BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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	)	**ORDER DENYING SAGWU'S MOTION TO AUTHORIZE INTERROGATORIES**

Background

On July 22, 2005, the Director of the Department of Water Resources ("Director" or "Department") entered a Scheduling Order in the above captioned matter in which it was stated:

> Prior to serving interrogatories on another party, the proponent of interrogatories must submit to the Director a detailed written explanation of the subject matter to be discovered and must also show that the information cannot be obtained through other sources of information. The Director may consider depositions as another source of information. General interrogatories asking for identification of witnesses, the nature of their testimony, and issues for the hearing will be submitted according to the timetable set forth below. If the Director finds that the requested interrogatories will result in discovery of evidence not otherwise available, he will approve the request by letter. No more than ten (10) interrogatories may be served by one party on another party and be outstanding against that party at any given time.

Scheduling Order at p. 2, ¶ 2(d).

On August 5, 2005, the State Agency Ground Water Users ("SAGWU")[1] filed its *Motion for Letter to Authorize Interrogatories to the Canal Companies that made the Surface Water Coalition Call* ("Motion"). In its Motion, SAGWU seeks to serve interrogatories, in regard to eight of its members' water rights, to determine whether the canal companies, represented by the Surface Water Coalition, will contend that certain SAGWU water rights should be curtailed and whether certain SAGWU water rights are consumptive or depletive to the Eastern Snake Plain Aquifer ("ESPA"). Additionally, the Motion seeks the designation of witnesses who will address the issues defined by the SAGWU's interrogatories.

[1] The State Agency Ground Water Users' are comprised of the Idaho Department of Juvenile Corrections, the Idaho Department of Health & Welfare, the Idaho Department of Fish & Game, and the Idaho Department of Transportation.

SAGWU Water Rights

SAGWU identifies eight water rights in its Motion. The SAGWU rights are as follows:

Water Right No. (ownership):	21-11972 (Juv. Corrections)	27-11987 (Health & Welfare)	31-2316 (Fish & Game)	31-2448B (Fish & Game)
Source:	Ground Water	Ground Water	Ground Water	Ground Water
Basis of Right:	Beneficial Use	Beneficial Use	Decree	Decree
Priority Date:	1/1/1909	4/1/1899	2/18/1953	1/3/1949
Beneficial Use(s):	Irrigation	Irrigation	Irrigation & Wildlife	Irrigation & Wildlife
Diversion Rate:	.9	.44	7.5	6.0
Period of Use:	4/15-10/15	4/1-10/31	4/1-11/1 1/1-12/31	4/1/-11/1 4/1-11/1

Water Right No. (ownership):	31-7372 (Dept. Trans.)	35-8624 (Fish & Game)	35-9041 (Dept. Trans.)	35-8625 (Dept. Trans.)
Source:	Ground Water	Ground Water	Ground Water	Ground Water
Basis of Right:	Decree	Decree	License	License
Priority Date:	1/28/1982	1/22/1986	2/8/1994	1/13/1986
Beneficial Use(s):	Industrial	Wildlife	Irrigation	Domestic
Diversion Rate:	.05	1.01	.06	.06
Period of Use:	1/1-12/31	1/1-12/31	4/1-10/31	1/1-12/31

Water Rights No. 21-11972 and No. 27-11987

Basins 21 and 27 are not located within Water District No. 120 or 130. Therefore, water rights no. 21-11972 and no. 27-11987 are not subject to the above captioned proceeding. Whether the Surface Water Coalition, or any other claimant in the Snake River Basin Adjudication, pursues an objection against the claimed priority dates for water rights no. 21-

11972 or no. 27-11987 is outside the scope of these proceedings. As a result, SAGWU should not serve interrogatories on the members of the Surface Water Coalition regarding those rights.

Water Right No. 35-8625

Water right no. 35-8625 is a licensed right held by the Idaho Department of Transportation for domestic use at two highway rest areas. The rest areas associated with water right no. 35-8625 have little or no irrigation and mainly provide water for in-house purposes, such as public restrooms. Because this type of water right is not subject to curtailment under the May 2 Order, the SAGWU should not serve interrogatories on the members of the Surface Water Coalition regarding water right no. 35-8625.

Water Rights No. 31-2316, No. 31-2448B, No. 31-7372, 35-8624, and No. 35-9041

The Order of May 2, 2005 ("May 2 Order") states:

> The watermasters for Water Districts No. 120 and No. 130 are directed to issue written notices . . . to the holders of consumptive ground water rights in Water Districts No. 120 and 130 having priority dates of *February 27, 1979, and later* identified to the watermasters by the Department, *including consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, excluding in-house culinary uses*. The written notices are to advise the holders of such consumptive ground water rights of this Order and to instruct the holders of such rights that they are required to provide replacement water to the members of the Surface Water Coalition as mitigation for out-of-priority depletions . . . .
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> . . . .
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> Holders of ground water rights affected by this Order *where the purpose of use is irrigation* shall provide the required replacement water through the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, or Bonneville-Jefferson ground water districts. Holders of ground water rights *for irrigation* that are not members of one of these ground water districts *shall be deemed a nonmember participant* for mitigation purposes pursuant to H.B. No. 848 (Act *Relating to the Administration of Ground Water Rights within the Eastern Snake River Plan*, ch. 352, 2004 *Idaho Sess. Laws 1052*) and shall be required to pay the ground water district nearest the lands to which the water right is appurtenant for replacement water as mitigation pursuant to Idaho Code § 42-5259.

May 2 Order at p. 45, ¶¶ 1, 2 (emphasis added).

House Bill 848 (Act *Relating to the Administration of Ground Water Rights within the Eastern Snake River Plan*, ch. 352, 2004 *Idaho Sess. Laws 1052*) states in pertinent part:

> SECTION 2. It is legislative intent that the *holders of junior priority ground water rights on the Eastern Snake River Plain* subject to administration within water districts created pursuant to Chapter 6, Title 42, Idaho Code, be required to provide mitigation to the holders of senior priority water rights from hydraulically connected surface water sources beginning April 1, 2004, for material injury caused by ground water withdrawal and use.

> SECTION 3. It is the intent of the Legislature to ensure that the burden of providing mitigation for junior ground water diversions from the Eastern Snake Plain Aquifer causing material injury to senior priority water rights is *equitably shared by the holders of all such junior ground water rights* . . . . It is therefore, hereby provided that beginning April 1, 2004, *all holders of such ground water rights* not otherwise covered by a mitigation plan and that are not members or applicants for membership of a ground water district . . . with a mitigation plan approved by the Director of the Department of Water Resources, shall be deemed a *nonmember participant* solely for mitigation purposes and shall be required to pay for mitigation . . . in the ground water district situated nearest the lands to which the water right is appurtenant . . . .

Water rights no. 31-2316 and no. 31-2448B have decreed priority dates that are earlier in time than February 27, 1979, and are not subject to curtailment in the above captioned proceeding. *May 2 Order* at p. 45, ¶ 1. Therefore, the SAGWU should not serve interrogatories on the members of the Surface Water Coalition regarding those rights.

While the May 2 Order states that only holders of ground water rights, where the purpose of use is irrigation, qualify as nonmember participants, House Bill 848 is controlling and does not limit nonmember participation to irrigation water rights only. Therefore, with the exception of domestic water rights, as defined under Idaho Code § 42-111, and in-house culinary uses associated with the use of recognized ground water rights,[2] all other junior priority ground water rights that are not within a water district must, as nonmember participants, mitigate their impact by paying the ground water district nearest the lands to which the water rights are appurtenant for replacement water. Because the Director found that the Idaho Ground Water Appropriators' Replacement Water Plan mitigates the Surface Water Coalition's material injury for the 2005 irrigation season, *Order Approving IGWA's Replacement Water Plan*, June 24, 2005, SAWGU should pay the ground water district nearest water rights no. 31-7372, no. 35-8624, and no. 35-9041 for their share of mitigation as nonmember participants. Because the Surface Water Coalition's material injury has been mitigated for this year, SAGWU should not serve interrogatories on the members of the Surface Water Coalition concerning water rights no. 31-7372, no. 35-8624, and no. 35-9041.

Surface Water Coalition Discretion

Finally, the SAGWU Motion misconstrues the discretion of the Surface Water Coalition. When a call for delivery of water is made by the holder of a senior priority surface water right against junior priority ground water rights, it is the Director's duty to examine the call, determine whether material injury has occurred, and, if necessary, curtail junior ground water rights. It is not necessary to engage in discovery because the junior priority water rights that are subject to curtailment will be curtailed regardless of ownership. Therefore, the SAGWU's interrogatories

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[2] The term "culinary purpose" is defined by the Idaho Code as "the use of water for direct human consumption, cooking, sanitary purposes, and other such uses." Idaho Code § 43-335. Therefore, depending on the use of water associated with Water Right No. 31-7372, an industrial water right held by the Idaho Department of Transportation for use at a maintenance shed, it is possible that the diversion under that right may be exempted from mitigation, if, for instance, water is being used for restroom facilities at the maintenance shed. The remainder of water, if any, that is not used for an in-house culinary purpose under Water Right No. 31-7372 should pay mitigation expenses to the nearest ground water district as a nonmember participant.

that ask whether the Surface Water Coalition intends to curtail its junior ground water rights are inappropriate and should not be answered by members of the Surface Water Coalition.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED as follows:

The State Agency Ground Water Users' motion to serve interrogatories on the members of the Surface Water Coalition is DENIED.

DATED this 23rd day of September, 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

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