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Attorney for Minidoka Irrigation District

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE MITIGATION)	
COMPUTATIONS IN WATER DISTRICT 120)	MINIDOKA IRRIGATION
FOR THE SURFACE WATER COALITION)	DISTRICT'S PETITION FOR
)	REVIEW OF DIRECTOR'S
)	INTERLOCUTORY ORDERS
)	
)	REQUEST FOR HEARING
)	
)	
_____)	

COMES NOW, Petitioner MINIDOKA IRRIGATION DISTRICT (“MID”), by and through counsel of record, W. Kent Fletcher of Fletcher Law Office, pursuant to Rules 230 and 711 of the Idaho Department of Water Resources’ procedural rules (IDAPA 37.01.01 *et seq.*) and hereby petitions the Director to review his “interlocutory orders” in the above-captioned matter. The reasons for this *Petition* are set forth below.

BACKGROUND

1. Petitioner Minidoka Irrigation District is a duly organized irrigation district under the laws of the State of Idaho, with its principal place of business located at 98 West 50 South Rupert, Idaho 83350.

2. MID holds or claims an interest in natural flow, storage and storage to irrigation water rights with the Snake River as their source, including: 01-8, 1-211A, 1-214A, 01-10187, 01-10188, 01-10189, 01-10190, 01-10192, 01-10193, 01-10194, and 01-10196 (some of these water rights are in the name of or are mirrored by claims in the name of the United States, Department of Interior, Bureau of Reclamation). MID's storage water rights are located in Jackson Lake, Palisades Reservoir, American Falls Reservoir, and Lake Walcott. Water under these rights is diverted through a system of canals and laterals and is beneficially used for irrigation purposes on the MID project.

3. On January 14, 2005 MID, along with six other irrigation districts and canal companies ("Surface Water Coalition") filed a water right delivery call against junior priority ground water rights in the Eastern Snake Plain Aquifer ("ESPA"). On May 2, 2005 the Director issued an amended order. After three years of a contested case before the Department, the Director issued a final order in the matter on September 5, 2008. MID and the other members of the Surface Water Coalition appealed the Director's final order to the Gooding County District Court. *See A&B Irr. Dist. et al. v. Tuthill et al.*, Case No. 08-0551, Fifth Jud. Dist., Gooding County. MID's appeal and petition for judicial review is pending decision from the Honorable John M. Melanson.

4. One of the issues on appeal before the Gooding County District Court is whether the Director improperly "bifurcated" the September 5, 2008 final order. Pursuant to the "bifurcation" in the final order the Director stated the following:

Because of the need for ongoing administration, the Director will issue a separate, final order before the end of 2008 detailing his approach for predicting material injury to reasonable in-season demand and reasonable carryover for the 2009 irrigation season. An opportunity for hearing on the order will be provided.

Final Order at 6.

MID and the other petitioners in the appeal have contended that the Director has violated Idaho's Administrative Procedures Act and IDWR's procedural rules in failing to issue a complete "final order" in that proceeding.

5. Pursuant to the Director's stated intent to "issue a separate, final order" regarding his approach for predicting material injury to MID's "reasonable in-season demand" and "reasonable carryover" for the 2009 irrigation season, the Director requested information relative to irrigated acreage within MID's project on November 7, 2008. MID, under protest, responded to the Director's request by letters and emails. .

6. On April 7, 2009 the Director, by electronic mail, issued notice of a meeting to "discuss mitigation computations" and "projected 2009 surface runoff computations" and a "Draft Protocol for determining reasonable carryover and reasonable in-season demand".

7. On May 4, 2009 the Director conducted the above-referenced meeting. That day the Director released a series of "PowerPoint" presentations (hereinafter collectively referred to as the "*Draft Protocol*"), all of which are available on the IDWR website, entitled as follows:

*Reasonable In-Season Demand
Adjustment for Forecast Supply
Selection of Average Irrigation Need
Reasonable Carryover
Draft Protocol for Determining Reasonable In-Season Demand and Reasonable
Carryover*

8. On May 7, 2009, MID, along the other members of the Surface Water Coalition, filed a request for technical meeting under protest. The Director thereafter scheduled a technical meeting with IDWR staff on June 1, 2008. In his May 15, 2009 letter, the Director advised that parties would be able to submit "comments" or "input" for the *Draft Protocol* until June 12, 2009. The Director further stated that "We look forward to developing a fair and equitable

protocol, with input and suggestions from the parties. Thank you for your participation in this regard.”

BASES FOR PETITION

9. MID incorporates paragraphs 1-8 as if fully stated herein.

10. MID is unaware of any statutory or regulatory authority for the Director to “bifurcate” a final order from a separate contested case before the agency, a case currently on appeal to the Gooding County District Court, and proceed to issue a “final order” in the above-captioned proceeding by way of a *Draft Protocol* and “comments” or “input” from the parties. The process violates Idaho’s Administrative Procedures Act and the Department’s own procedural rules.

11. MID submits that the *Draft Protocol* does not even follow the terms of the Director’s own September 5, 2008 final order.

12. MID submits that the Director, in proceeding with the *Draft Protocol* and the process instigated by his May 4, 2009 meeting, is not applying the Department’s *Rules for Conjunctive Management of Ground and Surface Water Sources* (IDAPA 37.03.11 *et seq.*) (CMR) in a constitutional manner and is not administering junior priority ground water rights in a manner that comports with Idaho law.

13. MID submits that the Director has no jurisdiction to modify a final agency order (the September 5, 2008 final order referenced above), that is currently on appeal to the Gooding County District Court.

14. The Department’s rules define an “order” as “an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons”. Rule 5.15. The rules define “interlocutory orders”

as “orders that do not decide all previously undecided issues presented in a proceeding.” Rule 710. The Director’s November 7, 2008 letter, the *Draft Protocol*, and the Director’s May 15, 2009 letter constitute “interlocutory orders” in the above-captioned proceeding. In essence, the Director has determined MID’s “legal rights, duties, or other legal interests” regarding certain aspects of the Director’s September 5, 2008 final order in a separate contested case, even though the case is presently on appeal to the Gooding County District Court. MID has proceeded in this process under protest. Pursuant to Rule 711 “any party or person affected by an interlocutory order may petition the officer issuing the order to review the interlocutory order”. MID is affected by the Director’s “interlocutory orders” and has the right to file this petition seeking review of the same.

15. By not requiring the delivery of replacement water into storage until commencement of the irrigation season when it will be diverted for irrigation, the Director’s proposed actions effectively eliminate the “carryover” component of storage for the purposes of administration, contrary to law and the CMR

16. The Director’s proposed actions do not comply with CMR 43 and are outside the scope of the Director’s authority pursuant to the CMR, law and the Idaho Constitution, an issue on before the Court on appeal from the Final Order. The Director recognizes that this matter is on appeal in his response to Question 48 posed by the Idaho Ground Water Appropriators.

17. Through this process the Director has announced that ‘reasonable in season demand’ as ultimately determined by him by fiat will be the upper limit of the water right that will be provided through administration, notwithstanding that the final order in this matter has adjudicated that the licensed or decreed quantity of water is in fact the maximum amount of water to be provided in administration.

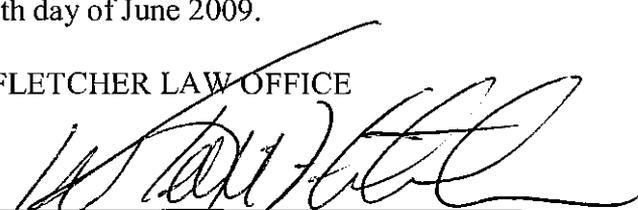
REQUESTS FOR RELIEF

WHEREFORE, MID requests the following relief:

1. The Director rescind and amend his November 7, 2008 letter, the *Draft Protocol*, and the May 15, 2009 letter whereby the Director has commenced a process to issue a final order through “comment” and “input” by parties to a separate contested case; and
2. The Director declare this process violates Idaho’s Administrative Procedures Act and the Department’s procedural rules; and
3. The Director declare that he is without jurisdiction to modify a “final order” from a separate contested case that is currently on appeal to the Gooding County District Court; and
4. The Director dismiss the “new protocol” action immediately; and/or
5. If the Director does not dismiss the “new protocol” action immediately, the Director provide for a hearing on this petition; and
6. For such other and further relief as deemed necessary.

DATED this 12th day of June 2009.

FLETCHER LAW OFFICE



W. Kent Fletcher

Attorney for Minidoka Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June, 2009, I caused to be served a true and correct copy of the foregoing document by electronic mail and regular U.S. Mail, postage prepaid, to:

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