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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 THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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 ORDER APPROVING IGWA'S REPLACEMENT WATER PLAN FOR 2005**

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" or "IGWA"), hereby petitions for reconsideration of the Director's June 24, 2005 *Order Approving IGWA's Replacement Water Plan for 2005* ("June 24 Order").

INTRODUCTION

In response to the Director's Amended Order issued on May 2, 2005 in this matter ("May 2 Order"), IGWA, on behalf of its member Ground Water Districts, filed an Initial Replacement Water Plan ("RWP") on April 29, 2005. In the RWP, IGWA committed "to make available 27,700 acre-feet of replacement water during the 2005 irrigation season to meet the 2005 Replacement Obligation from one or more of the sources shown in Attachment A."[1] RWP at 3. The RWP documented IGWA's entitlements to these water sources. IGWA supplemented the documentation in response to subsequent orders of the Director.

The RWP does three principal things: it responds to the Director's Order requiring a plan for providing a minimum of 27,700 acre-feet of water as mitigation in 2005; it commits to providing this as mitigation in 2005 *to the extent material injury ultimately is determined to occur in 2005*; and it documents that IGWA has on hand the water resources to meet such a commitment.

The RWP does not, however, commit to delivering to any Surface Water Coalition ("SWC") member more water in 2005 than may be determined to be such members' *actual* injury (as opposed to "reasonably likely material injury predicted for 2005"). Further, in submitting the RWP, neither IGWA nor the Ground Water Districts waived their objections to the Department's findings, conclusions and order contained in the May 2 Order, or their right to a hearing on all issues.

[1] Both the Director's May 2 Order and the RWP recognize that the 27,700 acre-foot replacement water requirement is based on the Director's determination of "likely" material injury, and that this amount might be reduced based on subsequent analysis of the water supply available to the SWC. In fact, the water supply situation subsequently has changed significantly for the better, and IGWA has requested a re-evaluation and reduction of the 27,700 acre-foot determination.

GROUNDS FOR RECONSIDERATION

IGWA incorporates herein all objections to the May 2 Order and all grounds for reconsideration contained in its May 16, 2005 *Petition for Reconsideration and/or Clarification of Director's Amended Order, Request for Hearing, and Motion for Stay.* In addition, IGWA's grounds for reconsideration are as follows:

1. Private Leases of Storage.

The June 24 Order correctly finds that IGWA properly documented its valid private leases with upper Snake River water delivery entities and the Water District 01 Watermaster for 20,000 acre-feet of storage. June 24 Order at 2. However, IGWA objects to, and requests reconsideration of, findings 3 and 4 of the June 24 Order, which state:

> the portion of the stored water from private leases provided as replacement water to members of the [SWC] . . . must be allocated to the [SWC] members in the 2005 irrigation year. . . ." [and] "Since the Department will make the allocation, the portion of the stored water from private leases . . . must be assigned to the Department.

IGWA does not disagree that water provided as replacement water to meet any actual 2005 obligation is to be provided during the 2005 irrigation season. But IGWA objects to the Director's order that IGWA must assign storage water held under the private leases to the Department for allocation to the SWC.

IGWA's RWP did not purport to "dedicate" any specific source of water, or portion thereof, to meeting a 2005 replacement water obligation. In particular, it did not dedicate the storage water IGWA's Ground Water District members acquired through private leases. IGWA has demonstrated it has contract entitlements, in 2005, to at least 27,700 acre-feet, and that it can and will provide water to SWC members in 2005 to the extent actually material injury may ultimately be determined. But the Director does not have the authority to take delivery or control of any of these sources of water. He certainly does not have such authority to do so to mitigate

what now appears to be a speculative injury. IGWA's members have other obligations that also must be met with the water supplies it has acquired. The RWP fulfills IGWA's obligations under the May 2 Order. When the Director specifies the actual amount of water (if any) that must be delivered, IGWA will provide it.

The June 24 Order assumes too much when it requires IGWA to assign to the Department the storage water it has acquired under private leases. The private contracts entered into between IGWA's members and certain storage spaceholders do not contemplate that the affected storage space can be assigned to someone else, including the Director.

Furthermore, because the 27,700 acre-foot quantity now represents a highly questionable number given the changed water supply situation, the June 24 Order sequestering the private lease water, pending some later determination of whether material injury actually exists, should be reconsidered and rescinded. IGWA believes that requiring it to assign the leased storage to the Director at this time would be arbitrary and capricious, an abuse of discretion and in excess of the Director's authority.

Finally, the June 24 Order improperly attempts to tie up the storage water held under private lease by prohibiting its use for other purposes, including meeting immediate needs to provide water to conversions and other mitigation actions being undertaken in Water District 130 by IGWA members Magic Valley Ground Water District and North Snake Ground Water District.

Tying up IGWA's leased storage in this manner would be particularly egregious given that the condition for release of this water to meet immediate needs is the Department's approval of the natural flow/exchange. But the Department itself has withheld this approval for over a month pending the outcome of various administrative inquiries over which IGWA has no control.

2. FMC Lease

The June 24 Order improperly refuses to recognize credit for 796 acre-feet of water included in the FMC lease associated with water right 29-11342. This same 796 acre-feet has been recognized by the Department under this lease for the past two years. The Department's water right data base includes documentation (including an affidavit of Department Supervisor Carter Fritschle) that this water has been diverted to beneficial use and should be recommended by the Department to the Snake River Basin Adjudication Court for approval. The June 24 Order should recognize the 796 acre-feet of water under FMC lease.

Also, the FMC lease includes up to 5,000 acre-feet of storage in Palisades Reservoir. The June 24 Order fails to acknowledge this. With Palisades nearly filling as of June 30th, a significant portion of this space will have filled and is available to the Ground Water Districts under the FMC lease. IGWA may choose to use some or this space for mitigation activities of its members in 2005.

The June 24 Order also improperly fails to account for the multi-year benefits that accrue under the FMC lease, which has been in effect as part of approved interim mitigation for several years. The Department needs to confirm the accounting method that will be used to credit these multi-year benefits.

The June 24 Order also requires FMC lease water to be "delivered first to the Surface Water Coalition" when SWC's natural flow rights are not being filled in 2005. This portion of the Order should be reconsidered because it is not apparent that additional natural flow water is needed by SWC members in 2005 and that SWC members are entitled to it. The June 24 Order should be amended to address this issue and set forth the accounting method showing how IGWA will obtain credit for the natural flow delivered if this proves to be the case

3. Dry Year Leases

The June 24 Order recognizes current-year reach gain benefits from the dry-year lease entered into by IGWA. It does not however, acknowledge that these leases will provide reach gain benefits in subsequent years and confirm the accounting method that will be used to credit these multi-year benefits. The June 24 Order also sets improper precedent for these and future voluntary curtailments (such as those that may occur under CREP) by requiring their participation in the Water Bank.

The June 24 Order also requires dry-year lease water to be "delivered first to the Surface Water Coalition" when SWC's natural flow rights are not being filled in 2005. This portion of the Order should be reconsidered because it is not apparent that additional natural flow water is needed by SWC members in 2005 and that SWC members are entitled to it. The June 24 Order should be amended to address this issue and set forth the accounting method showing how IGWA will obtain credit for the natural flow delivered if this proves to be the case.

4. Snake River Natural Flow Water Right Lease and Exchange

Paragraph 16 of the June 24 Order incorrectly states that IGWA agreed to lease an 4,644 acre-feet of natural flow for exchange from the Idaho Water Resource Board ("IWRB") in addition to the substantial natural flow IGWA's members have agreed to lease under private agreements. Neither IGWA nor its members have ever had discussions with the IWRB concerning the 4,644 acre-feet referenced in the June 24 Order. Moreover, IGWA understands that, in any event, the amount of natural flow water the IWRB for which actually has entered into lease agreements is 4,426.5 acre-feet. Reference to this 4,426.5 acre-feet should be deleted from the June 24 Order.

Paragraph 19 incorrectly finds that the Bureau will reduce the storage exchanged with natural flow by 80.65%. The actual reduction percentage used by the Bureau is 19.35%. Presumably this was a typographical error.

IGWA objects to, and requests reconsideration of, findings 20 and 21 of the June 24 Order, which state that "the portion of the stored water from exchange with Snake River natural flow leased by IGWA and provided as replacement water to members of the [SWC] . . . must be allocated to the [SWC] members in the 2005 irrigation year . . ." and "[s]ince the Department will make the allocation, the portion of the stored water from exchange . . . must be assigned to the Department." IGWA's grounds for objection are the same here as its objection to an identical requirement the June 24 Order seeks to impose on the private leases of storage water. IGWA has assured the Department that IGWA would have the exchange water in its RWP, and but for administrative delays at the Department level, it has fulfilled this obligation. However, IGWA never has stated that it would invariably and absolutely provide this particular water to the SWC in 2005. The portion to be allocated to the SWC in 2005, <u>if any</u>, has not yet been determined. Until it <u>is</u> determined and IGWA has a specific order to provide it for delivery to the SWC (or to any particular SWC member), IGWA believes it is entitled to hold this water in its own portfolio.

IGWA objects to any requirement that it must assign this water to the Department in any event, let alone in the absence of a determination of what portion of the exchange water, if any, might be appropriately allocated to a SWC member. IGWA should be entitled to make other uses of this water, at its risk and in its discretion, absent an order from the Department for immediate delivery to a water right holder determined to be entitled to immediate delivery of replacement water.

In other words, there is no authority for the Department to order a water right holder to assign a water entitlement to the Department for potential future delivery to another. IGWA has shown that it has the water in its own portfolio sufficient to meet any conceivable obligation to the SWC in 2005. Absent an order requiring immediate delivery, that is all the Department may require. The Department should not be in a position of being the escrow holder, because it is not clear that the water assigned to the Department will ever be needed. Such a precedent would have far-reaching adverse effects on all water users.

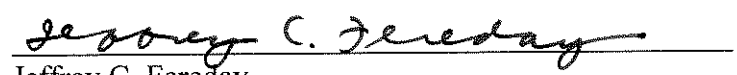
5. Review of the Snake River Water Supply Available to the SWC.

It is apparent that, regardless of the situation prevailing when the May 2 Amended Order was issued, there currently is no obligation to provide replacement water to SWC members. This is just the sort of situation that the June 24 Order should be structured to address. Instead, it essentially proposes to tie up and commit, presumably until the end of the irrigation season when water accounts are finalized, nearly 80,000 acre-feet of water associated with the sources described in Attachment A to the RWP. This to insure delivery to the SWC of a maximum 2005 obligation of 27,700 acre-feet.

The June 24 Order ignores the fact that this water was acquired for the benefit of IGWA's members so they could implement a variety of actions in 2005, only some of which may involve direct delivery to SWC members. Some of those actions require immediate use of this acquired water and are hamstrung by the unreasonable and unlawful conditions contained in the June 24 Order.

RESPECTFULLY SUBMITTED this 8th day of July 2005.

GIVENS PURSLEY LLP



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July 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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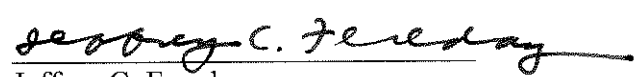

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