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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF) WATER TO WATER RIGHTS NO. 36-07071)	CM-DC-2011-002
(JOHN W. JONES, JR., and DELORIS D.) JONES)	REPLY TO ORDER REQUIRING THE JONES TO SUPPLEMENT DELIVERY CALL
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John W. Jones, Jr. and Deloris D. Jones. (the “Jones”), by and through their counsel of record, Hawley Troxell Ennis & Hawley LLP, hereby submits this Reply to Order Requiring the Jones to Supplement Delivery Call.

**I.
INTRODUCTION**

On July 12, 2011, the Jones delivered a letter to the Idaho Department of Water Resources (the “Department”) demanding that the Director require the watermaster for Water

District 130 to administer water rights as required by Idaho Code section 42-607 and pursuant to the Department's conjunctive management rules, IDAPA 37.03.11 in order to supply the Jones with water under its senior rights. The delivery call claimed that junior ground water pumpers are causing material injury to Jones's beneficial use of its water and. On July 29, 2011, the Department submitted its Order Requiring Jones of Idaho, Inc. to Supplement Delivery Call, asserting that the Jones must set forth specific information required under IDAPA 37.03.11.30.01.

II. ANALYSIS

A. IDAPA 37.03.11.30.01 is Inapplicable to the Jones' Delivery Call.

Idaho Code section 42-602 authorizes and compels the Director to control and distribute water in a water district in accordance with the prior appropriation doctrine. IDAHO CODE ANN. § 42-602. The Director and the Department have promulgated administrative rules which govern the administration of surface and ground water rights. These are known as the Conjunctive Management Rules, which are set forth in IDAPA 37.03.11.

Pursuant to Rule 20.01 of the Conjunctive Management Rules,

01. Distribution of Water Among The Holders of Senior and Junior-Priority Rights. Holders of Senior and Junior-Priority Rights. These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply.

IDAPA 37.03.11.20.01. Furthermore, Rule 20.04 provides the general statement and policy for water calls relating to the conjunctive management of surface and ground water resources:

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority

surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

IDAPA 37.03.11.20.04. Rule 20.07 then designates the particular rules that apply to each particular type of delivery call:

07. Sequence of Actions for Responding to Delivery Calls. Rule 30 provides procedures for responding to delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district or designated a ground water management area. Rule 40 provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created. Rule 41 provides procedures for responding to delivery calls within areas that have been designated as ground water management areas. Rule 50 designates specific known areas having a common ground water supply within the state.

IDAPA 37.03.11.20.07.

As indicated in Rule 20.07, Rule 30 provides the procedures for responding to delivery calls *only* when the common ground water supply has not been incorporated into an existing or new water district or designated as a ground water management area. *Id.* Rule 30 is thus inapplicable to delivery calls made in water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created. *Id.* Indeed, Rule 30.09 specifically acknowledges that Rule 30 is inapplicable:

09. Administration Pursuant to Rule 40. Upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a

new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.

IDAPA 37.03.11.20.09 (emphasis added).

In this case, as the Jones are located within the boundaries of Water District No. 130, Rule 30 is inapplicable to the current delivery call.

B. The Jones are Located Within the Boundaries of Water District No. 130, and Therefore, Rule 40 Governs the Procedures for Jones's Delivery Call.

As indicated above, Rule 40 “provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created.” IDAPA 37.03.11.20.07. As the Jones are located within the boundaries of Water District No. 130, Rule 40 of the conjunctive management rules governs the procedures for the Jones' delivery call. Rule 40 provides in relevant part:

040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (RULE 40).

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to

lessen the economic impact of immediate and complete curtailment; or

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

IDAPA 37.03.11.40.01.

Notably, the rules relating to delivery calls against the holders of junior-priority ground water rights within a water district do not contain similar provisions to Rule 30 requiring supplementation of, among other things, “[t]he names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of the public records.” IDAPA 37.03.11.30.01.b. Indeed, such a regulatory scheme makes logical sense, as the creation of the water district provides the information called for by Rule 30 in instances where no water district exists.

Furthermore, in the Department’s Order Granting IGWA’s Petition to Intervene, the Department itself recognizes that “IGWA’s members are all owners of water rights that divert from the Eastern Snake Plain Aquifer that have hydraulic connections with the source for Water Right Nos. 36-7072 and 36-8356 and many of its members are junior ground water users that Jones alleges have caused material injury to Water Right Nos. 36-7072 and 36-8356.” Consequently, there is no question that the Jones are within the boundaries of Water District 130 and that Rule 40 governs the delivery call.

III. CONCLUSION

In the Jones’ July 12, 2011, delivery call, the Jones alleged that by reason of diversion by junior-priority ground water users from an area within Water District No. 130, the Jones are

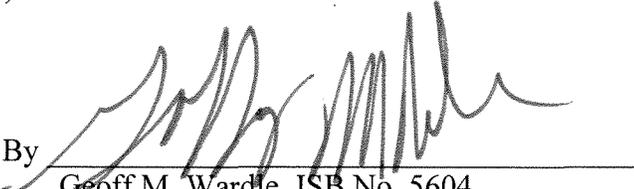
suffering material injury. Therefore, the Jones have fulfilled their delivery call requirements under Rule 40, have otherwise provided the information required by IDAPA 37.01.01, Rule 230, and are thus entitled to the prompt administration of its water rights within Water District 130 in accordance with the Jones' rights. It is disconcerting that the Department would attempt to impose regulations upon the Jones that are clearly not relevant or applicable to its claim.

**IV.
SUPPLEMENTATION**

Nonetheless, in the interest of reaching a just and prompt adjudication of the Jones's prior appropriation rights, the Jones hereby submit Exhibits A through B demonstrating the material injury to the Jones' beneficial use of their water rights.

DATED THIS 5th day of August, 2011.

By



Geoff M. Wardle, ISB No. 5604
Attorney for the Jones

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2011, I caused to be served a true copy of the foregoing REPLY TO ORDER REQUIRING THE JONES TO SUPPLEMENT DELIVERY CALL by the method indicated below, and addressed to each of the following:

Victoria Wigle
Idaho Department of Water Resources.
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Garrick.baxter@idwr.idaho.gov
Chris.bromley@idwr.idaho.gov

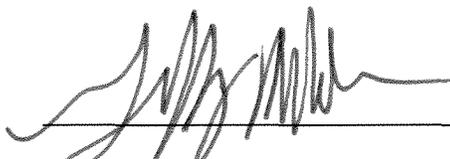
U.S. Mail, Postage Prepaid
 Hand Delivered
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Geoff M. Wardle

EXHIBIT A

John W. Jones, Jr
Fish Hatchery Flows
1975 - 2011

Outlet flow of 73.05cfs was measured in November 1972
Water Right 36-7071

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC		
1975								44.79	42.24	46.50	49.15	48.48	1975	46.23
1976	49.18	53.28	50.83	46.91	43.75	38.32	35.62	41.09	41.51	38.80	47.35	47.54	1976	44.35
1977	51.12	48.67	41.55	41.12	36.52	38.62	37.01	37.59	36.50	39.44	38.52	41.20	1977	40.66
1978	41.39	41.03	39.93	36.01	38.48	29.54	31.64	38.01	38.17	44.02	42.95	40.03	1978	38.43
1979	41.63	39.39	37.66	35.38	31.52	30.00	35.25	36.55	45.46	48.22	52.34	47.94	1979	40.11
1980	47.96	42.14	41.20	39.89	33.83	39.07	41.55	41.04	41.55	51.74	49.76	51.17	1980	43.41
1981	49.04	42.90	39.89	39.92	35.54	39.36	38.13	41.78	47.12	47.82	48.03	46.88	1981	43.03
1982	43.02	40.47	36.75	38.37	35.59	36.36	42.26	42.67	44.59	46.34	46.28	46.66	1982	41.61
1983	41.75	42.22	41.56	40.55	41.96	37.73	40.86	41.36	48.45	51.68	49.82	50.56	1983	44.04
1984	49.93	51.66	52.10	39.86	42.09	37.56	36.65	40.44	45.15	48.13	47.72	49.42	1984	45.06
1985	48.86	48.07	46.22	40.27	38.26	41.18	45.00	49.74	51.99	49.87	49.22	47.89	1985	46.38
1986	50.95	43.94	44.16	43.55	42.67	45.02	45.18	49.94	50.66	48.99	52.32	50.77	1986	47.35
1987	49.68	47.61	44.51	45.08	40.54	42.27	43.23	45.43	51.29	51.91	51.53	51.38	1987	47.04
1988	44.66	44.74	42.49	36.59	37.38	38.11	35.15	41.42	47.42	50.48	48.72	45.23	1988	42.70
1989	44.61	41.63	44.56	40.42	36.91	37.87	38.04	43.37	44.30	50.95	50.05	47.91	1989	43.39
1990	46.84	44.03	40.64	37.77	36.09	41.31	38.99	40.56	47.74	49.83	48.41	49.58	1990	43.48
1991	47.74	43.30	44.65	42.17	38.42	39.34	39.16	42.16	46.37	50.66	53.65	49.56	1991	44.77
1992	47.20	45.19	43.45	36.05	34.35	34.72	36.02	37.14	38.51	41.00	41.42	43.15	1992	39.85
1993	40.73	35.98	34.77	34.06	30.33	36.08	35.29	33.68	41.23	43.46	43.14	43.19	1993	37.66
1994	40.37	40.48	37.49	35.16	37.92	38.50	34.10	36.03	41.90	43.82	43.60	41.00	1994	39.36
1995	40.08	36.86	36.45	34.99	33.89	35.95	34.85	35.03	41.23	43.13	44.20	44.42	1995	38.42
1996	41.96	40.23	39.62	35.64	36.93	31.76	36.89	32.71	44.39	46.31	47.87	47.38	1996	40.14
1997	46.22	42.17	44.27	44.23	43.23	37.18	43.75	45.23	41.04	51.42	56.06	52.69	1997	45.62
1998	47.02	47.97	46.73	42.23	37.30	44.10	39.68	38.70	44.57	51.53	51.88	52.72	1998	45.37
1999	50.61	47.73	45.47	45.25	40.90	41.29	38.33	38.86	41.69	48.24	52.86	48.97	1999	45.02
2000	47.91	48.19	44.12	37.18	36.78	38.31	35.74	38.59	41.96	48.61	50.19	40.04	2000	42.30
2001	43.22	38.86	41.61	38.62	32.19	37.53	34.18	34.50	36.31	39.14	42.01	40.33	2001	38.21
2002	37.32	37.03	34.76	34.37	30.06	30.37	32.43	31.91	32.92	35.60	40.73	34.27	2002	34.31
2003	33.14	32.67	34.21	32.68	32.71	32.89	33.21	31.88	36.72	39.79	40.85	36.93	2003	32.92
2004	36.62	34.18	31.28	31.28	30.91	28.77	28.90	30.51	31.60	35.07	35.85	32.02	2004	31.68
2005	33.80	30.42	29.86	28.75	29.88	30.05	28.18	29.22	30.43	32.84	33.96	32.39	2005	30.02
2006	33.33	32.48	32.02	35.08	30.67	36.00	31.86	32.65	35.23	33.58	41.05	40.06	2006	34.50
2007	38.52	36.69	36.40	35.07	35.30	35.93	33.29	33.09	37.05	40.70	41.51	40.80	2007	37.03
2008	36.90	36.30	35.20	33.86	35.87	36.86	31.83	32.59	34.80	36.18	36.90	34.70	2008	35.17
2009	32.63	32.39	32.13	31.93	32.10	34.85	32.65	34.41	34.45	34.80	38.10	37.86	2009	34.03
2010	35.58	35.72	34.89	32.34	33.43	33.35	31.00	30.35	36.40	37.85	39.25	36.18	2010	34.70
2011	34.62	32.93	32.29	30.55	29.96	34.03	32.92						2011	32.47

highlighted yellow shows lift pump was on this adds 3cfs

EXHIBIT B

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA) PARTIAL DECREE PURSUANT TO)
Case No. 39576) I.R.C.P. 54(b) FOR)
Water Right 36-07071)

2010 APR 10 AM 10:19

FILED
TWIN FALLS CO., IDAHO

NAME & ADDRESS: DELORIS D JONES
JOHN W JONES JR
PO BOX 265
HAGERMAN ID 83332

SOURCE: WEATHERBY SPRINGS TRIBUTARY: BILLINGSLEY CREEK
THREE SPRINGS BILLINGSLEY CREEK
HOAGLAND TUNNEL BILLINGSLEY CREEK

QUANTITY: 73.05 CFS

THE APPROPRIATOR SHALL CONTINUOUSLY ALLOW 6.50 CFS FROM WEATHERBY SPRINGS TO BE DELIVERED INTO BAR S DITCH FROM THE OUTLET OF FISH OPERATION DESCRIBED ABOVE FROM MARCH 1 UNTIL NOVEMBER 1 OF EACH YEAR, AND SHALL CONTINUOUSLY ALLOW 4.00 CFS FROM WEATHERBY SPRINGS TO BE DELIVERED INTO THE BAR S DITCH FROM THE OUTLET OF FISH OPERATION DESCRIBED ABOVE FROM NOVEMBER 1 UNTIL MARCH 1 OF EACH YEAR.

PRIORITY DATE: 07/08/1969

POINT OF DIVERSION: T07S R14E S30 SESENW Within GOODING County
SESESW

PURPOSE AND PERIOD OF USE: PURPOSE OF USE PERIOD OF USE QUANTITY
FISH PROPAGATION 01-01 12-31 73.05 CFS
90 RACEWAYS

PLACE OF USE: FISH PROPAGATION Within GOODING County
T07S R14E S30 NESW

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

BARRY WOOD
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication