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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	MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND MOTION TO CONTINUE HEARING ON DIRECTOR'S MAY 2, 2005 AMENDED ORDER

COME NOW 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, hereinafter referred to as the

Surface Water Coalition ("SWC" or "Coalition"), by and through their respective attorneys of record, and respectfully submit this *Memorandum in Support of Motion for Protective Order and Motion to Continue Hearing on Director's May 2, 2005 Amended Order*:

I.

INTRODUCTION

Expert reports in the above matter are due November 4, 2005. Dispositive motions are due December 2, 2005. The SWC cannot complete expert reports by November 4, 2005, primarily because of the action, or inaction, of the Director of the Idaho Department of Water Resources ("Director") and the Idaho Department of Water Resources ("Department") itself. The Director and those acting for him have not supplied the materials obviously necessary to prepare expert reports. Further, they have modified, refined, or otherwise materially altered the ESPA ground water model, replacing Version 1 with Version 1.1, but have not made the necessary model runs to translate these changes into an Order amending the *Amended Order in Response to the Call* of May 2, 2005. Finally, due to no fault of any participant in this matter, the Idaho State Historical Society (ISHS) Library and Archives will be closed from October 9, 2005, until November 30, 2005, as the staff moves the collections to a new facility. During that time, access to the archives will be unavailable to the public, rendering the completion of necessary research in that facility impossible. All of the materials promised by or requested from the Director and his staff but not provided, model runs using Version 1.1 of the ESPA model, and access to the ISHS Library and Archives are all needed to

complete the SWC expert reports such that the SWC can benefit from a meaningful hearing.

II.

FACTS

On June 15, 2005, during a status conference in this matter, the Director announced, despite expressions of concerns from every party to this proceeding, that he would abbreviate a reasonable time to prepare for a hearing of the magnitude contemplated by all of the petitions filed challenging the Director's May 2, 2005 *Amended Order* by pressing the matter forward for hearing during the arbitrarily chosen month of January, 2006. On July 22, 2005, the Director issued a *Scheduling Order* requiring that expert reports be completed and filed by October 17, 2005, i.e. within sixty-one (61) work days. The *Order Amending Scheduling Order of July 22, 2005,* entered September 1, 2005, extended that date to November 11, 2005, requiring expert reports be filed within seventy-five (75) work days. This period emerges as particularly abbreviated when faced with the Director's reliance upon the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11, the novel interpretation of Idaho's prior appropriation doctrine set forth in the Director's May 2, 2005 *Amended Order*, and the introduction of an innovative interplay of factual, legal, administrative, and economic assertions crafted together in that *Amended Order*.

On July 20, 2005, compelled to go forward, and hopeful of cooperation, SWC experts formally requested the Department provide the files necessary to run the ESPA ground water model. Between the date of that request and the September 1, 2005, announcement of Version 1.1 of the ESPA ground water model, the Department failed to

provide all the files necessary to run the ESPA model, now known as Version 1. At the September 1, 2005 announcement of Version 1.1, the Director explained that the material variations between Version 1 and Version 1.1 required re-running the Curtailment Scenario. SWC's experts requested the necessary files to perform this task and the same have not been provided, nor has the Department or anyone else to the knowledge of the SWC's experts performed this task. The results of the model steady-state and transient runs, the Base-Case Scenario and the Curtailment Scenario all serve as part of the basis, analysis, and determinations for the Director's Orders regarding the Coalition's request for water right administration, represented to be the "best available science" at the time. The *Amended Order* of May 2, 2005, page 7, at paragraphs 32 and 33 asserts:

> 32. The Department is implementing full conjunctive administration of rights to the use of hydraulically-connected surface and ground waters within the Eastern Snake River Plain consistent with Idaho Law and available information. The results of simulations from the Department's ground water model are suitable for making factual determinations on which to base conjunctive administration of surface water rights diverted from the Snake River and ground water rights diverted from the ESPA.
>
> 33. The Department's ground water model represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. There currently is no other technical basis as reliable as the simulations from the Department's ground water model for the ESPA that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries.

This "best science" underlies the material justifications for the Director's conclusions in his May 2, 2005 *Amended Order*. Now that the emergence of Version 1.1 dispels these justifications, and until the *Amended Order* is further amended and modified to reflect the Director's adoption of the new "best science," this matter cannot reasonably

proceed. It certainly cannot reasonably proceed until the Base-Case and Curtailment Scenarios are run and the results offered to the parties for examination with a fair and reasonable amount of time to accomplish that task.

On July 29, 2005, SWC's experts requested in writing other information necessary to render expert opinions. As yet, the same has not been provided.

To further exacerbate frustration of the development of the SWC expert reports, the Department appears to have failed to make available to the SWC's experts information provided by the Department to other parties to this proceeding.

On August 15, 2005, the SWC filed its *Motion for Clarification and Supplemental Information Concerning Record*, seeking disclosure and itemization of all parts of the record relied upon by the Director in the informal proceeding that the Director also intends to consider in the formal proceeding. To date, the Director has not provided this most basic information.

Piling onto the hindrance caused by the Department's failure to provide necessary information in a timely manner, the ISHS Library and Archive materials will be unavailable to SWC's experts by happenstance.

As a consequence of the absent information and the redevelopment of the ESPA model into Version 1.1, SWC's experts cannot finish, nor can they be reasonably expected to finish, their work prior to June of 2006. Therefore, as will be set out below with more specificity, the Director should compel production of the necessary material requested by the SWC's experts and continue this matter for not less than six (6) months so that the experts can reasonably prepare and the parties can participate in a meaningful hearing.

III.

ISSUES

1. Whether the Director and the Department should be compelled to provide the information requested by SWC's experts necessary to render expert reports as well as run the Base-Case and Curtailment Scenarios using Version 1.1 of the ESPA model.

2. Whether the Director should continue this matter until such time that the parties may engage in a meaningful hearing at a meaningful time.

IV.

ARGUMENT

The Idaho Rules of Civil Procedure apply to discovery in this matter. IDAPA 37.01.01.520.02; *Scheduling Order* of July 22, 2005. Rule 26(c) of the Idaho Rules of Civil Procedure provides for protective orders directed to parties and non-parties, at the request of parties and non-parties, in the following relevant terms:

> Upon motion by a party . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from . . . oppression or undue burden or expense . . . .[1]

The SWC's experts are currently investigating the correctness, or incorrectness, of the *Amended Order* of May 2, 2005, the injury analysis contained in the *Amended Order*, and the effects of pumping on the aquifer in addition to all factual aspects of the *Amended Order*. The conclusions of the *Amended Order*, in turn, rely principally upon what was believed to be the "best available science" of the Department's then-current model, Version 1. These conclusions further depend upon other information sought by the

[1] If the Department were a party, Rule 37, I.R.Civ.P., seeking an order to compel discovery would be the appropriate device to require the Department to disclose information. Because the Department is not a party, but does have participatory rights at hearing, Rule 26, I.R.Civ.P., which is addressed to non-parties as well as parties, is the appropriate procedural device.

SWC's experts from the Department, which information has not been received. The timing is now such that it is too late to investigate the missing information and the new model Version 1.1 as well as construct expert reports by November 4, 2005.

Not only have the SWC's experts been unable to investigate the ramifications of Version 1.1, but the Department and other parties to the call have not had ample opportunity to examine the consequences of the new model. No longer can it be asserted, as it is in the *Amended Order,* that, "[t]he results of simulations from the Department's ground water model are suitable for making factual determinations on which to base conjunctive administration of surface water rights diverted from the Snake River and ground water rights diverted from the ESPA." Consequently, without suitable results pending from Version 1.1, which is now the "best available science," the parties, and the Department, must retrench and reinvestigate.

Unless this matter is continued, and the Director in the meantime orders provision of the missing information, the SWC's experts cannot conduct an adequate investigation. Without investigation of the effects of Version 1.1, and without access to the information requested from the Department in July, the SWC will not have a reasonable opportunity to prepare and complete expert reports which adequately service their property interests at stake in these proceedings. This compressed time frame will, therefore, deprive the SWC of a meaningful hearing upon the factual issues as framed by the *Amended Order.*

The basic requirement of due process is notice and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The opportunity to be heard means the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893,

902, 47 L.Ed.2d 18 (1976). The right to a hearing includes the right to present evidence and a reasonable opportunity to know the claims of the opposing party. *Gonzales v. United States,*348 U.S. 407, 75 S.Ct. 409, 99 L.Ed. 467 (1955). It is equally well-established that due process requires, at minimum, notice of the contemplated action and notice of the basis and evidence relied upon for the contemplated action, and an opportunity to respond. *Cleveland Bd. Of Ed. V. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494 (1985).

In another context, the Idaho Supreme Court has refined *Loudermill* to clearly require an opportunity to present a case:

> In order to justifiably modify attorney fee agreements in the interest of public welfare, the Commission must afford due process to the contracting parties, i.e., notice and an opportunity to be heard at a meaningful time. *Loudermill,* 470 U.S. at 542, 105 S.Ct. at 1493. The notice requirement mandates meaningful notification of the regulations to be imposed. *Loudermill,* 470 U.S. at 546, 105 S.Ct. at 1495. This means, at a minimum, that the Commission must give notice of the purpose of the hearing, must have clearly articulated evidentiary standards that will be used at the hearing, assign the burden of proof and level of proof, and formally publish clear guidelines upon which it will base the fee modifications in order to eliminate any latent arbitrariness. The "meaningful hearing" component of the due process requirement insures the attorney the ***opportunity to influence the discretion of the decision-maker by presenting his or her reasons*** "why the proposed action should not be taken" *before* the Commission makes the decision to modify the fee agreement. *Id. See also, Arnzen v. State,* 123 Idaho 899, 854 P.2d 242 (1993).

Curr v. Curr, 124 Idaho 686, 693, 864 P.2 132, 139 (1993). [Emphasis added.]

The process currently contemplated, forcing the SWC to proceed without the necessary runs from the Version 1.1 model, or even without the opportunity to become familiar with that model, and without the requested information concerning the foundation for the *Amended Order* conclusively deprives the SWC of its opportunity to

influence the discretion of the decision maker by presenting its reasons at hearing. Said otherwise, SWC is being forced forward by the Director while the Director and the Department prevent SWC from fairly putting on its case. It does not require a constitutional scholar to perceive that this process is unfair.

V.

CONCLUSION

A cursory review of the files of the Department indicates that the parties to this call are spending considerable amounts of one-time money on counsel and experts to resolve an issue of first impression in Idaho, an issue of economic consequence spreading beyond the participants and, foreseeably, beyond the state's boundaries. This is not the time, place, nor context for a rush to judgment, but instead a time to get it right. The Director is therefore respectfully requested to order the Version 1.1 Base-Case and Curtailment model runs and adjust the *Amended Order* accordingly; to further order the Department to forthwith provide the information requested by the SWC's experts; and, to further order this matter continued until the parties have had a reasonable opportunity to prepare expert reports at a time not sooner than June, 2006.

DATED this 6 day of October, 2005.

ARKOOSH LAW OFFICES, CHTD.

C. Tom Arkoosh

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of October, 2005, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

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