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 IDAHO POWER'S PETITION FOR HEARING**

This matter is before the Director of Department of Water Resources ("Director" or "Department") as a result of a petition filed by the Idaho Power Company ("Idaho Power" or the "Company") requesting a hearing as an aggrieved party pursuant to Idaho Code § 42-1701A(3) and the Department's Rule of Procedure 740, IDAPA 37.01.01.0740.02.b. Based upon the Director's consideration of the record, the pleadings, and briefs in this matter, the Director enters the following Finding of Facts, Conclusions of Law, and Order.

FINDINGS OF FACTS

Procedural Background

1. On January 13, 2005, seven irrigation districts, reservoir districts, and canal companies named in the above caption (referred to as the "Surface Water Coalition" or "Coalition"), hand-delivered to the Director its letter regarding *Request for Delivery of Water to Senior Surface Water Rights in Water District 120 (portions of the Eastern Snake Plain Aquifer)/ Request for Delivery of Water to the Senior Surface Water Rights*. The delivery call seeks administration and curtailment of ground water rights within Water District No. 120 that are junior in priority to water rights held by or for the benefit of the Surface Water Coalition.

2. On January 14, 2005, the Surface Water Coalition also filed its *Petition for Water Rights Administration and Designation of the Eastern Snake Plain Aquifer as a Groundwater Management Area*. The Petition was filed pursuant to Rules 30 and 41 of the Department's Conjunctive Management Rules, IDAPA 37.03.11, and Rule 230 of the Department's Rules of Procedure, IDAPA 37.01.01.

3. On February 11, 2005, Idaho Power submitted a letter to the Director expressing its support for the Surface Water Coalition's request for delivery, claiming it was similarly situated as the members of the Coalition in that it holds storage rights in American Falls Reservoir. Idaho Power alleged that to the extent the Coalition water rights suffer injury from failure to appropriately administer interconnected surface and ground water resources, the Company's storage rights in American Falls Reservoir will likely suffer injury. Idaho Power

stated that any action that injures its water rights will increase power costs to its customers. The letter further stated that Idaho Power has a reasonable expectation that water administration in the Snake River Basin will be consistent with state law. Idaho Power did not specifically make a call for delivery of its water rights. Therefore, the letter was treated as a petition for intervention pursuant to Department Rules of Procedure 351-534, IDAPA 37.03.01.0351-0354.

4. On February 14, 2005, the Director issued an order ("February 14 Order") that provided an initial response to water delivery calls made by the Surface Water Coalition. The Order designated the Surface Water Coalition's delivery call as a contested case. The February 14 Order stated that the Director would consider the water delivery calls as a call for administration and curtailment of junior priority ground water rights in Water Districts No. 120 and No. 130 that are alleged to or may be causing injury to the Coalition's senior surface water rights. The February 14 Order also concluded that whether the senior priority rights held by or for the benefit of the members of the Surface Water Coalition are injured depends in large part on the total supply of water needed for the beneficial uses authorized under the water rights held by the members of the Surface Water Coalition, including water available from both natural flow and reservoir storage, combined. *February 14 Order* at p. 30, ¶ 35. The February 14 Order granted the petition to intervene filed by the Idaho Ground Water Appropriators, Inc. ("IGWA"), but did not address the petition to intervene filed by Idaho Power.

5. On February 17, 2005, Murdock Farms, a ground water user in Water District No. 120, submitted a letter to the Director challenging Idaho Power's participation in this case. Murdock Farms' letter stated that Idaho Power is not a common party because Idaho Power's concerns are hydroelectric power, not irrigation. Therefore, Idaho Power's involvement would unduly broaden the issues before the Department.

6. On February 18, 2005, IGWA filed a motion opposing Idaho Power's intervention. IGWA alleged that Idaho Power's interests are already adequately represented by existing parties; namely, the Surface Water Coalition. Furthermore, IGWA alleged that if Idaho Power is granted party status, the issues would be unduly broadened.

7. On March 4, 2005, Idaho Power filed its *Answer to Idaho Ground Water Appropriators Inc.'s Motion Opposing Idaho Power's Petition to Intervene in Water District 120*, in which it stated that the Surface Water Coalition does not represent its interests because Idaho Power's water rights are unique. Idaho Power asserted that it must be allowed to intervene to ensure that any agreements, settlements, and findings of the Director are protective of Idaho Power's rights and not detrimental to Idaho Power's business operation. Finally, Idaho Power stated that as a senior water right holder it has a legitimate interest in the proper and lawful administration of the Snake River under the prior appropriation doctrine.

8. On March 7, 2005, the United States Bureau of Reclamation ("USBR") filed its *Petition to Intervene* in this case. According to its Petition, the USBR stated that as the legal titleholder of water rights at issue in the proceeding, it has a direct and substantial interest. The Petition further stated that the Surface Water Coalition may be able to represent the USBR's contractual and legal interests in the irrigation portion of the storage water rights that the USBR holds for them, but only the USBR can represent all of the authorized purposes for the various contracts it has with its storage users.

9. On April 6, 2005, the Department issued its *Order on Petition to Intervene and Denying Motion For Summary Judgment, Renewed Request For Information and Request For Briefs* ("April 6 Order"). In that Order, the Director found that the USBR, as the legal owner of some of the water rights directly at issue in the proceeding, demonstrated a direct and substantial interest in the subject of the proceeding that was not adequately represented by the existing parties. Furthermore, because the Director determined that granting intervention to the USBR would not unduly broaden the issues, intervention was granted. However, in the April 6 Order, the Director determined that Idaho Power, unlike the USBR, did not identify any water rights it holds that are subject to the proceeding. Moreover, Idaho Power did not state in its petition that it holds ground water rights that are potentially subject to curtailment as a result of the relief requested. Therefore, Idaho Power did not demonstrate a direct and substantial interest in the subject of the proceeding and was denied intervention. Additionally, the April 6 Order stated that to the extent Idaho Power believed its water rights were being interfered with by the exercise of junior priority ground water rights, it had adequate forms of relief available such as filing a separate delivery call. *April 6 Order* at p. 2.

10. On April 19, 2005, the Director issued an order on the delivery call which was amended on May 2, 2005 ("May 2 Order"). In the May 2 Order, the Director found that ground water depletions under junior priority rights in Water District No. 120 and No. 130 were causing material injury to senior natural flow and storage rights. As a result, the Director instructed the holders of junior ground water rights in Water Districts No. 120 and No. 130 having priorities of February 27, 1979, and later, to either curtail the diversion and use of ground water for the remainder of 2005, provide replacement water to the members of the Surface Water Coalition as mitigation, or a combination of both. *May 2 Order* at p. 44, ¶ 53.

11. On May 17, 2005, Idaho Power filed a *Petition For Hearing on May 2, 2005 Amended Order*, which stated that it was an aggrieved person under the May 2 Order. Thus, Idaho Power argued that it was entitled to a hearing before the Director to contest the May 2 Order pursuant to Idaho Code § 42-1701A(3) and the Department's Rule of Procedure 740. Idaho Power stated that it is an aggrieved party because it holds water rights, contract rights, and entitlement to water at American Falls Reservoir. Idaho Power alleged that the May 2 Order did not remedy harm to Idaho Power's water rights; therefore, as an aggrieved party, Idaho Power requested a hearing to challenge the May 2 Order. Idaho Power argued that it had standing to challenge the May 2 Order because it has a contract right for delivery of a portion of the USBR's storage water rights at issue in this case.

12. On June 16, 2005, the Department issued an *Order Regarding the Status and Scheduling Conference of June 2005*. In this order the Department requested briefing by the parties on the issue of Idaho Power's status in this case. The USBR, IGWA, and the State Agency Ground Water Users ("SAGWU") filed briefs regarding Idaho Power's status in the case on June 22, 2005.

13. The USBR brief stated that Idaho Power has an entitlement to storage water at American Falls Reservoir and an interest in the factual and legal questions raised in this case. Therefore, the USBR argued that Idaho Power should be admitted as a party.

14. The IGWA brief stated that Idaho Power did not appeal or seek reconsideration of the final order denying Idaho Power intervention in the case. IGWA argued that the attempt to now seek standing as an aggrieved party under the May 2 Order is an end-run by means of a petition from the alleged aggrieved person who actually is the same person who made the same argument to enter the case earlier and was denied. IGWA further noted that Idaho Power has failed to assert that it does not have enough water, or to file its own delivery call. Additionally, IGWA stated that Idaho Power's presence in the case will significantly broaden the scope of the proceedings and necessarily bring into question the Swan Falls Agreement and issues such as whether Idaho Power is in breech of that Agreement. IGWA also maintained that the Surface Water Coalition and the USBR adequately represent Idaho Power's interests. IGWA finally stated that Idaho Power's assertions that it is similarly situated as the USBR and the Surface Water Coalition for standing is without merit because the Surface Water Coalition has filed a delivery call concerning the delivery of its natural flow and contract storage rights while Idaho Power has not.

15. SAGWU argued that because Idaho Power has not participated in the call, its water rights are not being evaluated as part of the analysis of the call. Because Idaho Power's water rights are separate and distinct from those of the Surface Water Coalition, and because they include water rights downstream from the Surface Water Coalition's points of diversion, it is inevitable that Idaho Power's participation as a party "to ensure that long-term solutions . . . do not cause injury to Idaho Power's senior water rights" will broaden the issues if injury to Idaho Power is at issue. SAGWU argued that because Idaho Power is subject to the Swan Falls Agreement, consideration of the effect of that Agreement will also broaden the legal issues in this matter. As a practical matter, SAGWU stated that while Idaho Power's water rights may be affected by the outcome of the Surface Water Coalition's call, so too will the rights of every user on the Snake River downstream from Milner. Therefore, SAGWU asserted that Idaho Power has no personal stake in the Surface Water Coalition call; rather, Idaho Power is but a bystander to the Surface Water Coalition's rights and has no standing regarding them.

16. On June 29, 2005, Idaho Power replied to IGWA's and SAGWU's opposition to Idaho Power's participation as a party. Idaho Power argued that since the Director granted party status to the USBR, Idaho Power has essentially the same interest because of its contractual interests in the storage at American Falls Reservoir; therefore, it should be granted party status. Idaho Power asserted that it is an aggrieved person because its contractual rights for storage may be impacted by future Department rulings in this case and it needs to make sure the prior appropriation doctrine is followed.

17. In its reply of June 29, 2005, Idaho Power stated that if party status is not granted, it would participate in the ongoing proceedings in this matter as a "public witness" under Rule 355 of the Department's Rules of Procedure.

CONCLUSIONS OF LAW

1. Department Rule of Procedure 353, IDAPA 37.03.01.353, governing the granting of petitions to intervene, provides:

> If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

2. Idaho Code § 42-1701A(3), providing for hearings before the Director under certain circumstances, provides:

> ... [A]ny person aggrieved by any action of the director, including any decision, determination, order or other action, ... *who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter* shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing.

Emphasis added.

3. Department Rule of Procedure 740, IDAPA 37.01.01.0740.02.b, concerning final orders of the agency, reiterates the same hearing procedure provided for in Idaho Code § 42-1701A(3) for a person aggrieved by an action of the Director.

4. Department Rule of Procedure 355, IDAPA 37.01.01.0355, allowing for the participation of public witnesses provides, in part, as follows:

> Persons not parties and not called by a party who testify at hearing are called "public witnesses". Public witnesses do not have parties' rights to examine witnesses or otherwise participate in the proceedings as parties. Public witnesses' written or oral statements and exhibits are subject to examination and objection by parties. Subject to Rules 557 and 559, public witnesses have a right to introduce evidence at hearing by their written or oral statements and exhibits introduced at hearing, except that public witnesses offering expert opinions at hearing or detailed analysis or detailed exhibits must comply with Rule 528 with regard to filing and service of testimony and exhibits to the same extent as expert witnesses of parties. . . .

5. The Department's April 6 Order previously denied Idaho Power's intervention pursuant to Rule 353, based upon determinations that Idaho Power did not show a substantial and direct interest in this matter and Idaho Power's involvement in the case would unduly broaden the issues. The focus in this case is on the water rights of the Surface Water Coalition and on the junior priority ground water rights that are subject to curtailment as a result of the Coalition's water delivery call. The rights identified by Idaho Power as a basis for intervention do not fall within either category of rights at issue in the case. With no standing to intervene pursuant to

Rule 353, the issue becomes whether Idaho Power is an aggrieved person affected by the May 2 Order pursuant to Idaho Code § 42-1701A(3).

6. The term "aggrieved" is not succinctly defined in the Idaho Administrative Procedure Act or otherwise in the Idaho Code. The term, however, is used throughout the Idaho Code in relation to a party's right to appeal an administrative action. Idaho Code § 67-5270(3), relating to right of review, states that a party "aggrieved" by a final order in a contested case is entitled to judicial review. Idaho Code § 28-1-201 states that an "aggrieved party" means a party entitled to pursue a remedy. Under Idaho Code § 42-222, an "aggrieved person" is one whose application for a change in their water right has been denied.

7. According to Black's Law Dictionary (8th ed.) "aggrieved" is defined as a person or entity having legal rights that are adversely affected, having been harmed by an infringement of legal rights.

8. Idaho courts have held that a party injuriously affected by a judgment is an "aggrieved party." *Roosma v Moots*, 62 Idaho 450, 112 P.2d 1000 (1941); *Federal Land Bank of Spokane v. Parson*, 116 Idaho 545, 777 P.2d 1218 (Ct. App. 1989). Moreover, parties who can demonstrate that they have a property interest that may be affected by the issuance or denial of a permit authorizing development have a right to challenge the administrative action and request a hearing. *Evans v. Teton County*, 131 Idaho 71, 75-76, 73 P.3d 84, 88-89 (2003); *City of Burley v. McCaslin Lumber Co.*, 107 Idaho 906, 908, 693 P.2d 1108, 110 (Ct. App. 1984).

9. A recent Idaho Supreme Court decision addresses the issue of standing with respect to a person aggrieved by a generalized grievance as opposed to peculiar or personal injury. *Gallagher v. State of Idaho*, No. 30685, 2005 WL 1489964 (Idaho June 24, 2005). The court held,

> "It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 125, 15 P.3d 1129, 1132 (2000). "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). In Idaho, a taxpayer may not challenge a governmental enactment where the injury is one suffered by all citizens and taxpayers alike. *Van Valkenburgh,* 135 Idaho at 125, 15 P.3d at 1133. The taxpayer must establish a peculiar or personal injury that is different than that suffered by the public. *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). . . . Taxpayer's who have a "*generalized grievance" shared by a large class of citizens do not have standing. Young*, 137 Idaho at 104, 44 P.3d at 1159.

Id., 2005 WL 1489964 at *2 (emphasis added).

10. In its *Request for Hearing*, Idaho Power sets forth the grounds it relies upon to support its status as an aggrieved party. Idaho Power states that ground water withdrawals are depleting the river above Milner with a significant impact on Idaho Power's contract rights with the USBR at American Falls. Idaho Power also asserts that the May 2 Order does not sufficiently curtail junior priority ground water rights or require adequate mitigation to address

the injuries to Idaho Power. And Idaho Power states that it has a direct interest in the adequate administration of water rights occurring in the Snake River.

11. Idaho Power's assertion that it is an aggrieved party under the May 2 Order because the order does not curtail junior priority ground water rights or require adequate mitigation to address the injuries to Idaho Power's rights is incorrect. Idaho Power's rights were not at issue under the May 2 Order, and were therefore not considered, because the delivery call being addressed in this proceeding does not implicate Idaho Power's water rights. Idaho Power has not shown a direct interest in the outcome of this proceeding. Idaho Power has not made a delivery call for its water rights. Idaho Power has not demonstrated that its water rights will be directly affected by the outcome of this proceeding.

12. Idaho Power's assertion that it is an aggrieved party under the May 2 Order because ground water withdrawals are depleting the Snake River above Milner with a significant impact on Idaho Power's contract rights with the USBR at the American Falls Reservoir is similarly incorrect. Idaho Power has no personal stake in the Surface Water Coalition. Idaho Power is but a bystander to the rights of the Surface Water Coalition members and has no standing regarding them. Idaho Power's claim to be an aggrieved party is but a generalized grievance shared by a large class of water right holders, but does not give rise to standing in this proceeding. As a practical matter, the amount of water available to Idaho Power and other water right holders downstream from Milner on the Snake River will be positively affected by the outcome of the Surface Water Coalition's delivery call to the extent curtailment, replacement water, or other mitigation is required of the holders of junior priority ground water rights.

13. Finally, Idaho Power's general assertion that it is an aggrieved party under the May 2 Order because of the need to assure that the general law of prior appropriation is followed is also incorrect. This is a generalized concern shared by all water users if not all citizens of the State. Generalized concerns do not rise to the level of standing. *Gallagher*, 2005 WL 1489964 at *2. Idaho Power's general concern that the law of prior appropriation be followed is already adequately represented by the Surface Water Coalition and the USBR.

14. Idaho Power may participate in this case as a "public witness" pursuant to the provisions of Rule 355 of the Department's Rules of Procedure and submit such testimony and exhibits at the hearing of this matter as shall be appropriate.

15. The Department's Rule of Procedure 710, IDAPA 37.01.01.710, concerning interlocutory orders, provides, in part, as follows::

> Interlocutory orders are orders that do not decide all previously undecided issues presented in a proceeding, except the agency may by order decide some of the issues presented in a proceeding and provide in that order that its decision on those issues is final and subject to review by reconsideration or appeal, but is not final on other issues.

16. Idaho Code § 67-5271 concerning exhaustion of administrative remedies provides:

> (1) A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.

(2) A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy.

17. Upon the issuance of this Order, Idaho Power will have exhausted its administrative remedies with respect to the issue of whether it has standing to request a hearing as an aggrieved party, pursuant to Idaho Code § 42-1701A(3), in response to the Director's May 2 Order in this matter.

ORDER

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

1. Idaho Power's petition for hearing as an aggrieved party pursuant to Idaho Code § 42-1701A(3) and the Department's Rule of Procedure 740 is DENIED.

2. Idaho Power shall be allowed to participate in ongoing proceedings in this matter as a public witness pursuant to the Department's Rule of Procedure 355.

3. Pursuant to the Department's Rule of Procedure 710, the decision made in this order denying Idaho Power's petition for hearing as an aggrieved party is final and subject to review by reconsideration or appeal.

DATED this 22nd day of July 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

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