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Department of Water Resources

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ORIGINAL

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT # 2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALL CANAL COMPANY	)	**STATE AGENCY GROUND WATER USERS' MOTION TO POSTPONE STATUS CONFERENCE OR TO HOLD A SECOND STATUS CONFERENCE**

The State Agency Ground Water Users (the Idaho Department of Juvenile Corrections, the Idaho Department of Health & Welfare, the Idaho Department of Fish & Game, and the Idaho Transportation Department), by and through their counsel of record, Michael S. Gilmore, Deputy Attorney General, move to postpone the Status Conference of Wednesday, April 27, 2005, or, in the alternative, to hold a second Status Conference not earlier than two weeks after Monday, April 25, 2005, for the benefit of persons who received a watermaster's letter during or after the week of Monday, April 18, 2005, through Friday, April 22, 2005, because those persons have not had a reasonable opportunity to respond to those letters. This motion is based upon the following recitation of the timelines in this case:

1. The Department received the Surface Water Coalition's Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water

Management Area (the Letter Petition) on January 14, 2005. The Surface Water Coalition did not serve the Letter Petition upon all ground water users that would be affected by the Letter Petition. The Department had required the Surface Water Coalition to serve another petition that it had also filed that same day on affected water users.

2. On April 19, 2005, over three months after the Department received the Letter Petition, the Director issued the Order of April 19, 2005, which directed the watermasters for Water Districts No. 120 and No. 130 "to issue written notices by April 22, 2005, or as soon thereafter as practicable, to the holders of consumptive ground water rights in Water Districts No. 120 and No. 130 having priority dates of February 27, 1979, and later ... including consumptive grounds water rights for agricultural, commercial, industrial, and municipal uses." That Order further required five ground water districts to file mitigation plans on or before April 29, 2005, and required holders of commercial, industrial or municipal uses to mitigate through a ground water district if they chose to mitigate rather than curtail. The Order did not address uses other than agricultural, commercial, industrial or municipal uses, for example, domestic or wildlife uses.

3. On Friday, April 22, 2005, at least one watermaster (Lewis Rounds of Water District No. 120) mailed actual notice to various ground water users that they would be subject to curtailment or required mitigation. Despite the letter's importance and the urgency of its message, the letters were apparently sent by United States mail and not faxed. One of those letters, which included the bolded caption "**Affected Water Right Nos. 35-8624, 35-8625, 35-9041**," was mailed to and was not actually received by the Idaho Transportation Department until Monday, April 25, 2005. It is possible that other affected State agencies may not yet have been received similar notices or received them later than Monday, April 25, 2005.

4. The watermaster's notice of April 22, 2005, did not comply with the requirements of the Director's Order of April 19, 2005, first ordering paragraph, page 43, and did not comply with Idaho Code § 67-5242(1)(b) because it did not provide affected ground water users with the legal authority under which they would be curtailed or required to mitigate.

5. The watermaster's letter referred to in the two previous paragraphs included two rights that IDWR records show as being held by the Idaho Transportation Department and a third right (No. 35-8624) that IDWR records show as being held by the Idaho Department of Fish & Game. It is not currently known whether any other State Agency Ground Water Users' notice was also mailed to the wrong agency or not mailed at all.

6. The watermaster's letter listed two uses that were not agricultural, commercial, industrial, or municipal uses. IDWR records list Water Right No. 35-8624 as a wildlife use and further elaborate that it is for "wildlife, waterfowl nesting, brood rearing and hunting," uses that are not included in the uses subject to curtailment or required mitigation in the Director's Order of April 19, 2005. IDWR records list Water Right No. 35-8625 as domestic, a use that is not included in the uses subject to curtailment or required mitigation in the Director's Order of April 19, 2005.

7. The Director issued a Notice of Status Conference on Friday, April 22, 2005, which scheduled the Status Conference for Wednesday, April 27, 2005, at which only parties who have submitted written questions may be heard.

8. The State Agency Ground Water Users have also petitioned to intervene today, Tuesday, April 27, 2005, the day before the Status Conference and the day after they first received the watermaster's letter. The Department has not yet formally classified them as a party who can submit written questions.

9. The timelines cited above, including the possibility that the State Agency Ground Water Users may not be able to participate in tomorrow's Status Conference because they are not yet parties to this proceeding, raise substantial issues of denial of due process of law for ground water users who first received notice from the Department that they would be curtailed or required to mitigate on or after April 25, 2005, two or fewer days before the scheduled Status Conference.

10. These due process concerns can be obviated by

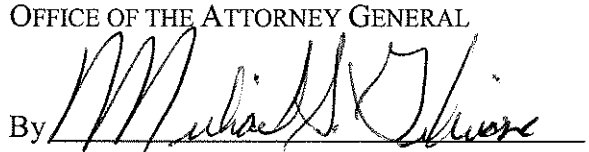
(a) canceling the Status Conference scheduled for tomorrow, Wednesday, April 26, 2005, or in the alternative,

(b) scheduling a second Status Conference no earlier than two weeks after Monday April 25, 2005, for persons who first received written notice of possible curtailment from the Department through watermasters' letters like the one mailed to the Idaho Transportation Department on Friday, April 22, 2005, and received on Monday, April 25, 2005.

11. If this Motion is granted, under either alternative, and if the State Agency Water Users' Petition to Intervene is also granted so that they may appear at a Status Conference as a party and submit questions to the Director, either orally or in writing at a Status Conference that they can attend as a party, they will not contend that the Department's procedure has denied them due process of law.

DATED this 26th day of April, 2005.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By 
MICHAEL S. GILMORE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 2005, I caused to be served a true and correct copy of the foregoing via e-mail or facsimile to:

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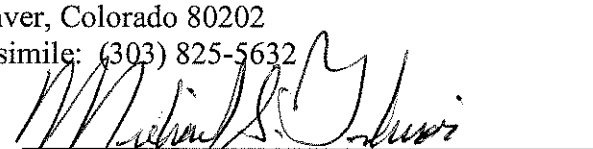

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