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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	**IDAHO POWER COMPANY'S COMBINED REPLY TO IGWA AND SAGWU'S OPPOSITION TO IDAHO POWER'S PARTICIPATION AS A PARTY**

Idaho Power Company ("Idaho Power"), by and through its counsel, respectfully submits this Combined Reply to Idaho Ground Water Appropriators, Inc. ("IGWA") and State Agency Ground Water Users ("SAGWU") Responses in Opposition to Idaho Power's Participation as a

Party, pursuant to the June 16, 2005 *Order Regarding Status and Scheduling Conference of June 15, 2005* issued by the Director, Idaho Department of Water Resources.

I. INTRODUCTION

IGWA and SAGWU attempt to muddle the inquiry in this matter by arguing that Idaho Power does not have constitutional standing and that Idaho Power does not meet the requirements for intervention. These are improper legal standards in the context of this matter. The inquiry is simply whether, having timely filed a petition for a hearing pursuant to the IDWR Rules of Procedure, Idaho Power is aggrieved by the May 2nd Order. Since Idaho Power is aggrieved by the May 2nd Order, the Director must grant Idaho Power party status and allow participation in the hearing of this matter.

Additionally, IGWA and SAGWU argue that party status should be denied because Idaho Power has not instituted its own call for water under its senior priority rights. IGWA and SAGWU cite to no administrative, procedural, or common law rules that preclude a party from participating in an administrative matter simply because that party has not initiated its own proceeding. The argument is also illogical because the Director has granted party status, and IGWA and SAGWU have not objected to the party status, of parties which have not instituted an independent call for water in Idaho. Specifically, the Director granted party status to United States Bureau of Reclamation ("USBR") which has not instituted a call for water. Idaho Power claims essentially the same interests in this matter as USBR, and therefore should be granted party status.

The IGWA and SAGWU responses obfuscate instead of clarify the issue. IGWA and SAGWU cite a total of one judicial case regarding standing – a case which is not on point and does not control the inquiry in this matter. IGWA and SAGWU fail to make a cogent argument

as to why Idaho Power is not an aggrieved party in this matter and why Idaho Power should be denied party status.

II. ARGUMENT

A. Proper Inquiry for Idaho Power's Status as a Party

Idaho law and IDWR procedural rules provide that "any person aggrieved by any action of the director" may file a written petition requesting a hearing. Idaho Code § 42-1701A(3); IDAPA 37.01.01.740 (emphasis added). Though the term "aggrieved" is not defined by statute or IDWR rules, the Idaho Supreme Court clarified the meaning by stating that the term "aggrieved party" refers to "any person injuriously affected by the judgment." Federal Land Bank of Spokane v. Parsons, 116 Idaho 545, 777 P.2d 1218 (Id.App. 1989); Roosma v. Moots, 62 Idaho 450, 112 P.2d 1000 (1941). Moreover, parties that can demonstrate that they have a property interest that "may be affected" by the judgment have a right to challenge the administrative action and request a hearing. See e.g. Evans v. Teton County, 73 P.3d 84, 88-89 (Idaho 2003); City of Burley v. McCaslin Lumber Co., 693 P.2d 1108, 1110 (Id.App. 1984). Thus, the relevant inquiry is whether Idaho Power is an aggrieved party with water rights[1] that are or may be affected by the May 2nd Order.

B. Idaho Power is an Aggrieved Party

The Director's Orders of April 6, 2005; February 14, 2005; and May 2, 2005, recognize that Water Rights Nos. 01-02064 and 01-04052 are directly at issue in this proceeding and confer standing upon parties with an interest in these rights. Idaho Power has an interest in these same water rights at American Falls which will be injuriously affected by the Director's May 2nd Order.

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[1] Water appropriated for beneficial use becomes the property of the appropriator. First Security Bank of Blackfoot v. State, 291 P. 1064 (Idaho 1930). Thus, water rights are property which may be affected by administrative decisions affecting those rights.

The Director's own statements concede that these interests in water confer standing on USBR. See May 2nd Order, Conclusions of Law, Paragraph 15, Page 34. Furthermore, USBR filed a supportive response stating that Idaho Power has contractual entitlements in American Falls Reservoir which give Idaho Power an "interest in the outcome of the factual and legal questions of first impression that will be raised herein, which determinations or precedent may be applied to its interests." USBR Response at 1-2. Thus, the party most similarly situated to Idaho Power in this matter has been granted party status, clearly concedes that Idaho Power's interests are aggrieved, and concludes that Idaho Power should participate as a party in this matter.

Idaho Power is injuriously affected by the legal and factual findings in the May 2nd Order, and on that basis is an aggrieved party. As set forth in detail in Idaho Power's Petition for Hearing in this matter, Idaho Power seeks to contest the many erroneous factual and legal findings in the May 2nd Order. These findings set precedent in Idaho which prevent the full and proper conjunctive administration of ground and surface water in accordance with the prior appropriate doctrine. These erroneous findings directly and substantially injure Idaho Power's water rights.

Neither IGWA nor SAGWU make compelling arguments that Idaho Power is not injuriously affected by the May 2nd Order. Neither SAGWU nor IGWA cite a single Idaho case supporting their argument that Idaho Power does not have a right to challenge an administrative order affecting water or property rights. It is therefore inconceivable how the Director could, on the one hand, grant USBR intervention in these proceedings, and on the other, deny Idaho Power aggrieved party status to protect essentially the same interests, in the same structures, as those which provide the foundation for USBR's participation in this matter.

SAGWU concedes, and IGWA makes no argument, that the outcome of this case will have an injurious affect on senior surface water users. See SAGWU Response at 3. The State's various modeling scenarios demonstrate that the ESPA is hydraulically connected to the Snake River, and that junior pumpers have a depletionary effect on the surface water resources of the Snake River by decreasing reach gains and increasing reach losses. The IWRRI model relied on by the Director in making his findings in the May 2nd Order thus establishes harmful depletions to senior water rights. It is thus far undisputed in this matter that depletions to the Snake River caused by ground water withdrawals in the ESPA decrease the amount of water in American Falls Reservoir and in the Snake River above and below American Falls Reservoir. Accordingly, injurious effect to senior water rights is a fact relied upon by the Director in issuing the May 2nd Order, and as yet uncontested by the parties to this matter.

C. SAGWU Concedes Idaho Power is Aggrieved by the May 2nd Order

SAGWU concedes that Idaho Power will be injuriously affected by the May 2nd Order when it states: "As a practical matter, Idaho Power's water rights may be affected by the outcome of the Surface Water Coalition call." SAGWU Response at 3. In short, SAGWU recognizes that Idaho Power has water rights that will be affected by the outcome of the Surface Water Coalition call, but fails to identify why this is not sufficient to confer party status on Idaho Power.

D. IGWA and SAGWU Argue Improper Legal Standards

SAGWU apparently fails to grasp the nature of the Director's May 2nd Order and the nature of the proceeding by mischaracterizing this matter as essentially an adjudication of water rights, Idaho Power's Petition for a hearing as a Petition to Intervene, and the proper inquiry regarding Idaho Power's participation as a questions of constitutional standing. SAGWU states that Idaho Power has no stake in the matter because Idaho Power has no interest in the "nature of

the SWC's rights and how they will be quantified." SAGWU Response at 3. Despite SAGWU's misguided arguments, this is not an adjudication or requantification proceeding, and the Director has no authority to quantify or requantify the senior water rights of the Surface Water Coalition in this proceeding. Rather, this matter relates specifically to a senior water rights call and broadly to the conjunctive administration of water rights in the Snake River Basin and ESPA under the prior appropriation doctrine.

IGWA and SAGWU attempt to obfuscate the issue and muddle the proper legal standard in order to deny party status to Idaho Power. The proper inquiry in this matter is not whether Idaho Power has constitutional standing, or whether Idaho Power meets the standards for a petition to intervene[2], but simply whether Idaho Power is aggrieved by the May 2nd Order. Constitutional standing is only required to be demonstrated to invoke the jurisdiction of a judicial body. Van Valkenburgh v. Citizens for Term Limits, 15 P.3d 1129, 1132 (Idaho 2000). The Director is not a judicial officer and this matter is not being heard before a judicial body. See Twin Falls Co. v. Huff, 76 P.2d 923, 926-927 (Idaho 1938). Accordingly, the three part constitutional standing inquiry cited by SAGWU is inapplicable to determine whether Idaho Power has standing to participate in this matter.

Even if the constitutional standard applies, Idaho Power has standing to participate. The essence of the standing inquiry cited by SAGWU is whether Idaho Power has a personal stake in the outcome of the case. See SAGWU Response at 3, citing In re Doe, 9 P.3d 1226, 1230 (Idaho 2000). As Idaho Power demonstrated in the Petition for Hearing, in the reference to the same water rights which form the basis for USBR's participation as a party, and repeatedly throughout this matter, Idaho Power's water rights are directly affected by junior ground water pumping and

[2]Idaho Power is not seeking to intervene or renew its Petition to Intervene. Accordingly, the SAGWU and IGWA arguments seeking to prove that Idaho Power will expand the issues before the Director and that Idaho Power is adequately represented in this matter have no bearing on the inquiry or the Director's determination.

the shortcomings and erroneous findings in the May 2nd Order. Idaho Power has therefore demonstrated a direct stake in the outcome of this matter that would support standing even if this matter were being heard before a judicial body. Accordingly, Idaho Power meets even this higher standard of constitutional standing and should at least be determined to be an aggrieved party with participatory rights in this matter.

F. Idaho Power is not Required to File its Own Call

IGWA and SAGWU also attempt to muddy the appropriate legal standard by stating that Idaho Power has not filed its own call for water, and therefore does not have standing to participate in this matter. However, IGWA and SAGWU cite no cases for the proposition that a party must file an independent action in order to participate in another action that affects its water and property rights. In fact, there are no cases upholding such a conclusion, and whether or not Idaho Power initiates its own call has no bearing on whether it should be allowed to participate in this matter.

Furthermore, this line of argument is illogical and contrary to the conduct of these proceedings to date. USBR has not filed a call for water under its senior rights, and yet USBR was granted intervention, has participated from nearly the beginning of this process as a party, and requested a hearing on the May 2nd Order. Again, the simple inquiry is whether Idaho Power is aggrieved by the May 2nd Order, not whether Idaho Power has sought to vindicate its rights in another proceeding.

G. IGWA Mischaracterizes the Nature of this Proceeding

IGWA attempts to falsely characterize this matter as an ongoing proceeding limited to those persons and entities already granted party status. See IGWA Response at 4. However, IGWA cites no administrative, procedural, or case law to support this statement, ignores the

obvious conclusion from the IDWR Rules of Procedure, and instead relies on unsupported allegations.

In fact, the hearing of this matter is a separate proceeding to contest the Director's May 2nd Order, and the proceedings are open to "any person" aggrieved by the Director's Order. See Idaho Code § 42-1701A(3); IDAPA 37.01.01.740 (emphasis added). "Person" is defined in the IDWR Rules of Procedure as "any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character." IDAPA 37.01.01.005.17. This expansive definition undisputedly includes Idaho Power as a person, and since any person may petition for a hearing if they are aggrieved, Idaho Power is clearly allowed to petition for a hearing in this matter.

Idaho Power does not dispute that the Director's May 2nd Order resulted from the designation of the former proceedings as an emergency matter under Idaho Code § 67-5247. However, nothing in the Idaho APA provides that such emergency orders cannot be contested by "any party aggrieved by any action of the Director" under the procedures set forth in Idaho Code § 42-1701A(3). To the contrary, the very terms of Idaho Code § 42-1701A allow "any person" to contest "any action of the Director." Since there is no apparent exception for orders issued under the emergency procedures of Idaho Code § 67-5247, any person aggrieved by such action may petition for a hearing.

Further, Rule 740 of the IDWR Rules of Procedure provide that orders must incorporate the statement from Idaho Code § 42-1701A(3) allowing any person aggrieved to contest the order and obtain a hearing. See IDAPA 37.01.01.740. The Director's May 2nd Order essentially concedes that such contests, even to orders issued under the emergency provisions of Idaho Code §67-5247, are allowed under the IDWR Rules of Procedure because the Director included the

required "final order" language in the May 2nd Order providing for a contest of the action by any person aggrieved. Accordingly, and despite IGWA's unsupported arguments to the contrary, this is a separate proceeding before the Director to contest the May 2nd Order.

H. SAGWU's Response Addresses the Wrong Idaho Power Pleading

SAGWU's entire response addresses Idaho Power's Petition for Hearing as though it were a petition to intervene, or as though Idaho Power had renewed its previously filed Petition to Intervene. Accordingly, SAGWU does not make a single cogent argument that Idaho Power is not an aggrieved party under the required analysis in Idaho Code § 42-1701A. Instead, SAGWU makes circular and inconclusive arguments mixing the standards for constitutional standing and intervention, with no clear analysis. Thus, the Director should disregard SAGWU's pleadings which is apparently addressed to the wrong pleading and makes no informative arguments on the relevant inquiries.

III. CONCLUSION

Idaho Power is an aggrieved person and should be allowed to participate in the hearing to contest the May 2nd Order.

WHEREFORE, Idaho Power respectively requests that the Director make a finding that Idaho Power is an aggrieved person allowed to participate in the hearing on this matter. If the Director denies Idaho Power's requested relief, Idaho Power respectfully requests that the Director immediately make such an order final for judicial review. During any such review period, Idaho Power shall participate in the ongoing proceedings in this matter as a "public witness" under Rule 355 of the IDWR Rules of Procedure, and shall introduce evidence, exhibits, and expert reports and testimony under the procedures set forth therein.

DATED this 29th day of June, 2005.

IDAHO POWER COMPANY

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CERTIFICATE OF MAILING

I hereby certify that on this 28 day of June, 2005, I served a copy of **IDAHO POWER COMPANY'S COMBINED REPLY TO IGWA AND SAGWU'S OPPOSITION TO IDAHO POWER'S PARTICIPATION AS A PARTY** by depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

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