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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 DECEMBER 27, 2005 SECOND 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 December 27, 2005 *Supplemental Order Amending Replacement Water Requirements* ("December 27 Supplement").[1]

Introduction

In its June 13, 2005 *Motion to Reduce Replacement Water Obligation* ("Motion to Reduce Obligation"), which is incorporated by this reference, 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 Ground Water Districts' replacement water obligation to the Surface Water Coalition ("SWC"). In the December 27 Supplement, the Director appears to apply the same method of analysis that was contained in the May 2 Order pertaining to predicted supplies, diversion entitlements, carryover storage and material injury. IGWA believes the Director has not taken into account critical facts concerning the 2005 water year and the alleged injury to the Twin Falls Canal Company ("TFCC").

IGWA respectfully requests that the Director reconsider the December 27 Supplement and amend its findings to reflect the points made herein and in IGWA's Reconsideration Petitions. IGWA believes that doing so will eliminate the need for providing any replacement water for the 2005 irrigation season.

Additional Points of Challenge

1. The December 27 Supplement continues to use the incorrect reference year in determining likely material injury.

IGWA continues to challenge the Director's use, in the December 27 Supplement, of 1995 as the reference year for all members of the SWC. With regard to TFCC, 1995 was an

[1]Pursuant to its May 16, 2005 *Petition for Reconsideration and/or Clarification of May 2, 2005 Amended Order*, IGWA already has sought, and continues to seek, reconsideration of the May 2 Order. IGWA also has submitted its August 5, 2005 *Petition for Reconsideration of the July 22, 2005 Supplemental Order Amending Replacement Water Requirements* and its June 13, 2005 *Motion to Reduce Replacement Water Obligation*, each with accompanying exhibits. The present Petition supplements these petitions and motion (IGWA's "Reconsideration Petitions"), and each is incorporated and restated herein.

above average year in terms of diversions. Affidavit of Charles M. Brendecke (hereinafter "Brendecke Aff.") at 3. In its information submittal to the Department in this case, TFCC has indicated that full $^5/_8$ inch headgate deliveries occurred in 1994, 2002, and 2003. Even if the May 2 Order were correct in basing its material injury evaluations on the "minimum amount recently diverted for full head-gate delivery," some year other than 1995 would be appropriate. For example, using 2002 (a full supply year) would result in a presumed material injury of some 66,800 acre-feet less than what the Director has found in the December 27 Supplement. Brendecke Aff. at 4.

2. The December 27 Supplement assumes an incorrect diversion rate, and thus the wrong annual diversion volume, for Twin Falls' Canal Company's water right.

The December 27 Supplement continues to rely on the May 2 Order's assumption that a "full headgate supply" for Twin Falls Canal Company is ¾ inch per acre. May 2 Order at 19-20. The assumption is in error. In *State v. Twin Falls Canal Company*, 21 Idaho 410, 419, 121 P. 1031, 1046 (1912), the Idaho Supreme Court ruled that the State of Idaho's contract with the Twin Falls Canal Company's predecessor binds the Company to divert from the Snake River, for delivery to its shareholders, only that amount of water "sufficient to deliver water at the rate of one-eightieth of one second-foot per acre...."[2] In other words, TFCC's water right—at least in terms of that which will be entitled to curtail juniors—should be calculated on the basis of $^5/_8$ inch per acre, not ¾ inch.

Furthermore, TFCC's $^5/_8$ inch per acre entitlement was calculated on the basis of 240,000 acres. *State v. Twin Falls Canal Company*, 21 Idaho at 419, 121 P. at 1046. On information and belief, IGWA contends that TFCC irrigates no more than 200,000 acres, and likely irrigates

[2] This decision also notes TFCC's obligation to deliver water "in rotation," something IGWA believes TFCC does not do. Before imposing any replacement water obligation, the Director also should determine whether TFCC is meeting this requirement.

significantly fewer acres than this. This further buttresses the conclusion that TFCC's "minimum full supply" should not be calculated on the basis of diversions of ¾ inch, but rather $^{5}/_{8}$ inch per acre.

Therefore, the Director's conclusions are in error as to both the instantaneous diversion rate and annual diversion volume for which TFCC can assert a delivery call or for which the State can curtail junior rights. IGWA maintains that, if the Director were to employ a proper calculation, any replacement water obligation would be significantly reduced or eliminated. Before the Director imposes any final replacement water requirement for 2005 or thereafter, IGWA respectfully requests that he evaluate any alleged material injury to TFCC with reference to these factors.

3. The December 27 Supplement erred by not considering actual 2005 irrigation requirements among the SWC's members.

The December 27 Supplement recognizes that actual irrigation requirements are an important factor, but then fails to analyze these in terms of what amount of material injury, to actual beneficial use, SWC members may have suffered in 2005. *See* December 27 Supplement at 4-5. A brief review of precipitation and evapo-transpiration data for the Twin Falls area for 2005 reveals that precipitation in the first half of the irrigation season was substantially above average while evapo-transpiration for the first half of the irrigation season was below average. Brendecke Aff. at 6. This indicates that irrigation requirements in the first half of 2005 were dramatically below normal. These reduced irrigation requirements are reflected in the preliminary accounting of diversions by the SWC members which shows that many of them did not begin to divert substantial quantities of water until late April or May and did not begin to use substantial quantities of storage water until late June or July. Brendecke Aff. at 8.

IGWA recognizes that the Department is "continuing to evaluate the water supplies available" to the SWC in 2005, that it will compare these to 1995 supplies and account for climatic variations, and that it may amend its conclusions about material injury in this matter. December 27 Supplement at 10. IGWA respectfully requests that the Director suspend the current order until he has evaluated the SWC members' actual irrigation requirements, and actual use, in 2005, and amend his order accordingly.

4. The December 27 Supplement fails to account for the availability and use of ground water as a source of irrigation supply to TFCC lands.

The December 27 Supplement continues the deficiency of previous orders by failing to account for the number of acres in TFCC (or any other SWC entity) irrigated with ground water, either as a primary or supplemental source. TFCC has failed to provide this information to the Director as requested. However, IGWA believes that approximately 12,800 acres within TFCC are irrigated by ground water. Brendecke Aff. at 10. The December 27 Supplement and previous orders should be amended to account for this. Juniors cannot be curtailed to supply surface deliveries to areas that already are served by diversions from a separate source.

5. The December 27 Supplement fails to calculate or provide credit for ground water curtailments that provided supplies to SWC members, including TFCC, in 2005.

The December 27 Supplement recognizes that IGWA ground water district members have provided ground water curtailments resulting in reach gains in the above-Milner river. December 27 Supplement at 4. These include IGWA's lease of ground water rights held by FMC Idaho, LLC, several "dry-year" leases covering certain other ground water-irrigated lands, and the effects of mitigation actions in Water District ("WD") 130. IGWA recognizes that the December 27 Supplement is, by its terms, preliminary. However, IGWA continues to urge that

all of its members' mitigation and replacement water activities, including those occurring due to seepage from surface delivery facilities, be credited to IGWA in the Director's calculations.

6. The December 27 Supplement fails to justify how any material injury can be found as to TFCC when it ended the irrigation year with carryover storage exceeding what the Director has found to be the minimum full supply.

In the December 27 Supplement, the Director fails to explain how TFCC can have suffered material injury where it provided full irrigation supplies in 2005 and yet end the year with an unused storage water account exceeding the 38,400 af "reasonable carryover" amount determined by the May 2 Order. The December 27 Supplement states that:

> [T]he benefit derived by the Twin Falls Canal Company from the unanticipated and enhanced storage allocations following the unprecedented precipitation in May and June of 2005 was significantly less than for other members of the Surface Water Coalition who receive a greater portion of their overall water supply from storage.

December 27 Supplement at 9. While it may be true that TFCC does not rely on storage to the same degree as other SWC members, this is irrelevant to the question whether TFCC shareholders suffered a lack of water for available beneficial uses in 2005. They did not. They had a full headgate supply. The fact that this might have been a result of its "enhanced storage allocation" does not provide the basis for an injury determination.

Assuming, arguendo, that junior water right holders may be deemed responsible for insuring that the senior has a reasonable minimum amount of carryover storage, it is unfair and contrary to law to penalize the juniors when the senior initially uses more storage than anticipated but still ends up the year with more than this minimum carryover.

The second reason the Director gives for assessing this penalty against junior ground water holders is that natural flow diversions declined in July 2005, which "caused the Twin Falls Canal Company to use considerably more storage in July of 2005, as compared to storage used in July of 1995." December 27 Supplement at 9-10. Again, this is irrelevant to the question

whether, under the Conjunctive Management Rules or other Idaho law, junior diversions should be curtailed or required to provide replacement water due to the existence of material injury.

The Director has noted that his accounting is "preliminary," and that certain gage and other adjustments may be made. December 27 Supplement at 10. He concludes that if final accounting shows that the natural flow regime available to TFCC in 2005 was better than he found preliminarily, adjustments "will result in an increase in carryover storage and a corresponding decrease in the shortage and material injury" found elsewhere in the order. *Id.* The Director does not explain how increases in carryover storage can reduce the amount of material injury where carryover storage already has been found to be greater than the minimum amount necessary to avoid injury.

The December 27 Supplement also shows that the 2005 diversions by the SWC members are comparable to those supplies anticipated in dry years in the planning of the current reservoir system. Brendecke Aff. at 9. IGWA believes that the Conjunctive Management Rules do not require mitigation under these conditions.

These errors should be corrected on reconsideration.

7. Non-waiver of claims or issues.

In setting forth the above challenges to the December 27 Supplement, IGWA supplements, and does not waive, the claims and issues it has raised in IGWA's Reconsideration Petitions. IGWA reserves the right to state other grounds for challenge or rehearing, including those that may be shown at trial in this matter.

The Director should grant IGWA's Petition and amend the May 2 and subsequent orders accordingly, or suspend the effectiveness of such orders until after the trial.

IGWA requests a hearing.

RESPECTFULLY SUBMITTED this 10th day of January, 2006.

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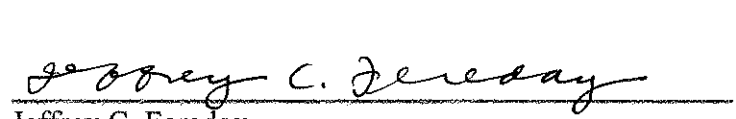

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January 2006, 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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