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Department of Water Resources

ORIGINAL

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR ADMINISTRATION 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' PETITION FOR RECONSIDERATION, HEARING, AND CLARIFICATION FROM AMENDED ORDER**

The Idaho Department of Juvenile Corrections, the Idaho Department of Health & Welfare, the Idaho Department of Fish & Game, and the Idaho Transportation Department, who will be called the State Agency Ground Water Users, by and through their counsel of record, Michael S. Gilmore, Deputy Attorney General, file this Petition for Reconsideration, Hearing, and Clarification from the Director's Amended Order of May 2, 2005.

Affected Water Rights

1. This Petition is based upon the following descriptions of water rights held by the Idaho Transportation Department (ITD) and the Idaho Department of Fish & Game (IF&G) that were listed by the District 120 watermaster as being subject to mandatory curtailment or required replacement water:

(a) IF&G holds decreed ground water right **No. 35-8624** described in a Partial Decree Pursuant to I.R.C.P. 54(b) as:

Priority date: 01/22/1986

Use: Wildlife right from 01/01 to 12/31 for 1.01 CFS and 731.2 AFY

Location of Use: T 5S R 31E Section 24, SWNE, NENW, SWNW, NESW, lot 3 of NESE, SWSE, lot 2 of SENE, NWNW, SENW, SESW, NWSE and lot 4 of SESE (no acreages listed).

The purpose of this right is to provide water for a pond approximately ½ mile west of American Falls Reservoir that is about 14 acres in area and that provides water fowl habitat year around. The pond has no outlet and water pumped into the pond seeps into the underlying ground and back into the aquifer, except for that lost to evaporation, *i.e.*, most of the ground water used to fill the pond returns to the ground. It is not apparent that this water right is the source of any significant depletions to the aquifer or of any material injury to the Petitioners' surface water rights.

(b) ITD holds licensed ground water right No. 35-8625 described in the license as:

Priority date: 01/13/1986

Use: Domestic right from 01/01 through 12/31 for 0.06 CFS and 1.2 AFA

Location of Use: T 1S R 36E Section 29 SENW and NESW (no acreages listed).

Remark 5 of the license states: "Domestic use is for 2 rest areas." The use is for water for two Interstate Highway rest areas (on opposite sides of the highway). It is not apparent that this water right is the source of any significant depletions to the aquifer or of any material injury to the Petitioners' surface water rights. It appears on its face that this is a culinary use exempt from the Director's Amended Order.

(c) ITD holds licensed ground water right No. 35-9041 described in the license as:

Priority date: 02/08/1994

Use: Irrigation right from 04/01 through 10/31 for 0.06 CFS and 7.6 AFA

Location of Use: T 4N R 37E, Section 27, NWNW 0.4 acres, NESW 0.5 acres, SWSE 0.2 aces, SWNW 0.4 acres, SESW 0.3 acres, and SENW 0.1 acres for a total of 1.9 acres.

This right is used for drip irrigation for trees (and not for sprinkling grass) that constitute

a windbreak near Interstate 15. The purpose of the windbreak is to reduce blowing dirt and sand that has reduced visibility and resulted in closure of the Interstate highway. The delivery system consists of drip hoses with emitters every two feet. It is not apparent that this water right is the source of any significant depletions to the aquifer or of any material injury to the Petitioners' surface water rights.

1. Petition for Reconsideration and for Hearing Regarding Lack of Notice of Alleged Depletions and of Alleged Material Injury

2. The Amended Order, Ordering Paragraph 1, directed the watermasters of Water Districts No. 120 and 130 "to advise the holders of ... consumptive rights [having priority dates of February 27, 1979, and later ..., excluding in-house culinary uses] that they are required to provide replacement water to the members of the Surface Water Coalition as mitigation for out-of-priority depletions."

3. The watermaster's letters of April 22, 2005, to ITD and to IF&G listed the rights described in Paragraph 1 of this Petition as subject to the Order and subject to curtailment or the requirement to provide replacement water in an approved mitigation plan. Neither the Amended Order nor the watermaster's letter quantified the Department's allegations of depletions or material injury for any of the three water rights at issue and left the State Agency Ground Water Users to speculate upon the Department's quantification of their water rights' depletions (if any) and upon the Department's quantification of their water rights' material injury to members of the Surface Water Coalition (if any) and upon the Department's quantification of the State Agency Ground Water Users' obligations to provide replacement water (if any). See Attachment 1, which is a copy of the Watermaster's letter to ITD. (The letter to IF&G was similar.)

4. The Department has not provided the State Agency Ground Water Users with notice of specific evidence that pertains to their unique wildlife, rest stop (domestic), and drip irrigation uses. It is a due process violation for lack of notice to the State Agency Ground Water Users for the Department to order the State Agency Ground Water Users to curtail and/or provide replacement water on the basis of alleged depletions caused by their ground water uses

unless the Department first gives notice of its quantification of the alleged depletions of the water uses at issue and of their alleged material injury to members of the Surface Water Coalition and also gives the State Agency Ground Water Users a timely and meaningful opportunity to review and rebut the Department's allegations. See Idaho Code § 67-5242(1)(c) ("all parties shall receive ... [¶] (c) a short and plain statement of the matters asserted or the issues involved"); § 67-5248(2) ("Findings of fact must be based exclusively on the evidence in the record of a contested case and on matters officially noticed in that proceeding"); § 67-5249(2)(c) ("The record shall include: ... [¶] (c) a statement of matters officially noticed, ... [¶] (f) staff memoranda or data submitted to the presiding officer or agency head in connection with consideration of the proceeding"); § 67-5251(4) ("Parties shall be notified of the specific facts or material noticed and the source thereof, including any staff memoranda and data. Notice ... must be provided before the issuance of any order that is based in whole or in part on facts or material noticed. Parties must be afforded a timely and meaningful opportunity to contest and rebut the facts or material so noticed.").

5. It is also a due process violation for the lack of notice to the State Agency Ground Water Users for the Department to require replacement water as part of an approved mitigation plan as an alternative to curtailment unless the Department first gives notice of its quantification of the alleged depletions of the water rights at issue and of the alleged material injury to members of the Surface Water Coalition so that the State Agency Ground Water Users will be given fair notice of how much replacement water is required of them if they choose not to contest the watermaster's determinations that they are subject to the Amended Order. See statutes cited in previous paragraph.

6. The State Agency Ground Water Users petition the Director to:

(a) grant reconsideration of the application of the Amended Order to the water rights listed in Paragraph 1 for lack of notice of the alleged depletions of those water rights and alleged material injury to members of the Surface Water Coalition,

(b) grant a hearing regarding the alleged depletions and alleged material

injury to members of the Surface Water Coalition resulting from the ground water uses listed in Paragraph 1,

(c) provide the Department's position concerning alleged depletions and alleged material injury to members of the Surface Water Coalition resulting from the ground water uses listed in Paragraph 1 to the State Agency Ground Water Users a reasonable time before the hearing (and not less than two weeks before the hearing), and

(d) vacate the effectiveness of the Amended Order against the State Agency Ground Water Users' ground water rights listed in Paragraph 1 until:

(i) the Department has provided the State Agency Ground Water Users with its quantification of (A) the alleged depletions of each of the water rights listed in Paragraph 1, (B) the alleged material injury to members of the Surface Water Coalition for each of the water rights listed in Paragraph 1, and (C) the alleged obligation to provide replacement water for each of the water rights listed in Paragraph 1, and

(ii) the Department has given the State Agency Water Users an opportunity for a hearing at which they can contest those allegations or can propose alternative quantifications and/or assess the amount of replacement water, if any, that they would be responsible for providing if they accepted the Department's quantification.

2. Petition for Reconsideration Regarding Lack of Options for Holders of Wildlife and Domestic Rights

7. The Amended Order, Ordering Paragraphs 2, 3, requires all holders of irrigation ground water rights affected by the Amended Order who are not members of ground water district to be non-member participants of ground water districts providing replacement water . Ordering Paragraph 3 gives the holders of commercial, industrial and municipal water rights affected by the Amended Order the option to provide replacement water through a ground water district as a nonmember participant or separately or jointly to provide replacement water.

8. The Amended Order has no provisions for holders of wildlife or domestic uses subject to the Amended Order to join in water districts' replacement water plans or in other water users' replacement water plans, *i.e.*, it apparently requires holders of wildlife or to domestic uses subject to the Amended Order to devise their own plans for replacement water or be curtailed. Every other water user subject to the Amended Order has the option to join (or is required to join) other entities' replacement plans.

9. It is arbitrary, capricious and an abuse of discretion for the Department to allow holders of commercial, industrial and municipal water rights affected by the Amended Order the options to provide replacement water through a ground water district as a nonmember participant or to separately or jointly provide replacement water and not to give the same opportunity to holders of wildlife and domestic rights subject to the Amended Order (if they are subject to the Amended Order).

10. It is arbitrary, capricious and an abuse of discretion for the Department not to allow ITD to participate in other ground water users' replacement water plans when it holds a domestic water right for .06 CFS at an Interstate Highway rest stop and to require ITD to devise a replacement water plan for that tiny right alone (if it is subject to the Amended Order).

11. It is arbitrary, capricious and an abuse of discretion for the Department not to allow a unique beneficial use of water like IF&G's wildlife right to participate in other ground water users' replacement water plans and to require IF&G to devise a replacement water plan for that right alone (if it is subject to the Amended Order).

12. The State Agency Ground Water Users petition the Director to:

(a) grant reconsideration of the Amended Order,

(b) amend the Amended Order to give the holders of any non-irrigation right subject to the Amended Order (including holders of domestic and wildlife rights), and not only holders of commercial, industrial, or municipal rights subject to the Amended Order, the option to provide replacement water through a ground water district as a nonmember participant or to separately or jointly provide replacement water through another plan

approved by the Director, and

(c) vacate the effectiveness of the Amended Order against the ground water rights listed in Paragraph 1 until the Director has amended the Amended Order as requested in subparagraph (b) immediately preceding.

3. Petition for Clarification, Reconsideration and Hearing Regarding Curtailment or Replacement Water for ITD's Domestic Rights for a Rest Stop

13. The Amended Order, Ordering Paragraph 1, exempts from the effects of the Amended Order "in-house culinary uses."

14. The statutory authority cited by the Department in issuing its Amended Order, Conclusion of Law 1, is Idaho Code § 42-1701A(3)-(4). Conclusion of Law 24 also cites Idaho Code § 42-607 as authority for the watermaster's actions, and Conclusions of Law 29-35 cite the Conjunctive Management Rules, IDAPA 37.03.11.001 *et seq.* None of these statutes or rules contain a definition of "culinary" uses of water to which the watermaster may refer in administering the Amended Order.

15. Idaho Code § 43-335, which is in a chapter and title of the Idaho Code not cited in the Amended Order's Conclusions of Law, provides: " 'culinary purposes' shall mean the use of water for direct human consumption, cooking, sanitary purposes, and other such uses."

16. ITD's water right No. 35-8625 for drinking, washing and toilet facilities at an Interstate Highway rest stop is an "in-house culinary use" within the meaning of Idaho Code § 43-335 because the water is used on site for "direct human consumption, cooking, sanitary purposes, and other such uses."

17. The Amended Order exempts "in-house culinary uses" from the requirements of curtailment or mandatory replacement water without regard to whether the "in-house culinary use" is depletive or causes material injury to members of the Surface Water Coalition.

18. It is arbitrary, capricious and an abuse of discretion for the watermaster to single out ITD's "in-house culinary use" of water in water right No. 35-8625 for curtailment or required replacement water when, to the best of the State Agency Ground Water Users' knowledge, the

watermaster has not systematically identified other "in-house culinary uses" for curtailment or required replacement water and when Ordering Paragraph 1 contains no authorization to curtail any "in-house culinary uses."

19. The State Agency Ground Water Users petition the Director to:

(a) clarify that use of the term "culinary" in the Amended Order's first Ordering Paragraph has the same meaning as "culinary" in Idaho Code § 43-335,

(b) clarify that uses of water at a highway rest stop for drinking, washing and toilet purposes are "in-house culinary uses" within the meaning of the Amended Order's first Ordering Paragraph,

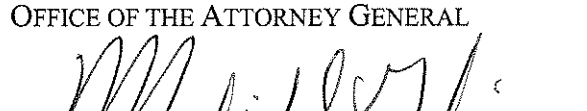
(c) order the watermaster to remove ITD's water right No. 35-8625 for domestic purposes at a highway rest stop from the list of water rights subject to curtailment or required replacement water because his action is inconsistent with the Amended Order's first Ordering Paragraph, which contains a blanket exclusion from the effects of the Amended Order for "in-house culinary uses," or, in the alternative,

(d) grant reconsideration and/or grant hearing on the issue of whether ITD's water right No. 35-8625 for domestic purposes at a highway rest stop should be curtailed or forced to provide replacement water if the Amended Order is not clarified in the fashion set forth in subparagraphs (a)-(c) above, and

(e) vacate the effectiveness of the Amended Order against ITD's water right No. 35-8625 until the Director's disposition of the State Agency Ground Water Users' Petition for Reconsideration or Hearing, whichever is later.

DATED this 16th day of May, 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 16th day of May, 2005, I caused to be served a true and correct copy of the foregoing by regular U.S. Mail, postage prepaid, to:

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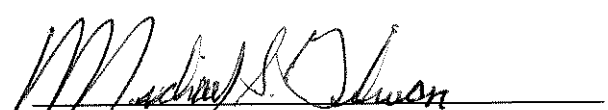
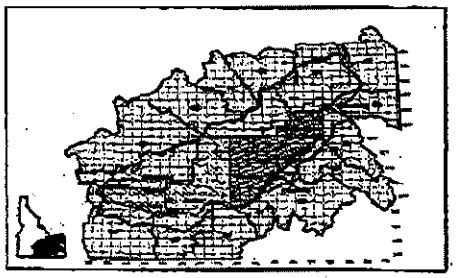


Michael S. Gilmore
Deputy Attorney General

ATTACHMENT



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RECEIVED APR 25 2005 ITD LEGAL SECTION

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BUSINESS & SUPPORT MGMT

STATE OF IDAHO
DEPT OF TRANSPORTATION
DIVISION OF HWYS
PO BOX 7129
BOISE ID 83707

April 22, 2005

RE: Curtailment of Ground Water Rights with Priority Dates of February 27, 1979 or Later, Located in Water District No. 120

Affected Right Nos: 35-8624, 35-8625, 35-9041

Dear Water Right Holder:

The records of the Idaho Department of Water Resources (IDWR) and Water District 120 indicate that you are the holder of one or more consumptive ground water rights with a priority date of February 27, 1979 or later than February 27, 1979. On April 19, 2005, the Director of IDWR issued an order directing the watermaster of Water District 120 to notify holders of consumptive ground water rights with priority dates of February 27, 1979 or later that they will be required to provide replacement water as mitigation for depletions to flows of the Snake River caused by their ground water pumping. (*See* Order issued April 19, 2005, *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).* **If you do not provide replacement water in an approved mitigation plan as set forth below, diversions of ground water authorized by your water right(s) bearing a priority date of February 27, 1979 or later will be curtailed for the remainder of 2005 and/or in future years.**

The order affects consumptive ground water rights bearing priority dates of February 27, 1979 or later, including ground water rights for irrigation, commercial, industrial, municipal, non-exempt domestic use, and other consumptive uses. Culinary in-house uses of water are not subject to curtailment, however.

The order also affects certain irrigation rights bearing priority dates senior to February 27, 1979, if those rights were decreed as "enlargement" rights containing a condition of use that subordinates the right to all rights with priority dates earlier than April 12, 1994 that were not decreed as enlargements.

If you are the holder of a ground water irrigation water right(s) describing a point(s) of diversion within the boundaries of either the Aberdeen-American Falls Ground Water District, Bingham Ground Water District, or the Bonneville-Jefferson Ground Water District, you must participate in the

mitigation plan of the district in which your ground water point(s) of diversion is located. If your ground water point(s) of diversion is located outside the boundaries of a ground water district, you are required to participate in mitigation provided by the ground water district nearest your ground water point(s) of diversion.

If you are a holder of a water right authorizing commercial, industrial, municipal, or non-exempt domestic use, you may provide the replacement water: (1) As a member of a ground water district; or (2) As a non-member participant for mitigation provided by a ground water district. Under limited circumstances, IDWR will entertain proposals to provide individual replacement water from large commercial, industrial, or municipal entities. IDWR encourages other non-irrigation ground water users to participate in the ground water districts' mitigation plans.

Ground water districts must submit a mitigation plan to IDWR no later than April 29, 2005, on behalf of its members and other participants in its mitigation plan. Large commercial, industrial, or municipal water users who elect not to participate in a ground water district's plan must submit an alternative mitigation plan to IDWR no later than April 29, 2005.

The above referenced order was issued in response to a call for delivery of water rights held or used 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 Falls Canal Company, collectively known as the Surface Water Coalition (Coalition). These water rights authorize the diversion of natural flows or stored water from the Upper Snake River system above Milner Dam, to be used for irrigation purposes within Gooding, Jerome, Lincoln, Minidoka, Twin Falls and Cassia Counties in southern Idaho. The Director of IDWR determined that ground water withdrawals from certain areas of the Eastern Snake Plain Aquifer (ESPA) cause depletions to the flow of the Snake River within those reaches of the Snake River from near Blackfoot, Idaho to Minidoka Dam, including the American Falls Reservoir. The Director further determined that diversion and use of ground water within Water District 120 under water rights that bear priority dates of February 27, 1979 or later would materially injure the Coalition water rights during 2005.

A copy of the order signed by the Director dated April 19, 2005 can be found on the main page of IDWR's website at: www.idwr.idaho.gov. At the website, you can also review maps showing boundaries of ground water districts, find address and phone numbers for the districts, and find answers to specific questions about the order, including answers about how much replacement water is required. If you have questions concerning the order and this correspondence, please contact the Water District 120 office in Idaho Falls at 208-525-7161, or contact the IDWR state office in Boise at 208-287-4800.

Regards,

Lewis Rounds

Lewis Rounds
Watermaster
Water District 120

cc: Karl J. Dreher, Director, IDWR