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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	**IGWA'S PETITION FOR RECONSIDERATION OF THE JULY 22, 2005 SUPPLEMENTAL ORDER AMENDING REPLACEMENT WATER REQUIREMENTS**

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP and on behalf of its ground water district members, Aberdeen-American Falls Ground Water District, Magic Valley Ground Water District, Bingham Ground Water District, North Snake Ground Water District, Bonneville-Jefferson Ground Water District, Southwest Irrigation District, and Madison Ground Water District (the "Ground Water Districts"), hereby petitions for

reconsideration of the Director's July 22, 2005 *Supplemental Order Amending Replacement Water Requirements* ("July 22 Amendment"). [1]

In its June 13, 2005 *Motion to Reduce Replacement Water Obligation* ("Motion to Reduce Obligation") IGWA requested that, due to the cool wet weather in May and June, the Director amend the May 2 Order to reduce or eliminate the replacement water obligation. In the July 22 Amendment, the Director appears to apply the same method of analysis that was contained in the May 2 Order pertaining to predicted supplies, carryover and material injury. However, there is much more information now about what actual values have accrued in these categories—particularly actual diversions in 2005 by members of the Surface Water Coalition ("SWC") such as American Falls Reservoir District No. 2 ("AFRD").

In addition, IGWA believes the July 22 Amendment fails to follow the finding in the May 2 Order concerning the percentage of responsibility the Director finds assessable to ground water users in Water Districts ("WD") 120 and 130.

IGWA respectfully requests that the Director reconsider the July 22 Amendment and amend its findings to reflect the actual 2005 diversions. IGWA believes that doing so will eliminate the need for any replacement water in 2005, at least with regard to AFRD, and render moot the error concerning the failure to apply the percentage reduction.

1. The calculations pertaining to AFRD fail to take into account AFRD's actual 2005 natural flow diversions.

In Findings of Fact 6 and 7, the July 22 Amendment finds that, because the predicted 2005 July-September natural flow at the Snake River's Heise Gauge is between the actual 2002 and 2004 July-September natural flows, the total natural flow supply that should be available to

[1]Pursuant to its May 16, 2005 *Petition for Reconsideration and/or Clarification of May 2, 2005 Amended Order* ("IGWA Petition"), IGWA already has sought, and continues to seek, reconsideration of the May 2 Order. The present Petition supplements the IGWA Petition.

the SWC in 2005 is the same as that predicted in the May 2 Order—that is, the average of the 2002 and 2004 natural flows. In other words, the Director has relied on the Heise gauge (and the Bureau of Reclamation's estimates of rest-of-season natural flows there) as the only predictor of natural flows available to SWC members in 2005.

Using this logic, the July 22 Amendment concludes that AFRD will have only 9,000 af of natural flow available to it in 2005. *See, e.g.,* July 22 Amendment at Finding 12. However, this logic is flawed, and ignores the wet weather that occurred between April 1 and July 1 that produced substantial amounts of natural flow below the Heise gauge. In contrast to the July 22 Amendment's predicted 9,000 af of 2005 natural flow for AFRD, Water District 01 records show that AFRD actually diverted some 116,300 acre-feet of natural flow in 2005. *Second Affidavit of Charles M. Brendecke Regarding Replacement Water Plan* (August 5, 2005) ("Second Brendecke Affidavit"), filed contemporaneously herewith. The July 22 Amendment should be corrected to dispense with a prediction of AFRD's natural flow diversions in 2005 and instead substitute the actual amount diverted. With this substitution, no reasonable calculation can tally any injury to AFRD's natural flow supply in 2005.

In Finding 12, the Director adds the 9,000 af of (erroneously) predicted natural flow to the allocated storage (383,400 af), resulting in a total predicted supply of 392,400 af. If the Director had used the actual natural flow that AFRD has already diverted this year—116,300 af—AFRD's total 2005 supply would become 499,700 af.

In Finding 15 of the July 22 Amendment, the Director compares predicted water supplies with what the Department sees as AFRD's minimum requirements. Subtracting AFRD's assumed requirement of 405,600 af from the predicted supply of 392,400 af results in the conclusion that AFRD will be short 13,200 af during this season and will end the year with no

carryover storage. If the Director had used the actual total supply available to AFRD (499,700 af) in this calculation, the resulting calculation would show that AFRD will suffer no shortage during the irrigation season and will end the year with 94,100 af of carryover. This is nearly eighty-four percent more carryover storage than the 51,200 af the May 2 Order recites as the minimum required. The Director should reconsider and further amend his findings and conclusions to reflect this.

2. The July 22 Amendment appears not to apply the required percentage reduction to account for wells outside Water District 120 and 130.

It appears to IGWA that the July 22 Amendment fails to insert a percentage reduction that should apply to any calculation of replacement water affecting ground water users in Water Districts 120 and 130. The situation is this. In the May 2 Order, the Director predicted that in 2005 certain members of the SWC would experience material injury in a combined total amount of 133,400 acre-feet. However, the Director recognized that the ground water districts could be obligated to meet only 101,000 af of this, which is the amount (according to calculations based on the ground water model) attributable to pumping in Water Districts 120 and 130.

In other words, the May 2 Order directs the affected ground water users to account for only 76 percent of the reasonably likely material injury. The July 22 Amendment appears not to apply this 76 percent factor.

In acknowledging changes in water conditions in 2005, the July 22 Amendment concluded that the reasonably likely material injury should be reduced from the May 2 Order's 133,400 af to 69,800 af. However, it appears that the Director did not then apply the 76 percent factor to this new amount. Even if one were to ignore the actual 2005 diversions by AFRD to date and accept the figures the July 22 Amendment sets out as predicted injury—which IGWA neither ignores nor accepts—the amount should be 53,048 af, not 69,800.

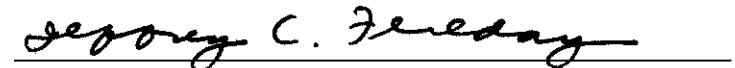
3. Apparent clerical error in Finding 17 of the July 22 Amendment.

The clause at the end of the second sentence of Finding 17 of the July 22 Amendment suggests that the two columns of figures contained in this finding will reveal the carryover storage remaining after in-season mitigation/replacement has occurred. However, the numbers in the table appear to be inconsistent with this assumption. The table's first column correctly depicts the Director's calculated total in-season and carryover shortage predicted for 2005 (which, of course, IGWA believes to be in error for substantive reasons). The second column mixes two different kinds of numbers. For every member of the SWC except AFRD and Twin Falls Canal Company, the second-column numbers are the Director's predicted carryover for 2005. The column heading is correct in terms of these water users.

However, for AFRD and Twin Falls Canal Company the second-column entries are the minimum carryover requirements from the May 2 Order, so the column heading appears to be inaccurate in this respect.[2]

RESPECTFULLY SUBMITTED this 5th day of August 2005.

GIVENS PURSLEY LLP



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[2] Incidentally, if one were to insert into Finding 17's second column the actual supply available to AFRD in 2005, the predicted AFRD carryover would be 94,100 af and its combined shortage and carryover shortfall would be zero. This would leave only the 5,400 af carryover shortfall to Twin Falls Canal Company (which IGWA believes will be reduced or eliminated once end-of-year numbers are available) as the only predicted material injury to SWC for 2005 under the Director's approach to this case.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 2005, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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