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Department of Water Resources

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 RESPONSE TO SURFACE WATER COALITION'S MOTION TO CONTINUE HEARING**

Idaho Ground Water Appropriators, Inc., 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 responds to the Surface Water Coalition's ("SWC's") October 6, 2005 *Motion for Protective Order and*

Motion to Continue Hearing on Director's May 2, 2005, Amended Order ("SWC Motion to Continue"). IGWA respectfully requests that the Director deny the SWC Motion to Continue.[1]

INTRODUCTION

The hearing in this matter is scheduled to begin January 29, 2006. After having failed at last summer's status conference to convince the Director to postpone it for various reasons, SWC now seeks to delay the hearing at least six months on the theory that its experts cannot complete their preparations within the current schedule. Such a delay in the hearing is unnecessary and would severely prejudice the Ground Water Districts.

ARGUMENT

Pursuant to the Department's May 2, 2005 Order ("May 2 Order"), the Ground Water Districts have, at significant expense, acquired storage and natural flow water entitlements, and have secured ground water-surface water conversions and curtailments on several thousand acres of irrigated land. Although it disputes the factual and legal basis for the May 2 Order, and has sought reconsideration and a hearing, IGWA nevertheless has complied with the May 2 Order with respect to obligations imposed for 2005. Indeed, the Ground Water Districts likely have acquired or provided more replacement water than is necessary for 2005.[2]

IGWA is not willing to go into another irrigation season with the replacement water obligations of its members still subject to dispute pending a hearing on the merits. Continuing the hearing as the SWC proposes, presumably would continue the status quo and require the Ground Water Districts in 2006 again to expend great effort and substantial resources to procure

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[1] The SWC's pleading indicates that it contains motions both for protective order and for postponement. However, the text of the SWC Motion to Continue contains no description of the proposed protective order. Instead, it seeks information from the Department and a delay of the hearing.

[2] IGWA has separately requested an amendment to the May 2 Order in light of changes in storage supplies and other water conditions in 2005, and anticipates hearing from the Director on that score in the near future. *See IGWA's Petition for Reconsideration of the July 22, 2005 Order Amending Replacement Water Requirements.*

and have available replacement water that again might prove unneeded. Thus, IGWA would be in the untenable position of having provided two years of replacement water without ever obtaining a ruling on whether it actually was required to do so. This exercise of acquiring thousands of acre-feet of water is costing the Ground Water Districts millions of dollars, while it has become increasingly apparent that the SWC members will have finished the 2005 irrigation season with a full supply of water. The Ground Water Districts and their members need, and deserve, finality in the matter.

The SWC initiated this action last January with the assertion that its members needed relief "for 2005 and beyond." SWC Letter of January 14, 2005. It is inconsistent and inappropriate for the SWC now to propose that the hearing not even start until well into the 2006 irrigation season. Carrying the above obligations while facing a hearing that would occur well after the start of the 2006 irrigation season would put the Ground Water Districts' members in the untenable position of having to secure loans, plant crops, and begin irrigating before they know for sure they will have the ability to pump their wells to irrigate.

The SWC asserts that its experts need at least six more months to understand the new ESPA model and differences between ESPA Model versions 1.0 and 1.1. The assertions in their motion and the affidavits fall far short of a justification for such a delay. SWC's consultant, Mr. Koreney, asserts that he and his associates have yet to be able to analyze the ESPA model due to the Department's alleged failure to provide them certain documentation. Yet, the SWC's other consultant, Dr. Brockway, who has been on the case from the beginning, apparently already has made preliminary runs of version 1.1 of the model. Dr. Brockway asserts in his affidavit that a recent change in the ESPA Model, which at least some on the modeling committee describe as "insignificant," justifies setting over the entire process for six months. Dr.

Brockway was on the ESPA modeling committee and actively participated in the new model's development. His consulting firm was represented at the IWRRI model training session. The fact that the SWC has elected to also retain additional consultants who may not have experience with MODFLOW programs generally, or the new ESPA model (including versions 1.0 and 1.1) specifically, does not justify the SWC's proposed delay. Presumably Dr. Brockway has the expertise to conduct any modeling analysis the SWC deems necessary or to assist SWC's other consultants in that regard.

Beyond that, it is unclear why the SWC is even concerned at this point about such variations in the model. The Department has not used the ESPA model to evaluate whether material injury has occurred to the SWC's members' water rights or in what amount, and the ESPA model plays only a minor role in evaluating the replacement water supplies offered by IGWA.

With respect to the SWC's assertion that the hearing must wait because the Idaho Historical Society Library will be closed, neither its Motion to Continue nor Mr. Shaw's affidavit indicate why historical information concerning Carey Act development is relevant to responding to the May 2 Order, or if it is relevant, why the SWC did not seek to obtain this information much earlier than it has. Obtaining such information was not contingent on an order authorizing discovery.

Delaying the hearing simply is unnecessary and will prejudice the Ground Water Districts.

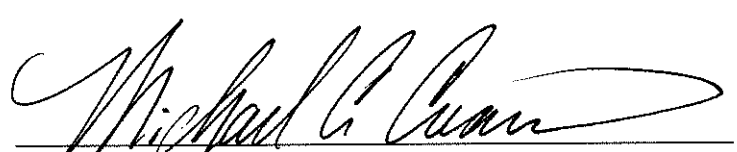
It conceivably could be appropriate to extend the deadlines for expert reports by three to four weeks, but not for the reasons raised in the SWC Motion to Continue. Despite reasonable efforts by all of the parties to coordinate numerous site visits and the depositions of the parties'

witnesses and Department staff, these forms of discovery will not be concluded until October 24th at the earliest. This leaves only seven working days for experts to complete their analysis of facts that have been obtained and prepare and file their initial reports, which are due November 4th under the current scheduling order. Moreover, IGWA still has not received a significant amount of documents from SWC members. These include documents that SWC members have refused to produce in response to IGWA's and City of Pocatello's August 9, 2005 Document Production Requests, and documents they have agreed to provide at various depositions of their witnesses but have yet to deliver. IGWA's experts will have a very limited opportunity to analyze this information if and when it is produced. It is not apparent, however, that slipping the due date for expert reports by several weeks to allow experts more time to analyze information and prepare reports necessarily requires the hearing date to be moved.

This matter can be tried within the schedule set out by the Director, and SWC has failed to articulate adequate grounds for delaying it.[3]

DATED this 13th day of October, 2005.

GIVENS PURSLEY LLP



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[3] As the Director knows, Idaho Power Company ("IPCo") has filed a district court challenge to the Director's denial of IPCo's Motion to Intervene in this matter (Ada County Case No. CV-OC-0506175). If the court were to order IPCo's entry into this case, it is not clear how that would affect the hearing schedule. Presumably, the parties and the Director will evaluate that when and if it arises. But in the meantime, it serves only the SWC's desire for delay to put off the hearing until well into next year's irrigation season.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 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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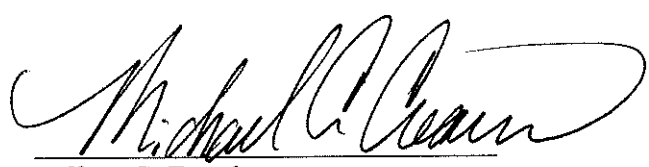

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