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	)	**ORDER REGARDING SIMPLOT REPLACEMENT WATER REQUEST**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of *Request for Approval to Provide Replacement Water Diverted Under Water Rights Curtailed by the Director's April 19, 2005 Order* ("Request") submitted to the Department on April 29, 2005, by the J.R. Simplot Company ("Simplot").

On April 19, 2005, the Director issued his order *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*, which was amended May 2, 2005, finding that senior natural flow and storage water rights are reasonably predicted to incur material injured by consumptive diversions of ground water under junior priority rights. As part of the Order, the Director required affected holders of junior priority ground water rights where the purpose of use is commercial, industrial, or municipal, to participate with a proximate ground water district as a nonmember for purposes of mitigation or to submit a plan for replacement water with the Department no later than April 29, 2005.

Based upon the Director's consideration of the documents in this matter, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

Procedural History

1. On January 14, 2005, the Surface Water Coalition ("Coalition")[1] delivered to the Director a letter ("Letter") regarding *Request for Water Right Administration in Water District 120 (portion of the Eastern Snake Plain Aquifer) / Request for Delivery of Water to Senior*

[1] The Coalition is composed 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.

Surface Water Rights. The same day, the Coalition also filed its petition ("Petition") captioned *Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area*. In the Letter and Petition, the Coalition stated that junior ground water diversions have caused material injury to its members' natural flow and storage water rights. Accordingly, the Coalition sought administration of junior ground water rights and delivery of water to its respective natural flow and storage water rights.

2. On February 3, 2004, IGWA filed two petitions to intervene. The first was filed to intervene in the request for administration and curtailment of ground water rights within Water District No. 120, and the second was filed to intervene in the request for administration and curtailment of ground water rights in the American Falls Ground Water Management Area and designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.

3. On February 11, 2005, Idaho Power Company ("Idaho Power") filed a letter in which it requested that the letter be treated as a motion to intervene should a contested case be initiated in response to the Letter and Petition filed by the Coalition.

4. On February 14, 2005, the Director issued his initial Order ("Initial Order") in this matter, responding to the Letter and Petition filed by the Coalition, designating the requested water right administration in Water District No. 120 and the American Falls Ground Water Management Area as contested cases, and granting the two petitions to intervene by IGWA. Pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, the Initial Order was an interlocutory order and not subject to review by reconsideration or appeal, with the exception of the portions of the Initial Order (1) determining certain water rights to be junior in priority for the purposes of distributing water to any decreed, licensed, or permitted water rights and (2) denying the portion of the Petition seeking designation of the Eastern Snake Plain Aquifer as a ground water management area. Those two portions of the Initial Order were final on March 7, 2005. The Coalition filed a petition with the Department seeking a hearing on the denial of designation of the Eastern Snake Plain Aquifer as a ground water management area.

5. On February 17 and March 7, 2005, respectively, the Idaho Dairymen's Association ("IDA") and the United States Bureau of Reclamation ("USBR") each filed petitions to intervene in the request for administration and curtailment of ground water rights within Water District No. 120.

6. On April 6, 2005, the Director issued an Order denying Idaho Power's February 14, 2005, petition to intervene; however, the Director granted intervention by the IDA and the USBR. *Order on Petitions to Intervene and Denying Motion for Summary Judgment; Renewed Request for Information, and Request for Briefs*.

7. On April 19, 2005, the Director issued his order *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*, which was amended May 2, 2005 ("Amended Order").

8. In the Amended Order, the Director found that consumptive ground water diversions under junior priority rights in Water Districts No. 120 and 130 are reasonably likely to cause material injury to senior natural flow and storage water rights during the 2005 irrigation year, which begins on November 1, 2004, and ends on October 31, 2005. As a result, the Director instructed the holders of junior ground water rights in Water Districts No. 120 and 130, "having priorities of February 27, 1979, and later . . . to either curtail the diversion and use of ground water for the remainder of 2005, provide replacement water to the members of the Surface Water Coalition as mitigation, or combination of both." *Amended Order* at p. 44, ¶ 53.

9. The Amended Order provides that no later than 5:00 p.m. on April 29, 2005, "the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, and other entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water . . . ." *Id.* at p. 46, ¶ 9.

10. "The plan will be disallowed, approved, or approved with conditions by May 6, 2005, or as soon thereafter as practicable in the event an extension is granted as provided in the order granting the extension." *Id* at p. 47, ¶ 9.

11. Excluding in-house culinary uses, "consumptive ground water rights for agricultural, commercial, industrial, and municipal uses . . . are required to provide replacement water to the members of the Surface Water Coalition as mitigation for out-of-priority depletions, as provided herein, in amounts equal to the annual depletions to the reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage under their rights as determined using the Department's ground water model for the ESPA." *Id.* at p. 45, ¶ 1.

12. Holders of affected ground water rights where the purpose of use is irrigation "shall provide the required replacement water through the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, or Bonneville-Jefferson ground water districts [the "Districts"]. Holders of ground water rights for irrigation that are not members of one of these ground water districts shall be deemed a nonmember participant for mitigation purposes . . . and shall be required to pay the ground water district nearest the lands to which the water right is appurtenant for replacement water as mitigation pursuant to Idaho Code § 42-5259." *Id.* at p. 45, ¶ 2.

13. "Holders of ground water rights affected by this Order where the purpose is commercial, industrial, or municipal may provide the required replacement water through a ground water district as a nonmember participant for mitigation or may separately or jointly provide the required replacement water." *Id.* at p. 45, ¶ 3.

14. The Director allocated replacement water between the North Snake Ground Water District (2,400 acre-feet), Magic Valley Ground Water District (17,800 acre-feet), Aberdeen-American Falls Ground Water District (58,700 acre-feet), Bingham Ground Water District (14,900 acre-feet), and Bonneville-Jefferson Ground Water District (7,200 acre-feet). *Id.* at p. 46, ¶ 4.

15. While the total amount of replacement water was calculated at 101,000 acre-feet, "[t]he total amount of replacement water provided for mitigation *in 2005 shall not be less than 27,700 acre-feet*, which equals the amount of the predicted shortage in 2005 . . . ." *Id.* at p. 46, ¶ 5 (emphasis added). "If at any time the mitigation for out-of-priority depletions is not provided as required herein, the associated water rights are subject to immediate curtailment, based on the priorities of the rights, to the extent mitigation has not been provided." *Id.* at p. 46, ¶ 8.

16. In stating his intent to "monitor water supply requirements and the water supplies available throughout the irrigation season [,]" *id.* at p. 47, ¶ 10, the Director also stated that the amount of mitigation for the 2005 irrigation season could vary, depending on "the final accounting for surface water diversions from the Snake River for 2005[,]" *id.* at p. 47, ¶ 11. "To the extent less mitigation is provided than was actually required, a mitigation obligation will carry forward to 2006 and be added to any new mitigation determined to be required for 2006. To the extent more mitigation is provided than was actually required, a mitigation credit will carry forward to 2006 and be subtracted from any new mitigation determined to be required for 2006." *Id.*

17. The Director stated that he would continue to evaluate conditions in the Eastern Snake Plain Aquifer on an annual basis "after April 1, when the USBR and U[nited] S[tates] A[rmy] C[orp] [of] E[ngineers] release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 31, and require mitigation or curtailment as warranted without further demand by members of the Coalition until such time that a permanent mitigation plan may be approved." *Id.* at p. 47, ¶ 12.

18. "Mitigation debits and credits resulting from year-to-year mitigation will continue to accrue and carry forward until such time as the storage space held by the members of the Surface Water Coalition under contract with the USBR fills. At that time, any remaining debits and credits will cancel." *Id.* at p. 47, ¶ 13.

19. The Amended Order was a final order of the Department.

<u>Request for Approval to Provide Replacement Water Plan</u>

20. Before 5:00 p.m. on April 29, 2005, Simplot filed its Request with the Department.

21. Simplot owns various junior priority ground water rights that are identified in the Request to be subject to curtailment pursuant to the Amended Order. Because Simplot was unaware of any plan submitted by the Districts that had "been approved to mitigate diversions" under Simplot junior ground water rights, "Simplot independently submits the . . . [Request] to provide replacement water . . . [and] protect Simplot's continued use of water during the 2005 irrigation season." *Request* at p. 2.

22. The first set of junior ground water rights that are identified in the Request to be subject to curtailment are identified by Simplot as the "Affected Simplot Water Rights." The

Affected Simplot Water Rights are: 35-8726, 35-10422, and 35-10427. Water right no. 35-8726 is a licensed water right for irrigation with a priority of April 28, 1989 for 2.60 cfs. *Request, Attachment "A"*. Water right no. 35-10422 was partially decreed by the Snake River Basin Adjudication ("SRBA") District Court for irrigation with a priority of July 31, 1987 for .47 cfs. *Id.* Water right no. 35-10427 was also partially decreed by the SRBA District Court for irrigation with a priority of October 31, 1986 for .53 cfs. *Id.* Total annual diversions associated with Simplot's Affected Water Rights are 3.60 cfs. *Request* at p. 2.

23. According to the Request, "[e]ach of the Affected Water Rights are used to irrigate farmland in combination with other Simplot-owned water rights that are senior to the February 27, 1979 curtailment date . . . . Accordingly, each irrigated acre within the overlapping places of use receives part of its water supply through the Affected Simplot Water Rights, and part of its water supply through other senior Simplot water rights." *Id.*

24. Holders of affected ground water rights where the purpose of use is irrigation "shall provide the required replacement water through the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, or Bonneville-Jefferson ground water districts. Holders of ground water rights for irrigation that are not members of one of these ground water districts shall be deemed a nonmember participant for mitigation purposes . . . and shall be required to pay the ground water district nearest the lands to which the water right is appurtenant for replacement water as mitigation pursuant to Idaho Code § 42-5259." *Amended Order* at p. 45, ¶ 2. Therefore, Simplot must provide mitigation for its affected irrigation water rights through the the Districts' replacement water plan that was conditionally approved as of the date of this order.

25. The second set of junior priority ground water rights that are identified in the Request to be subject to curtailment are "water right nos. 35-8162 (.04 cfs/3.4 afa for industrial and commercial purposes), 35-8131 (.02 cfs/0.6 afa for industrial and commercial purposes) and 35-8114 (.01 cfs/4.22 afa for commercial purposes) . . . ." *Request* at p. 3.

26. In order to account for these water rights, the Request "proposes to replace the volume of water diverted under these rights with the volume of water appurtenant to 3 acres of land that will not be irrigated under water right 35-2713[,]" a "Simplot Senior Water Right." *Id.*

27. Department staff modeled the depletions to the Near Blackfoot to Minidoka reach caused by the industrial and commercial water right diversions and the gains to the Near Blackfoot to Minidoka reach resulting from non-diversion of water under water right no. 35-2713. Department staff determined that Simplot must cease irrigating four acres of irrigated land under water right no. 35-2713 to mitigate for ground water withdrawn under the Simplot commercial and industrial water rights.

28. After deducting replacement volumes for the above-mentioned sets of junior ground water rights, the Request states that "the balance of the water available under the Simplot Senior Water Rights (0.53 cfs/35 acres) would be available for use by Simplot to mitigate any further Orders curtailing additional water rights held by Simplot during 2005, or could be used to credit Simplot for mitigation that may be required during 2006." *Id.*

29. The final set of junior ground water rights that are identified in the Request to be subject to curtailment are water right nos. 29-7763 and 35-8469. According to the Request, water will not be diverted under these rights during 2005. Therefore, replacement water is not proposed for those rights.

30. Upon approval of the Districts' mitigation plan, the Request "reserves the right to apply the entire quantity of water available under the Simplot Senior Water Rights to mitigate other water users during the 2005 irrigation season or for use as a credit toward any mitigation that may be required during 2006." *Id.*

CONCLUSIONS OF LAW

1. The Director of IDWR recognizes the importance under Idaho law of protecting the interests of a senior priority water right holder against interference by a junior priority right holder from a tributary or interconnected water source. Art. XV, § 3, Idaho Const.; Idaho Code §§ 42-106, 42-237a(g), and 42-607.

2. Idaho Code § 42-602 states:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.
> The director of the department of water resources shall distribute water in the water districts in accordance with the prior appropriation doctrine.

3. Idaho Code § 42-607 provides that the following shall apply during times of scarcity of water when it is necessary to distribute water between water rights in a water district created and operating pursuant to chapter 6, title 42, Idaho Code, in accordance with the priority of those rights:

> [A]ny person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such steam or water supply . . . .

4. In water districts, watermasters must summarily determine: (1) whether a water right holder calling for delivery of water is receiving the water authorized by the water users water right; (2) if not, what junior water right diversions must be curtailed; and (3) whether there are alternative means to provide the water to senior water rights to reduce or eliminate injury to the senior water rights.

5. Non-irrigation of four acres of the place of use described by water right no. 35-2713 irrigated in 2004 will fully replace the depletion from ground water diverted under water

right nos. 35-8162, 35-8131 and 35-8114 to the reach gains from the Near Blackfoot Gage to the Minidoka Gage in the Snake River.

ORDER

The Director enters the following Order for the reasons stated in the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED as follows:

That replacement water for depletions caused by diversion of water under water right nos. 35-8726, 35-10422, and 35-10427 must be provided by the ground water district within which the points of diversion for the water rights are located or are most closely located.

IT IS FURTHER ORDERED that the temporary replacement plan by Simplot for water right nos. 35-8162, 35-8131 and 35-8114 is APPROVED provided that Simplot identifies four acres irrigated during 2004 described within the place of use for water right no. 35-2713 that will not be irrigated in 2005.

IT IS FURTHER ORDERED that no replacement water is required for water right nos. 29-7763 and 35-8469 because ground water will not be diverted under these water rights during 2005.

IT IS FURTHER ORDERED that information required by this order must be submitted on or before May 23, 2005, and is subject to further verification.

IT IS FURTHER ORDERED that failure to submit the information on or before May 23, 2005, will result in curtailment on May 24, 2005, consistent with the Director's Amended Order issued on May 2, 2005.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, this is an interlocutory order and is not subject to review by reconsideration or appeal. The Director may review this interlocutory order pursuant to Rule 711, IDAPA 37.01.01.711.

DATED this 10TH day of May 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

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