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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

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

Petitioners,

vs.

DAVID R. TUTHILL, in his capacity as
Director of the Idaho Department of Water
Resources, and THE IDAHO DEPARTMENT
OF WATER RESOURCES

Respondents,

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

Case No.: CV-2008-551

**GROUND WATER USERS' OPENING
BRIEF ON REHEARING**

INTRODUCTION

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively, the “Ground Water Users”), through counsel, submit this rehearing brief pursuant to Rule 42 of the Idaho Appellate Rules, in support of the issues that were granted rehearing in the *Ground Water Users’ Petition for Rehearing* filed August 13, 2009. The Ground Water Users petitioned for rehearing in response to the Court’s *Order on Petition for Judicial Review* dated July 24, 2009 (the “*Order*”), asking the court to reconsider and clarify portions of its decision. This opening rehearing brief addresses the following issues:

1. Whether the Court should clarify that the Director must decide the issue on the methodology for determining material injury and reasonable carryover based exclusively upon facts and evidence contained in the current record without holding any additional hearings on this issue?
2. Whether the Court should clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full decreed (or recommended) amount?
3. Whether due process allows for junior groundwater users to be physically curtailed while the hearing process is proceeding under a proposed mitigation plan and before a final order has been entered?

ARGUMENT

- 1. The Court Should Clarify That The Director Must Decide the Issue on Methodology for Determining Material Injury And Reasonable Carryover Based Exclusively Upon Facts And Evidence Contained In The Current Record Without Holding Any Additional Hearings On This Issue.**

The Ground Water Users request that the Court clarify its decision concerning the Director’s issuance of two “Final Orders” and determination of methodologies for determining material injury and reasonable carryover. The Court explained its decision as follows:

In the *Recommended Order*, the Hearing Officer found that adjustments should be made to the methodologies for determining material injury and reasonable carryover for future years. The Director adopted this conclusion, but did not address a new method in his September 5, 2008 *Final Order*. The process for determining material injury and reasonable carryover is an integral part of the Hearing Officer's *Recommended Order*, and the issues raised in the delivery call. The Director abused his discretion by not addressing and including all of the issues raised in this matter in one *Final Order*. Styling the *Final Order* as two orders issued months apart runs contrary to the Idaho Administrative Procedures Act and IDWR's Administrative Rules. In addition, the issuance of the separate "Final Orders" undermines the efficacy of the entire delivery call process, including the process of judicial review. Such a process requires certainty and definiteness as to the *Final Order* issued, so that any review of the *Final Order* can be completed and timely.

Order on Petition for Judicial Review at 32 (citations omitted). Although the Court remanded this matter "for further proceedings consistent with this decision" (*Order on Petition for Judicial Review* at 33), there is no clarification or instruction as to what proceedings, if any, are required by the Director to remedy this deficiency. The Ground Water Users are concerned that, without such clarification or instruction, the Director may implement an improper proceeding or procedure resulting in the waste of additional judicial and legal resources. Action by the Court to provide the requested clarification and instruction will avoid the waste of those resources.

This concern stems from footnote 8 from the Court's *Order on Petition for Judicial Review*, in which the Court noted that "the Director issued an *Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*" (hereinafter "*Order Regarding Protocol*") but that the *Order* was "not part of the record in this matter." The Ground Water Users are concerned that the Director may on remand simply incorporate the *Order Regarding Protocol* into a unified Final Order. The problem is that the *Order Regarding Protocol* contains methodology adjustments which are not based upon technical and scientific facts proffered at the three-week hearing from which this hearing arises. In other words, it is not based upon facts in the record before this Court. Rather, it appears that

the methodology adjustments contained in the *Order Regarding Protocol* are improperly based upon technical and scientific facts that were never proffered at the hearing either as evidence or by official notice.

To be clear, the Ground Water Users acknowledge that the Court is not in a position to determine whether the *Order Regarding Protocol* is or is not violative of Idaho law because it is not part of the record on appeal and the Ground Water Users are not seeking such a determination at this time. Rather, the Ground Water Users are simply requesting that the Court clarify that, with regard to the Court's order concerning the aforementioned methodology adjustments, the Director must rely exclusively upon the evidence and facts contained in the record established in the three-week hearing from which this appeal arises.¹

This requested clarification is fully supported by the Idaho Administrative Procedures Act and IDWR's own procedural rules. The Idaho Administrative Procedures Act provides very specific rules with regard to Final Orders issued by State agencies. For example, Idaho Code § 67-5248(1) governing the contents of agency orders mandates that all orders contain a reasoned statement in support of the decision, findings of fact, a concise statement of "the underlying facts of record" supporting the findings, and the procedure and time limits for seeking reconsideration and other relief. Of even more significance to the matter at hand is the directive in Idaho Code § 67-5248(2) which requires that all findings of fact "must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding." (Emphasis added).

¹ IGWA agrees with the City of Pocatello in its *Opening Brief In Support Of Rehearing* that if any additional hearing is required, it is limited to any mitigation plan offered by the junior Ground Water Users.

The IDWR Rules of Procedure contain an identical requirement. Section 712 provides that all orders issued by IDWR must contain (among other things) findings of fact “based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.” IDAPA 37.01.01.712 (emphasis added). Section 602 provides that a matter concerning “technical or scientific facts within the agency’s specialized knowledge” can be “officially noticed” only if (1) all parties to the contested hearing are “notified of the specific facts or material noticed and the source of the material noticed, including any agency staff memoranda and data” and (2) this required notice is “provided either before or during the hearing” and “before the issuance of any order” based upon the officially noticed material. IDAPA 37.01.01.602.

This Court has concluded that the Director must make adjustments to the methodologies for determining material injury and reasonable carry over and that those adjustments must be contained in a single Final Order.² Without question, these adjustments will be based upon technical and scientific facts. Pursuant to Idaho Code § 67-5248(1) and IDAPA 37.01.01.602 and IDAPA 37.01.01.712, the Director’s adjustments to the methodologies is exclusively limited to the technical and scientific facts “in the record of the contested case” or “officially noticed in that hearing.” Thus, as argued above, the Director’s adjustments to the methodologies are exclusively limited to the technical and scientific facts proffered in the three-week hearing from which this appeal arises.

The Court should also advise the Director that no further or additional hearing is permitted. There has already been a three-week hearing in which the method of calculating

² The most judicious remedy would be to require IDWR to use its methodology, apply the facts and evidence already in the record and issue a unified order for purposes of one unified appeal in this case so that all issues could be briefed to the Supreme Court.

material injury and reasonable carryover was litigated at length. And there is no basis under either the Idaho Administrative Procedures Act or the IDWR Rules of Procedure for a rehearing. Considerable expense and effort have been incurred by all parties involved. All of these expenses and efforts will have been utterly wasted if a rehearing is required. This matter has been fully litigated and briefed before the Department. The Director should be instructed to issue its final order with regard to the methodology adjustments based exclusively upon the evidence and facts contained in the current record and without requiring any further hearings on the matter.

2. In Times Of Shortage, The Director Has The Discretion Based Upon The Evidence Presented To Determine That Twin Falls Canal Company Is Not Entitled To Its Full Decreed (or Recommended) Amount.

“[T]he quantity element in a water right necessarily sets the ‘peak’ limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time (i.e. there is no right to divert water that will be wasted).” In *Re: SRBA, Memorandum Decision and Order on Challenge, Order Granting State of Idaho’s Motion for the Court to Take Judicial Notice of Adjudicative Facts, Order of Recommitment with Instructions to Special Master Cushman*, Subcase Nos. 36-00003A, 36-00003B, 36-00003C, 36-00003F, 36-00003K, 36-00003L, and 36-00003M, at 41-42 (11/23/1999) citing, *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 415, 958 P.2d 568 (1997). The Court on page 26 of the *Order on Petition for Judicial Review* (hereinafter “*Order*”) correctly applies this principle and found that “[i]n times of shortage junior users will only be regulated or required to provide mitigation subject to the material injury factors set forth in CM Rule 42” and that a “finding of material injury requires more than shortfalls to the decreed and licensed quantity of the senior

right.” These conclusions correctly find that the decreed quantity is an authorized maximum and that an application of the factors in CM Rule 42 may show that there is an amount of water that is less than the decreed or licensed quantity that a senior may be required to use in times of shortage.

However, on pages 31 and 32 of the *Order*, the Court determines that the Director exceeded his authority in determining that the full head gate delivery for Twin Falls Canal Company is $\frac{5}{8}$ of an inch instead of $\frac{3}{4}$ of an inch. The Court reasoned that because the Director recommended a maximum of $\frac{3}{4}$ inch in his Director’s Report in the SRBA, that the Director cannot examine Twin Falls Canal Company’s need for water in times of shortage in a delivery call. However, this confuses the functions that are performed by the SRBA Court in decreeing the maximum beneficial use under a water right, and the Director’s function of distributing water under the CM Rules based on need and extent of beneficial use at that time, which is often something less than the maximum. The Supreme Court in *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862 (2007) (“AFRD2”) recognized that the function performed in the SRBA is not the same as the function performed by the Director in water administration cases: “water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the Idaho Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules), do not constitute a re-adjudication.” *Id.* at 877 (emphasis added). Yet, by requiring the Director to change his recommendation in the SRBA in order to distribute less than the peak amount in a delivery call case essentially relegates water administration to delivery of the amount on the decree, which again is the maximum amount. Evidence in the SRBA may end up showing that the Director’s recommendation of $\frac{3}{4}$ inch is wrong, however, that has not been pre-determined in

the administrative hearing. If it had, the Director would be adjudicating the water right in violation of Idaho Code § 42-1401 et seq. In fact, if the Director changed his recommendation in the SRBA based solely on evidence in the administrative delivery call, as suggested in the *Order*, then it would be even more apparent that the Director was not distributing water under the CM Rules but re-adjudicating the water right. Thus, requiring the Director to change his recommendation in the SRBA would directly usurp the SRBA's adjudicatory function and authority. These points need to be clarified and the apparent inconsistency of the Court's statements on pages 26 and 31 resolved.

The Court should confirm that for purposes of this delivery call, evaluation of Twin Falls Canal Company's material injury can be based $\frac{5}{8}$ inch as established by the evidence in the case and that the Director did not abuse his discretion in making that determination.

3. Due Process Demands That Junior Ground Water Users Not Be Physically Curtailed Until After A Hearing On The Extent Of Material Injury And Mitigation Plan.

The Idaho Supreme Court affirmed in *Nettleton v. Higginson*, 98 Idaho 87 (1977) that due process justifies a hearing *before* curtailment when it comes to ground water administration. “[I]ndividual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state,” and “except in ‘extraordinary circumstances’ where some valid governmental interest justifies the postponement of notice and a hearing, due process requires an adversary proceeding before a person can be deprived of his property interest.” *Nettleton*, 98 Idaho at 90 (citing Idaho Const. Art. 15, § 4; quoting *Fuentes v. Shevin*, 407 U.S. 67 (1972)). There are three clearly-defined requirements to establish the “extraordinary circumstances” necessary to justify postponement of a hearing:

First...the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for

very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standard of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Nettleton, 98 Idaho at 92 (quoting *Fuentes*, 407 U.S. at 92). Issues unique to conjunctive management bear directly on two of the requirements that must be met to curtail without a prior hearing. First, the curtailment must be “necessary to secure an important governmental or general public interest.” *Fuentes*, 407 U.S. at 92. In *Nettleton* the Court cited the governmental and general public interest “of securing the maximum use and benefit of its water resources.” 98 Idaho at 90. As between surface water users, that is accomplished by application of doctrine that “first in time is first in right.” In contrast, while “first in time is first in right” has a place in the conjunctive management context, the Legislature has mandated that the doctrine “shall not block full economic development of underground water resources.” Idaho Code § 42-226.

The law of full economic development gives rise to public interest and economic considerations that are not susceptible to quick, easy and straightforward determination. Further, the conjunctive administration of surface and groundwater rights is far more technically complex than the relatively simple administration of surface water rights. Whereas essentially all of a curtailed surface water right reaches the calling senior, the curtailment of a groundwater right has a radial effect, resulting in the calling senior receiving only a fraction of the curtailed junior water use. And, in this case, the vast majority will never be used by the Surface Water Coalition. *See Ground Water Users’ Brief in Response to Surface Water Coalition’s Joint Opening Brief* filed on April 30, 2009 at 8; Wylie, Tr. Vol. 3, p. 593, L. 10-19. Consequently, the Idaho Supreme Court expressly recognized that conjunctive administration cannot be reduced to a simple ministerial act, but instead

‘requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water rights are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.’ *AFRD2*, 143 Idaho at 877 (quoting *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422 (1997)). “That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.” *Id.*

Secondly, due process can be satisfied without a hearing prior to curtailment only when “there has been a special need for very prompt action.” *Fuentes*, 407 U.S. at 92. In surface water administration, the effects of curtailment are relatively easy to predict, usually well-established, and essentially immediate, which enables IDWR to provide an immediate response to delivery calls, and allows seniors to receive an immediate benefit from curtailment. In contrast, the effects of groundwater curtailment are very difficult to predict and typically take years and even decades to be realized. Immediate curtailment does not provide an immediate benefit to the calling senior. Moreover, groundwater curtailment is a long-term, often permanent arrangement, whereas surface water curtailment is seasonal, with each surface right beginning anew the following spring.

Consequently, “the state policy of securing the maximum use and benefit of its water resources,” *Nettleton*, 98 Idaho at 90, is accomplished differently in conjunctive administration than in surface water administration. Surface water administration is governed by priority with few limitations. Conjunctive management, on the other hand, is governed by the CM Rules which account for the hydrologic complexities of groundwater administration as well as the law of full economic development. Given such differences, the Idaho Supreme Court rejected the argument made in the *AFRD2* case that the Director should curtail before holding an administrative hearing on the extent of material injury and proposed mitigation in the

conjunctive management context. The Idaho Supreme Court explained that what is “timely” simply means something different in conjunctive administration than it does in surface water management:

While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior’s right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

AFRD2, 143 Idaho at 875.

The District Court in its *Order on Petition for Judicial Review in Clear Springs Foods, Inc. v. Tuthill*, Case No. 2008-444 (Fifth Jud. Dist. Gooding County) at 49 stated that “[a]fter an initial order is issued and pursuant to the requirements of due process, the parties pursuant to notice and upon request are entitled to a hearing before junior rights are curtailed.” Junior priority groundwater users cannot be expected to divine when and where delivery calls may come from or to have a mitigation plan in place for every conceivable delivery call. This factual reality supports the Court’s conclusion that “a more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making that order final, and then hold a hearing on the order of curtailment and material injury ... and the mitigation plan at the same time.” *Id.* at 51.

However, a more appropriate process would be to provide a hearing prior to the finding of injury so that the Director had input from the water users, both junior and senior, before making his initial determination. The Director’s commitment to immediate curtailment resulted

in hasty evaluation of complex technical and legal issues of first impression without the benefit of a full evidentiary record or alternative perspectives. Admittedly, holding a hearing before curtailment may result in some delay in curtailment (if curtailment turns out to be justified), leaving the senior users without their full water supply (but still receiving nearly their full supply) for a time. But in “balancing ... both the nature of the government function and the private interests affected” (*Nettleton*, 98 Idaho at 90), that risk is far outweighed by the risk of massive and potentially irreversible harm that results from the type of widespread curtailment that occurs in conjunctive management.³ In this case, the amount of curtailment contemplated would have been over 80,000 acres in 2005. R. Vol. 8 at 1359.

The Idaho Supreme Court certainly realized that holding a hearing before curtailment may result in delayed implementation if curtailment turns out to be justified, but still accepted that a hearing before curtailment is a more appropriate course, explaining that “concepts like beneficial use, waste, reasonable means of diversion and full economic development ... are highly fact driven and sometimes have unintended or unfortunate consequences” (as opposed to stating that “first in time is first in right” has unintended and unfortunate consequences). *AFRD2*, 143 Idaho at 869.

With these principles in mind, the Court should clarify its *Order* in this case to state when curtailment can legally occur consistent with the parties’ rights to due process. The Court’s finding on p. 29 of the *Order* states that:

³ If a hearing is held before curtailment is ordered, the senior user still receives almost their entire water supply and in fact diverts as much water as they want during the irrigation season because storage water is available and has never ran out. See *Final Order Regarding the Surface Water Coalition Delivery Call* dated September 5, 2008, FF 13, R. Vol. 39 at 7384; Swank Tr. Vol. 5, p. 992, L. 12-18. In contrast, if curtailment is ordered before a hearing, the Ground Water Users’ water rights are deprived entirely, resulting in no beneficial use and potentially irreversible harm.

Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer . . .

However, in the *Order on Petition for Judicial Review in Clear Springs Foods, Inc. v. Tuthill*, Case No. 2008-444 (Fifth Jud. Dist. Gooding County) the Court found in that

After the initial order is issued and pursuant to the constitutional requirements of due process, the parties pursuant to notice and upon request are entitled to a hearing before junior rights are curtailed and before the senior rights are injured further.

Id. at 49. The Court further stated that

[A] more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making that order final, and then hold a hearing on the order of curtailment and material injury . . . and the mitigation plan at the same time.

The indication in that case is that the curtailment order should not be enforced until a hearing process has been completed on a mitigation plan and a final order issued. The Court should confirm in its *Order* that the same process applies here.

CONCLUSION

Based on the foregoing the Ground Water Users request that the Court 1) instruct the Director to issue a final order with regard to the methodology adjustments based exclusively upon the evidence and facts contained in the current record and without requiring any further hearing; 2) clarify that the determination of material injury for Twin Falls Canal Company can be based on something less than their maximum decreed (or recommended) quantity; and 3) clarify the requirements for due process in delivery call proceedings.

DATED this 9th day of October, 2009.



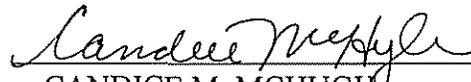
RANDALL C. BUDGE
CANDICE M. MCHUGH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of October, 2009, the above and foregoing document was served in the following manner.

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