:

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