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DEPARTMENT OF
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF GROUND WATER DISTRICTS' APPLICATION FOR APPROVAL OF MITIGATION PLAN FOR THE AMERICAN FALLS REACH OF THE SNAKE RIVER	**SURFACE WATER COALITION'S MOTION TO DISMISS THE GROUND WATER DISTRICTS' APPLICATION**

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 collectively referred to as the "Surface Water Coalition" or "Coalition"), by and through their respective counsel, hereby move for an order dismissing the

Application for Approval of Mitigation Plan (AFR) submitted by the six ground water districts and one irrigation district.[1] The Coalition moves to dismiss the application pursuant to Rule 260 of the Department's rules of procedure (IDAPA 37.01.01.260) and Rule 43 of the conjunctive management rules (IDAPA 37.03.11.43).[2]

PROCEDURAL BACKGROUND

The Surface Water Coalition filed a letter with the Department on January 14, 2005, requesting immediate administration of water rights by priority within Water District No. 120. The Coalition requested delivery of water to their senior natural flow and storage water rights pursuant to Idaho law. The Idaho Ground Water Appropriators, Inc. ("IGWA") filed a petition to intervene on February 3, 2005. Five days later on February 8, 2005, the Ground Water Districts filed their *Application for Approval of Mitigation Plan (AFR)*, the subject application in this proceeding. On February 11, 2005, Idaho Power Company filed a letter in support (petition to intervene) of the Coalition's request for water right administration by priority. The Director then issued an initial order on February 14, 2005 and stated the following in response to the Coalition's request for priority water right administration:

> 36. Given present snowpack conditions and low carry-over storage in reservoirs in the Upper Snake River Basin, injury to the senior priority water rights held by or for the benefit of the members of the Surface Water Coalition is likely during the 2005 irrigation season. However, the extent of the likely injury is not reasonably determinable at this time because: (1) it is presently outside the authorized season of use for the rights held by the members of the Surface Water

[1] The application was submitted by the American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, and South West Irrigation District (hereinafter collectively referred to as the "Applicants" or "Ground Water Districts."

[2] The legality of the Department's conjunctive management rules (IDAPA 37.03.11 *et seq.*) is presently the subject of litigation in the Ada County District Court, *Rim View Trout Co. v. Dreher et al.*, Case No. CV-03-07551D (4th Jud. Dist.). The Court's stay of the case recently expired on March 15, 2005. Twin Falls Canal Company (TFCC), a member of the Coalition, is an intervenor in that case. By moving to dismiss the present application, the Coalition does not concede the Department's conjunctive management rules are constitutional or consistent with Idaho law. The Coalition specifically reserves the right to challenge the legality and constitutionality of the conjunctive management rules in this or any other proceeding.

> Coalition; and (2) a reasonable projection of the amount of fill in the reservoirs operated by the USBR for the benefit of the members of the Surface Water Coalition and a reasonably likely projection of the total amount of water that may be available to the members of the Surface Water Coalition under their respective rights can not be determined with reasonable certainty until at least April 1, 2005, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for period April 1 through July 1.
>
> 37. If injury to the senior priority water rights held by or for the benefit of the members of the Surface Water Coalition is determined to be occurring on an individual member basis after April 1, 2005, because of the diversion and use of ground water from the ESPA under junior priority rights, the Director will order mitigation or curtailment of junior ground water diversions in at least Water Districts No. 120 and 130 to the extent of that injury, in accordance with Idaho law.
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> 3. The Director will make a determination of the extent of likely injury after April 1, 2005, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 1, 2005.

February 14, 2005 Order at 30, 31, 33.

In addition to the above statements, the Director also granted IGWA's petition to intervene. *See id.* at 34. Shortly after the Director's first order was issued, the Idaho Dairyman's Association filed a petition to intervene on February 18, 2005. Later, on March 7, 2005, the United States Bureau of Reclamation also filed a petition to intervene. On March 3 and 10, 2005, the *Times-News* published notice of the protest deadline (March 21) and tentatively scheduled dates for the hearing on the mitigation plan (March 22 – 25).

MOTION TO DISMISS APPLICATION

The Coalition moves to dismiss the Ground Water Districts' *Application for Approval of Mitigation Plan (AFR)* for the following reasons. First, the Director has yet to issue a determination on the Surface Water Coalition's "likely extent of injury" caused by diversions under junior priority ground water rights. The Director intends to issue an "injury"

determination after release of the April 1st Upper Snake River Basin watershed forecasts. Therefore, any consideration, including a hearing or decision on a plan to "mitigate" for the extent of that injury is premature and contrary to the Department's rules and the procedure already established by the Director in response to the Coalition's water delivery call. Next, the application fails the meet the requirements of a mitigation plan set forth in the Department's conjunctive management rules (Rule 43). The application lists various actions and proposals without any supporting details or information. Without the information, the Director is without any basis to consider whether or not the proposal is sufficient. Hence, the application is facially deficient and must be dismissed.

I. The Application is Premature and Contrary to the Department's Rules and Established Procedure

The Director has yet to make an "injury" determination in response to the Surface Water Coalition's water right deliver call. The Director has already stated that he will not make an "injury" determination until after the Bureau of Reclamation and Army Corps of Engineers release their April 1 through July 31 operating forecasts for the Upper Snake River Basin's unregulated inflow. *February 14, 2005 Order* at 33. Until the Director issues an "injury" order there is nothing to judge a proposed "mitigation plan" against. In other words, the Director is without any basis to consider whether a proposal will effectively "mitigate" for the depletive effects caused by junior ground water right diversions when the extent of those depletions has yet to be determined. To that end, the Coalition is also without a sufficient basis to formulate a complete response or protest to the application.[3]

Furthermore, the Department's conjunctive management rules require the Director to first make an "injury" determination in response to the Coalition's request for

[3] Notwithstanding the inability to formulate a complete response, the Coalition members are filing a joint protest to the application.

water right administration. IDAPA 37.03.11.40.01. Nothing in Idaho law or the Department's rules provide the Director with any authority to approve a mitigation plan when the extent of the "injury" to be mitigated has not yet been determined. The Director must respond to the Coalition's water right delivery call prior to consideration of any proposed "mitigation plan." Since the "injury" decision will not be made until after the April 1st forecasts are released, the Ground Water Districts' application for approval of a mitigation plan is premature and contrary the Department's own rules and the procedure established by the Director.

II. The Application Fails to Meet the Requirements of the Department's Conjunctive Management Rules.

Aside from violating the process envisioned under the conjunctive management rules, the Ground Water Districts' application fails to meet the minimum requirements of a mitigation plan that would entitle the plan to even be considered by the Director. In addition to considering a proposed plan under the criteria and procedures outlined in Idaho Code § 42-222, Rule 43 also expressly requires an application to include "such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03." The rule lists fifteen (15) factors to judge or evaluate a proposed plan.

The Ground Water Districts' application fails to provide "such information" or meet any of the requirements listed in the fifteen factors. In essence, the application is facially deficient and must be dismissed. While the application contains pages of irrelevant information that do not address the "depletions" to the Coalition's senior surface water rights caused by diversions of junior ground water rights held by members of the Ground Water Districts, it provides few or no details concerning the proposed "mitigation." Importantly, the Ground Water Districts' application fails to meet <u>any</u> of the requirements in Rule 43.03 that would give the Director a

basis to determine whether or not the application "will prevent injury" to the Coalition's senior surface water rights.

A. Water Rights That Will Benefit From the Mitigation Plan (Rule 43.01.b)

The application does not list any specific ground or surface water rights that would apparently "benefit" from the mitigation plan. The application only lists the names of the relevant ground water districts and the irrigation district that are submitting the plan. In addition, the application only references "senior surface water rights within the Near-Blackfoot to Minidoka reach of the Snake River", but fails to identify which "water rights" will benefit from the proposed plan. Members of the Surface Water Coalition hold various natural flow and storage water rights with different priority dates in the referenced reach of the Snake River, however, other water right holders not part of the Coalition also hold water rights within that reach. The application states that the intended beneficiaries include "surface water users within the AFR collectively," however it fails to explain which "water rights" will benefit. By failing to identify the specific surface water rights that will benefit from the plan, one is left to assume that perhaps one or more water rights held by the Coalition will not benefit. In addition, since other users hold water rights within the American Falls reach it is not understood whether or not those rights will benefit instead of the Coalition's water rights. Finally, it is unclear which ground water rights would "benefit" from the plan. Unless specific water rights are listed and described, it is impossible to determine who will actually benefit by the proposed plan.

B. Description of Water Supplies Proposed to be Used for Mitigation / Limitation on Availability / Reliability (Rule 43.01.c, h)

The application fails to provide a description "setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies." A fundamental component of a "mitigation plan" is identifying the proposed "mitigation" water

supplies. The Ground Water Districts' application lacks <u>any</u> identification of specific water supplies and hence fails to meet the requirements of the conjunctive management rules.

The application notes that the Ground Water Districts "will acquire storage and/or natural flow water that can be delivered as replacement water or exchanged with other surface water supplies . . ." *Plan* at 20. In addition, the application states that the Ground Water Districts "will reduce ground water withdrawals or surface water demand to the extent that replacement water cannot be obtained . . ." *Id.* at 21. Although the Ground Water Districts set forth these "intended future actions", they have failed to specifically identify "water supplies proposed to be used for mitigation." Nowhere does the application list a specific natural flow or storage right that has been acquired, by lease or otherwise, for mitigation purposes. In addition, the application lacks any certain description of specific acres where "ground water withdrawals" or "surface water demand" will be reduced. The omission of any firm description of the proposed mitigation water supplies is further evidenced by the Ground Water Districts' failure to explain all "circumstances or limitations on the availability" of those supplies. Without a more concrete description of the proposed "water supplies" to be used for mitigation, the application is only a statement of what "might" be done, not a plan that will actually mitigate for depletions to senior surface water rights caused by junior ground water diversions.

In addition, since no specific supplies are identified, it is no surprise that the application provides no analysis of the "reliability" of those "replacement water supplies." By not identifying actual mitigation "water supplies", the Director has no basis whatsoever to determine whether or not the plan will effectively prevent injury to senior surface water rights.

C. Whether Delivery, Storage and Use of Water Complies With Idaho Law (Rule 43.03.a)

As explained above, the application fails to identify any specific mitigation "water supplies." Accordingly, there is no factual or legal basis to determine whether or not the "delivery, storage, and use" of the mitigation "water supplies" will comply with Idaho law, including Title 42, Idaho Code, the Department's rules, and any applicable local rental pool procedures.

D. Replacement Water Sufficient to Offset the Depletive Effect of Ground Water Withdrawals / At a Time and Place Required by Senior Priority Water Rights (Rule 43.03.c)

The application does not even attempt to calculate the depletive effects on the water supply available to senior surface water rights that are caused by withdrawals under junior priority ground water rights. Instead, the Ground Water Districts vaguely estimate, without any supporting information, that approximately 65,000 acre-feet "is equal to increased reach gain that would accrue to the AFR within one year of curtailment" of all ground water rights held by their members. *Plan* at 4, 21. The amount of water proposed by the application is tied to the Ground Water Districts' estimate of water that would show up in the American Falls reach within one year of curtailment, not an estimate of their members' "depletive effects" caused by ground water diversions. In other words, the application completely fails to address whether or not this amount of water is sufficient to "offset the depletive effect of ground water withdrawals" on the water available for diversion by senior surface water rights. Moreover, the application does not describe the timing, location, or how the "replacement water" will be specifically provided to the senior surface water rights. Finally, the application is void of any discussion of whether or not mitigation water will be provided "at such time and place as necessary to satisfy the rights of

diversion from the surface [ ] water source."[4] Accordingly, there is no basis to determine whether or not the proposed "replacement water" is sufficient to meet the rule's requirements. Unless specific water supplies are identified, the Director cannot determine whether or not those supplies are available or will actually be provided in 2005 and beyond.

E. Replacement Water or Other Appropriate Compensation When Needed During a Time of Shortage / Contingency Plan (Rule 43.03.c)

The application fails to describe whether "replacement water supplies or other appropriate compensation" will be provided to senior priority water rights "when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed." Similar to the shortcomings explained above, the application does not describe proposed "replacement water supplies" with any particularity. As such, there is no basis to determine if any "replacement water supplies" will provided during times of "shortage." Since the present Upper Snake River Basin watershed forecast is well "below normal", shortages are expected this irrigation season. The application provides no explanation how "replacement water supplies" will be provided during these times of "shortage." In addition, the application does not attempt to identify "other appropriate compensation" that would mitigate for the depletions of ground water pumping under junior priority water rights.

Coupled with the failure to identify "replacement water supplies" or "other appropriate compensation", the application does not set forth a "contingency plan." Rule 43 requires the application to "include contingency provisions to assure protection of the senior priority right in

[4] Rule 43.03.c states that "[c]onsideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods." This statement is non-sensical in terms of legal water right administration. If diversions by junior ground water rights are depleting water supplies that would otherwise be available for diversion by senior surface water rights, it makes no difference about the timing of the water supply. The statement further exposes the flaws in the conjunctive management rules since depletions by junior ground water rights that are realized during low-flow periods, such as July, August, or September, occur during the most critical times when effective water right administration and replacement water is needed to satisfy senior surface water rights.

the event the mitigation water source becomes unavailable." Since the Ground Water Districts have failed to identify the "mitigation water source", it follows that they have not proposed "contingency provisions" that will "assure" the Coalition's senior priority rights will be protected. Again, the failure to follow the bare requirements of the conjunctive management rules renders the application inadequate on its face.

F. Artificial Recharge (Rule 43.03.d)

The application includes a statement that the Ground Water Districts "with the cooperation and assistance of the Department and other relevant agencies and water users, will cooperate in long-term, large-scale aquifer recharge on the ESPA." *Plan* at 21. The application then describes the State of Idaho's "Straw Man" proposal and its envisioned managed recharge component. *Id.* at 26. The application then briefly describes the proposal as utilizing the Milner-Gooding Canal (American Falls Reservoir District #2) and the North Side Canal (North Side Canal Company) and providing a per year "average" of 170,000 acre-feet of water.

The shortcomings of the application's recharge proposal are obvious. First, the application offers a State of Idaho proposal to apparently mitigate for the Ground Water Districts' depletions. Nothing in Idaho law or the conjunctive management rules allows a junior priority ground water right to mitigate for its injury caused to a senior surface water right by relying upon a proposal offered by the State of Idaho. Second, there is no assurance in the application that the State program will or even can be implemented. Next, the application fails to identify specific supplies of water that are available for "artificial recharge", or when those supplies might be available to use for that purpose. Finally, the application does not even attempt to explain how the recharge proposal will serve as a means of "protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for

exchange or other purposes related to the mitigation plan." Without further analysis that the State's recharge proposal is actually intended to mitigate for the Ground Water Districts' depletions, that it can and will be implemented, or that it will protect pumping levels and senior priority rights, the application fails to meet the rule's requirements.

G. Appropriate Engineering and Hydrogeologic Formulae for Calculating Ground Water Depletions / Appropriate Values for Aquifer Characteristics (Rule 43.03.e, f)

Noticeably absent from the application are any data or explanations about the "computer simulations and calculations" that were used to calculate the depletive effect of the Ground Water Districts' ground water withdrawals. The application claims that only 65,000 acre-feet of water would show up in the American Falls reach within one year if all the Ground Water Districts' members were curtailed, but it does not even attempt to estimate the "depletions" those ground water withdrawals will cause. Without any supporting data, hydrologic reports, and/or analyses, there is no basis to determine whether the "computer simulations and calculations" relied on by the Ground Water Districts used "accepted and appropriate engineering and hydrogeologic formulae" to calculate their depletive effects. Regardless of this lack of information, the Coalition does not concede that the computer simulations and calculations relied on by the Ground Water Districts used "accepted and appropriate engineering and hydrogeologic formulae" or "appropriate values for aquifer characteristics, such as transmissitivity and specific yield." Since the application does not contain this information or even reference the actual simulations and calculations that were performed, the application fails to meet the standard set forth in the rules.

H. Calculation of Ground Water Diversion Consumptive Use (Rule 43.03.g)

The application provides no analysis of the "consumptive use component" of the Ground Water Districts members' diversion and use of ground water. The application generally describes each district and the number or acres irrigated within the respective districts' boundaries, however, it fails to describe the total water diversions by quantity, including any consumptive use calculations. This required information is fundamental to determine whether the proposed plan will "mitigate" for the "depletive effect" caused by junior priority ground water rights to senior surface water rights. The application contains no facts or data to identify any ground water rights, including diversion and consumptive use information that would provide the Director with a basis for a complete evaluation.

I. Enlargement of Rate of Diversion, Quantity, or Timing of Diversion of Water Rights Proposed for Use (Rule 43.03.i).

As explained above, the application does not describe or identify any firm sources of "replacement water supplies", including specific water rights, nor does it list the existing ground water rights and their associated diversion quantities. Unless specific ground water rights and their calculated depletions are identified, there is no basis to decipher whether or not the application proposes to "enlarge the rate of diversion, seasonal quantity or time of diversion" of those rights. Presumably, allowing out of priority diversions to injure senior water rights results in an "enlargement" of those junior water rights. The lack of information on the water rights proposed to be used in the plan is yet another example of the application's failure to set forth basic elements necessary for the Director's review.

J. Conservation of Water Resources / Public Interest / Injury to Other Water Rights / Withdrawals Beyond Reasonably Anticipated Rate of Future Natural Recharge (Rule 43.03.j)

The application is devoid of any facts or analyses to demonstrate that the proposed plan is "consistent with the conservation of water resources", including ground water supplies in the ESPA. Next, there is nothing in the plan to show how the plan is in the "public interest" or that it will not result in "injury" to other water rights, including those rights held by the Coalition. On the contrary, allowing junior priority ground water rights to continue to injure senior surface water rights is contrary to the prior appropriation doctrine and Idaho law, and hence, by its very nature is not in the "public interest." Since review of a proposed mitigation plan mirrors the process for reviewing a transfer application, the application must meet certain statutory requirements as well. Here, the Ground Water Districts have not even attempted to meet their burden of proving that the plan is "consistent with the conservation of water resources", is in the "public interest", and does not "injure" other water rights. Under the standard set forth in the rules the Director has no choice but to dismiss the application. I.C. § 42-222(1)("the director . . . shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby . . . the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest . . ."; IDAPA 37.03.11.43.02 ("Upon receipt of a proposed mitigation plan the Director will . . . consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.").

Finally, since the application does not identify total ground water diversions and depletions, it is impossible to determine whether the plan results "in the diversion and use of

ground water at a rate beyond reasonably anticipated average rate of future natural recharge." Again, since the application fails to meet the rules' basis requirements, it must be dismissed.

K. Monitoring / Adjustments to Protect Senior Priority Water Rights (Rule 43.03.k)

The application proposes "voluntary" monitoring programs on the part of the Ground Water District "hydrographers", and in some instances, only in "cooperation" with the Department or water district watermasters. *Plan* at 24-25. Nothing in the application ensures that the Ground Water Districts will perform the required monitoring to protect senior surface water rights from injury. In addition, the application only states that it will incorporate some "adaptive management" protocol to adjust the plan in the future. The application is void of any specific details or requirements if the plan is not implemented or monitored.

L. Mitigation for Effects of Existing and Future Wells (Rule 43.03.l)

Similar to the failure to identify the depletions and consumptive use components of the relevant ground water rights, as well as the failure to demonstrate that senior surface water rights will not be injured, the application does not provide for "mitigation of the effects of pumping of existing wells" or pumping of "any new wells." Although approval of any new consumptive use applications for permit in the ESPA is prohibited by the moratorium, the application does not describe the "effects" of existing wells. Accordingly, there is no basis to analyze whether or not the proposed plan will "mitigate" for the "effects" of those wells.

REQUESTS FOR RELIEF

I. Dismissal of the Application

Since the determination of "injury" will not be made until after April 1, 2005, the application is premature under the Department's conjunctive management rules and must be dismissed. In addition, since the application fails to meet even the most basic elements of a

proposed "mitigation plan", there is nothing for the Director to even consider at this point. Given the application's information deficiencies and lack of specificity, the Coalition does not possess the relevant facts, data, or analyses to adequately prepare and provide a meaningful response. The lack of information, coupled with the failure to meet the requirements of Rule 43, warrants a dismissal of the application. Accordingly, the Coalition requests the Director to dismiss and/or deny the application. The Coalition requests a hearing on this motion.

DATED this 21st day of March 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 2005, I served a true and correct copy of the foregoing *Surface Water Coalition's Protest / Motion to Dismiss Application* on the following by the method indicated:

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