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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

UNITED STATES OF AMERICA,
BUREAU OF RECLAMATION,

Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

GARY SPACKMAN, in his capacity as Interim
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

Case No.: CV-2008-0000551

**GROUND WATER USERS'
REPLY ON REHEARING**

FALLS RESERVOIR DISTRICT #2, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, MINIDOKA
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY AND TWIN FALLS
CANAL COMPANY

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 of record, submit this Reply Brief in response to the Responses respectively filed by the Surface Water Coalition (“SWC”) and the Idaho Department of Water Resources (“IDWR”) on November 6, 2009.

ARGUMENTS IN REPLY

- I. There is sufficient facts and evidence in the current record for IDWR to issue an order establishing the methodology for determining material injury and reasonable carryover without holding any additional hearings on these matters.**

In their Opening Brief on Rehearing filed October 13, 2009, the Ground Water Users requested that the Court instruct IDWR to enter an order establishing the methodology for determining material injury and reasonable carryover based exclusively upon the facts and evidence contained within the current record and to do so without requiring any additional hearings in this case. It was the Ground Water Users’ concern that IDWR was going to require a re-hearing with regard to these matters where new facts and evidence would be elicited. Having already established an extensive record based on substantial pre-filed written direct and rebuttal testimony and exhibits filed by all parties followed by a lengthy three-week evidentiary hearing on these matters, the Ground Water Users’ believe it is improper to simply disregard the facts and evidence proffered at that hearing and that any further hearing would be duplicative, unnecessary and burdensome to the parties and the Department.

In their Response to Petitions for Rehearing filed on November 6, 2009, the SWC agreed that IDWR should issue its order without requiring another evidentiary hearing. The SWC acknowledged that “the Director is required to issue a new order on remand based upon the facts and evidence in the existing agency record” and that “the Director has an adequate record in this case to issue a new final order consistent with the Court’s directive.” *See SWC Response to Petitions for Rehearing*, at p. 4-5.

IDWR also agreed with this proposition. IDWR indicated in its Response Brief on Rehearing filed November 6, 2009 that “the Director agrees that sufficient information exists to issue an order determining material injury to reasonable carryover and reasonable in-season demand.” This is an acknowledgement that another evidentiary hearing will not be necessary.

Based upon the acknowledgements of both the SWC and IDWR, it is requested that the Court instruct IDWR to enter an order establishing the methodology for determining material injury and reasonable carryover based exclusively upon the facts and evidence contained within the current record and to do so without requiring any additional evidentiary hearings in this case.

II. The Director is authorized in times of shortage to determine that the Twin Falls Canal Company is not entitled to its full or *recommended* amount.

As set forth in their Opening Brief on Rehearing, the Ground Water Users’ assert that in times of water shortage a water user is “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). In their Response to Petitions for Rehearing, the SWC acknowledges that IDWR is required in times of shortage to limit the Twin

Falls Canal Company to an amount that can be “beneficially used within the authorized diversion rates.” See *SWC Response to Petitions for Rehearing*, at p. 7. In other words, an *adjudicated* water right sets forth the “maximum” authorized diversion of water; however, the diversion may be *administered* in times of shortage to further limit it to an amount that can be “beneficially used.” This is not a new or novel proposition. See *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 876, 154 P.3d 433, 447 (2007)(“If the Court were to rule that the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.”); *American Falls Reservoir Dist. No. 2*, 143 Idaho at 877, 154 P.3d at 448 (“reasonableness is not an element of a water right; thus, the evaluation of whether a diversion is reasonable in the administration context should not be considered a re-adjudication.”).

In this case, the Director has recommended in the adjudication of TFCC’s water right a maximum authorized headgate delivery of 3/4 inch. However, in the administration of this water right, the Director has found that TFCC can only beneficially use a headgate delivery of 5/8 inch. There is a clear distinction between (1) a maximum authorized diversion and (2) an amount that can be beneficially used. Because of this distinction, there is no inconsistency between the Director’s recommendation in the adjudication of the water right and the Director’s finding of beneficial use in the administration of the water right. The SWC’s arguments to the contrary must be rejected.

The Ground Water User’s request that the Court hold as a matter of law that Twin Falls Canal Company’s material injury is limited to the amount of water it can beneficially use and,

based thereon, affirm the Directors finding that the amount beneficially used by Twin Falls Canal Company is limited to a headgate delivery of 5/8 inch.

III. Due Process demands that a hearing be held with regard to the extent of material injury and the adequacy of a mitigation plan *before* junior ground water users are curtailed.

Astonishingly, the Surface Water Coalition (“SWC”) likens the Ground Water Users’ previously decreed and licensed water rights to those of an unadjudicated surface water right and argues that the Ground Water Users deserve no due process. *SWC Response to Petitions for Rehearing*, at p. 9 (there is no notice or hearing prior to shutting off unadjudicated water rights and the “same procedure applies to junior priority adjudicated and licensed water right....”). The SWC relies on *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977) for their argument. Yet, they ignore the important holding in *Nettleton* that specifically acknowledges that: “[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.” *Nettleton*, 98 Idaho at 90, 558 P.2d at 1051. As this Court is well aware, curtailment of junior groundwater rights is not something that occurs late in the irrigation season to fill a downstream senior water right holder; rather, curtailment of junior groundwater rights contemplates complete curtailment for an entire irrigation season and perhaps permanently. These facts make it obvious that, prior to suffering a complete loss of their real property rights, junior groundwater users are entitled to due process before their property is taken and livelihoods permanently altered.

The SWC relies on Conjunctive Management Rule (“CM Rules”) 40 to argue that such hasty and permanent action is required when a Water District exists. However, upon close and fair reading of the CM Rules, and Rule 40 specifically, it is apparent that first a determination of material injury and reasonable use of water diversion must occur before the watermaster has authority to curtail the junior user. “[U]pon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster shall [regulate use of water by

junior-priority ground water users].” CM Rule 40.01. Hence, the finding of material injury must be made first and that is when junior groundwater users must be afforded due process. The junior groundwater users must be given an opportunity for a hearing on the extent of material injury, if any, and an opportunity to provide mitigation water prior to the actual curtailment that could potentially follow a material injury finding.

Further, the Surface Water Coalition’s argument essentially amounts to a “shut and fasten” priority only administration which is simply not applicable in the conjunctive management context. While strict priority administration has a place in surface water administration under Idaho law, it is not the law when it comes to evaluating the impact of junior groundwater rights on senior surface water rights and thus, the process for administration requires additional due process requirements to protect all interests involved. *See* Idaho Code § 42-101; *American Falls Reservoir Dist. No. 2*, 143 Idaho at 876-78, 154 P.3d at 447-49.

This process is what the Ground Water Users are requesting that the Court clarify in its *Order on Petition for Judicial Review* dated July 24, 2009. The Ground Water Users are requesting clarification that due process requires that a hearing on the extent of material injury caused by junior-priority groundwater users and on a proposed mitigation plan must be held *before* the physical curtailment of junior groundwater users. Specifically, the Ground Water Users request that the Court clarify the due process requirements and find that junior groundwater users must be afforded notice and a hearing prior to actual physical curtailment on the issues of material injury and required mitigation.

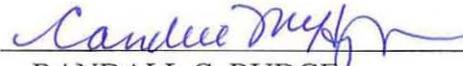
DATED this 30th day of November, 2009



RANDALL C. BUDGE
CANDICE M. McHUGH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of November, 2009, the above and foregoing document was served in the following manner.



RANDALL C. BUDGE
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