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Department of Water Resources

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	**IDAHO GROUND WATER APPROPRIATORS' PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF DIRECTOR'S MAY 2, 2005 AMENDED ORDER; REQUEST FOR HEARING; MOTION FOR STAY OF AMENDED ORDER**

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 the Director, Idaho Department of Water Resources ("Director") for reconsideration of the Director's May 2, 2005 Amended Order ("Amended Order") in the above-captioned matter.

IGWA also requests that the Director convene a hearing on the Surface Water Coalition ("SWC") delivery call ("Delivery Call"). Until the Director concludes the requested hearing on the merits with issuance of a new order, IGWA moves that the Director temporarily stay the implementation of the Amended Order. IDAPA 37.01.01.780.

While the Idaho Department of Water Resources has no substantive administrative rules respecting petitions for reconsideration, Idaho case law addressing motions for reconsideration brought under Idaho Rule of Civil Procedure 11(a)(2)(B) instructs that a tribunal or decision maker "should take into account any new facts presented by the moving party that bear on the correctness" of the order. *Nationsbanc Mortgage Corp. of New York v. Cazier*, 127 Idaho 879, 884, 908 P.2d 572, 577 (Ct. App. 1995); *Coeur D'Alene Mining Co. v. First National Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

GROUNDS FOR RECONSIDERATION AND HEARING

1. In the Amended Order, the Director erroneously concluded that the Ground Water Districts owe any amount of water to the SWC as mitigation or to avoid material injury to the SWC's members. In reaching this conclusion the Director failed to consider and/or give due weight to relevant hydrologic and economic factors as required by Idaho law. Relevant hydrologic and economic factors that should have been considered by the Director are included in the Affidavits of Charles M. Brendecke and John Church, previously submitted with IGWA's Motion for Summary Judgment on March 23, 2005. Indeed, the Director specifically disregarded these affidavits when they were submitted by IGWA prior to issuance of the Amended Order. See Amended Order, p. 5, ¶ 17, "Director...did not rely on either filing in preparing the present Order.")

2. These two affiants render expert opinions regarding the cumulative effects of curtailing the Ground Water Districts' water rights and respectively opine: "curtailing ground water diversions on a large, or even small scale is not likely to produce meaningful supplies of water during the short-term period when it might be diverted to beneficial use by surface water users," (Brendecke Affidavit, ¶ 72), and "the concept of pursuing full economic development of Idaho's groundwater resources is wholly inconsistent with any alternative that regulates the use of the state's water resources to cause the state's economy to lose a present value of close to $8.1 billion in gross output during the next thirty years to gain a present value of 423.5 million." (Church Affidavit, p. 21, ¶ 53) (emphasis in original). Had the facts contained in these two affidavits been appropriately considered, the Amended Order would properly have found that no material injury has resulted from ground water pumping by the Ground Water Districts' members.

3. The SWC has failed to demonstrate a reasonable likelihood of material injury, much less any necessity for curtailing ground water pumping. The SWC has not provided any evidence of on-farm water shortages. The Director's Amended Order itself provides:

> None of the members of the Surface Water Coalition have identified lands that are entitled to receive surface water but have not been irrigated or where crops could not be harvested because of shortage in the surface water supplies available to members of the Coalition under the Members' various rights. The Coalition simply alleges that material injury is occurring because in recent years members of the Coalition have been unable to divert natural flow at the diversion rates authorized under the members' rights for as long a period of time as the members otherwise could, and that members have been unable to accrue as much storage in USBR reservoirs as the members otherwise could, but for depletions caused by diversions of ground water under junior priority water rights.

(Amended Order, pp. 24-25, ¶ 111.) Without sufficient evidence of material injury provided by the SWC, the Director was obligated to refuse the SWC's delivery call.

4. To preserve the necessary neutrality, the Director is not permitted to gather his own evidence in aid of, or to the detriment of, any party before him on the instant matter. The Director erroneously relied on information obtained from outside (non-party) sources to draw conclusions about the material injury allegedly suffered by the SWC members. (Amended Order, pp. 25, ¶s 110-114.) The Director had unidentified Department staff contact unidentified employees of the University of Idaho and the federal Farm Services Agency ("FSA") to obtain unsubstantiated, anecdotal information about the SWC water supplies and possible on-farm water shortages in 2004. There is no indication that the persons contacted have actual personal knowledge, training or expertise to make the statements or opinions apparently given to Department staff, or that they or their agencies systematically and routinely compile any information that would support such statements or opinions. Particularly with respect to federal FSA employees, who may not be subpoenaed to testify at a hearing in this matter absent their consent, there likely will be no opportunity to examine these persons as witnesses at any hearing and determine what foundation, if any, exists for their views.

5. The Director erroneously concluded that SWC members were suffering material injury due to their inability to maintain a "reasonable amount of carryover storage to minimize shortages in future dry years pursuant to Rule 42.01.g of the Conjunctive Management Rules (IDAPA 37.03.11.042.01.g)." (Amended Order, p. 26, ¶ 118.) Rule 42.01.g provides that the Director, in assessing material injury:

> may consider…[t]he extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies…; provided, however, the holder of a surface water storage right shall be entitled to maintain

a reasonable amount of carry-over storage to assure water supplies for future dry years.

6. Rule 42.01.g provides that the Director, when determining the reasonable amount of carry-over storage water, "shall consider the average annual rate of fill of storage reservoirs *and* the average annual carry-over *for prior comparable water conditions* and the projected water supply for the system." (Emphasis added). The Director also previously has held that a party making a delivery call is "not entitled to a water supply that is enhanced beyond the conditions that existed at the time such rights were established[.]" Amended Order in the Matter of Distribution of Water to Water Rights Nos. 36-15501, 36-02551 and 36-07694 (March 10, 2004)("Rangen Order") at 13. The Amended Order fails to consider, however, the amount of carryover storage SWC members would have had under prior comparable water conditions, the projected water supply for the storage system when it was constructed or the water supply conditions that existed at the time the storage appropriations were made.

7. Dr. Brendecke conducted an extensive analysis of these factors, which is detailed at pages 12-19, and Exhibits A through EE of his Affidavit. Based on this analysis, which includes review of Project Planning Reports for the Palisades and Minidoka North Side Pumping Division and historical natural flow and storage water supplies and use, Dr. Brendecke is of the opinion that:

- Ground water depletions are not the cause of declines in measured reach gains between the Near Blackfoot Gage and the Neeley Gage since 1999. Brendecke Affidavit at 18.
- There has been no significant trend or change, either up or down, in the reach gain contributions to the water supply of SWC members over the 97 year period of record. Brendecke Affidavit at 18.

- Current levels of natural flow and storage supplies available to the SWC members as a result of the instant drought are consistent with the levels of reductions in those supplies that would have occurred, and did occur, historically under similar climatic conditions and prior to the time the effects of ground water pumping would have been expressed in reach gains. Brendecke Affidavit at 18-19.
- The current storage system would not have prevented water shortages to SWC members under historical climatic conditions similar to the current drought that occurred prior to ground water development. Brendecke Affidavit at 19.
- When storage appropriations were made and the projects were completed, they were not intended to provide a full supply of water during the kind of drought conditions currently being experienced. Brendecke Affidavit at 19.

8. The Director, in issuing the Amended Order, has failed to consider whether the use of junior ground water rights by the Ground Water Districts' members "affects, contrary to the declared policy of [full economic development], the use of the senior right." Idaho Code §42-237b. Indeed, the Director expressly refused to consider evidence bearing directly on this important factor contained in the Church Affidavit. After a thorough review of several recent economic studies evaluating the economic effects of administrative curtailment of ground water use on the ESPA, Mr. Church's opinion was that:

- Full economic development of Idaho's water resource would be thwarted by curtailment of ESPA groundwater users during periods of severe drought.
- Curtailment of junior ground water rights to produce relatively small short-term benefits to senior surface water supplies will unavoidably put ground water

irrigators out of the irrigated farming business, which will spell the end of much of the agricultural economy dependent on ESPA ground water.

- The concept of pursuing full economic development of Idaho's groundwater resources is wholly inconsistent with any alternative that regulates the use of the state's water resources to cause the state's economy to lose a present value of $8.1 billion in gross output during the next thirty years to gain a present value of $423.5 million.

9. Although the Ground Water Act mandates that conjunctive administration of ground water rights to fill senior surface water rights hinges directly on the question of whether such administration is consistent with full economic development, the Amended Order gives that factor no consideration, and therefore must be reconsidered.

10. The Director, in issuing the Amended Order, has violated Idaho Code §§ 42-237b-d by failing to follow the statutory mandate to appoint a local ground water board and set this matter for hearing before the board pursuant to. While Title 42, Chapter 6 may not require the Director to appoint a local ground water board and hold a hearing, it is a founding principle of Idaho statutory construction that a more specific statute such as 42-237b-d controls over the more general provisions of Chapter 6. *People ex rel. Springer v. Lytle*, 1 Idaho 143 (1867); *Gooding County v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002).

11. The specific provisions of the Ground Water Act at Idaho Code § 42-237b provide that "[*w*]*henever any* person owning or claiming the right to the use of *any* surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority. . . such person as claimant, may make a written statement under oath of such claim to the director. . . ." Thereafter, if the Director deems the

statement sufficient, he "shall issue a notice setting the matter for hearing *before a local ground water board. . . .*" (Emphasis added). Chapter 6, Idaho Code does not contain the specific distinctions between senior and junior surface and ground water rights contained in the Ground Water Act, nor does it provide specific hearing requirement, let alone a hearing before a ground water board.

12. To the extent that the Department's Rules of Procedure or Conjunctive Management Rules do not provide for appointment of a local ground water board in cases like this one, they are invalid as applied to the instant case because they contradict Idaho Code § 42-237b. *Holly Care Center v. State, Dept. of Employment*, 110 Idaho 76, 78, 714 P.2d 45, 47 (1986) ("administrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law"). The Department's promulgated rules and the Director's application of them in individual cases must conform to existing legislative enactments.

13. The Amended Order fails to analyze the effects of, and provide credit against, mitigation obligations for reach gains accruing today from mitigation that the Ground Water Districts have provided over the last three years under interim stipulated agreements approved by the Director as effectively operating mitigation plans.

14. Paragraphs 27 and 122 of the Amended Order's Findings of Fact state that actual material injury will be determined at a later time. The Amended Order should clarify when and how actual material injury is to be later determined and if at such later time additional material injury is found, what the required schedule of any additional deliveries or curtailment to mitigate it will be.

15. Paragraph 124 finds that curtailing ground water rights junior to February 27, 1979 within the ground water model area for the ESPA would increase reach gains in the Snake

River between the Near Blackfoot gage and the Minidoka gage by 133,900 acre-feet. Paragraph 126 finds that curtailing ground water rights junior to that date within Water Districts 120 and 130 would increase reach gains in the this reach by 101,000 acre-feet. The difference between these amounts is 32,900 acre-feet. The Amended Order should clarify whether ground water users in newly created water districts will have an immediate mitigation requirement of 32,900 acre-feet, and when that water must be provided to avoid curtailment.

16. The Amended Order finds that water users in existing ground water districts within Water Districts 120 and 130 have a current, 2005 mitigation requirement of 101,000 acre-feet, and requires minimum mitigation of 27,700 acre-feet in 2005.

A. The Amended Order should clarify whether the 27,700 acre-foot minimum mitigation requirement represents the obligation of only the five existing ground water districts that are in WD 120 or WD 130, or whether these five districts are obligated only for their share of 27,700 in the same proportion as 101,000 bears to 133,900 (i.e. 75%).

B. The Amended Order should clarify whether the 27,700 acre-foot minimum is in addition to the 101,000 acre-feet of reasonable carryover obligation or included in it.

C. The Amended Order should clarify specifically when the minimum requirement of 27,700 acre-feet of replacement water in 2005 must be delivered and through what mechanisms or facilities.

D. The Amended Order should clarify over what period of time the balance, if any, of the Ground Water Districts' 2005 mitigation requirement must be met, and if it is met using replacement water, at what specific times it must be delivered.

17. The Amended Order does not indicate how it is to be implemented with regard to determining the amount of replacement water to be provided by non-irrigation users within the affected portion of the ESPA.

18. The Amended Order should confirm and clarify that if the Ground Water Districts provide replacement water in the quantities and at the times required by the Order, non-irrigation ground water users who are ground water district members will not be required to provide any separate mitigation for their continued diversions.

19. The Amended Order should clarify how replacement supplies are to be delivered by the Ground Water Districts to the members of the SWC and how such deliveries will be credited against the individual ground water district obligations.

20. The Amended Order fails to describe the accounting process or system that will be used to track future obligations and carry-forward credits.

21. The Amended Order fails to establish a means to account for water bank transactions of SWC members, including rental of storage to non-SWC members or for delivery below Milner, in determining year-to-year whether the SWC members have reasonable carryover.

22. Paragraph 6 of the Order on page 45 says that future mitigation obligations shall not be cancelled unless the storage space held by members of the SWC fills. However, not all storage reservoirs used by SWC members are physically affected by conditions of ESPA water use. Further, the SWC members are not entitled to a "joint and several" material injury determination, whereby any injury to one is injury to all. Therefore, the "failure to fill" factor must be evaluated individually as to each surface water right holder. The Amended Order must confirm and clarify that if any individual SWC member's storage space fills, that satisfies such

SWC member's water right and eliminates all Ground Water District mitigation obligations with respect to that SWC member.

23. Paragraph 7 at page 45 of the Amended Order improperly limits "curtailment as mitigation" only to lands that were irrigated in the previous year. This improperly denies ground water users recognition of their valid, decreed water rights. Inasmuch as the Director's Amended Order proposes to deny certain ground water users the right to irrigate their lands in 2005 regardless of whether they were irrigated in 2004, ground water users are entitled to voluntarily foregoing the exercise of their decreed rights on such lands in 2005 and receive mitigation credit for such curtailment.

24. The Amended Order fails to recognize that curtailment in any one year will generate reach gain benefits in later years even if the curtailed lands subsequently are brought back under irrigation. Since such benefits will occur whether or not there is a determination of injury in later years. The Amended Order must recognize carryover benefits and identify how carryover benefits will be credited against mitigation obligations.

25. The Amended Order must set forth the means by which non-priority-based curtailment can be implemented as a method for meeting mitigation obligations, together with the means by which credit for such curtailments will be calculated.

26. The Department previously has agreed that the depletive effect of diversions by certain ground water users within the Aberdeen-American Falls Ground Water District who also are shareholders in the Aberdeen-Springfield Canal Company ("ASCC"), can be mitigated by ASCC diversions.[1] These ground water rights are appurtenant to some 15,100 acres within the

[1] *Settlement Agreement Regarding Aberdeen-Springfield Canal Company's Basin 01 Surface Water Rights and Consolidated SRBA Subcase No. 35-2315* (June 7, 2002).

ASCC service area. The Department previously has determined that the mitigation requirement for these ground water rights is approximately 28,100 acre-feet, and that they are mitigated to that extent when the amount available for mitigation due to diversions of surface water into the ASCC canal system is greater than 28,100 acre-feet. Among these ground water rights, approximately 40 have priority dates junior to February 27, 1979. The Amended Order must be clarified to confirm that the ASCC ground water mitigation entitlement is a credit against any Ground Water District mitigation obligation.

27. The Amended Order must be clarified to confirm that other ground water users with priorities junior to February 27, 1979, who already have an approved mitigation plan, will produce a credit against any Ground Water District mitigation obligation.

CONCLUSION

For the foregoing reasons, IGWA petitions the Director to Reconsider his Amended Order of May 2, 2005, and enter a replacement order denying the SWC's delivery call. Pursuant to Idaho Code § 42-1701A(3), and having been aggrieved by the Director's Amended Order, IGWA requests that the Director convene a hearing regarding this matter. Lastly, pursuant to Department Rule of Procedure 780, IDAPA 37.01.01.780: "Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final." Accordingly, pursuant to Rule 780, IGWA moves for a stay of the Director's May 2, 2005, Amended Order, until such time as the Director convenes the statutorily mandated hearing and rules upon IGWA's Petition for Reconsideration.

If the Ground Water Districts are made to comply with the Amended Order while their Petition for Reconsideration and request for a hearing are pending, the Ground Water Districts' members will suffer severe economic harm, resulting from the unlawful curtailment of their

ground water rights. Until such time as the Director has had an opportunity to fully consider the multitude of issues raised in this Petition and additional facts to be presented at hearing, any curtailment of the Ground Water Districts' water rights is premature and would cause irreparable harm to the Ground Water Districts' members. Without granting the requested stay, IGWA's right to be heard on this matter is meaningless

RESPECTFULLY SUBMITTED this 16th day of May 2005.

GIVENS PURSLEY LLP

Michael C. Creamer

Attorneys for Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May 2005, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

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