BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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 ON PETITIONS TO INTERVENE AND DENYING MOTION FOR SUMMARY JUDGMENT; RENEWED REQUEST FOR INFORMATION; AND REQUEST FOR BRIEFS**

Background

On February 14, 2005, the Director of the Department of Water Resources ("Director" or "Department") issued an Order in this matter and other related matters. The Order provided an initial response by the Director to the water delivery call made by letter on January 14, 2005, by the seven irrigation districts, reservoir district, and canal companies named in the above caption and referred to as the Surface Water Coalition ("Coalition"). The delivery call seeks the 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 members of the Coalition. Among other actions, the Order designated the Coalition's delivery call as a contested case and granted the petition of the Idaho Ground Water Appropriators, Inc. ("IGWA") to intervene in the delivery call proceeding involving Water District No. 120.

In addition, the Order required each member of the Coalition to submit to the Director within thirty (30) days certain information called for in the Order. The Order states that the Director will consider the water delivery call 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 senior surface water rights of the members of the Coalition. The Order further states that the Director will make a determination of the extent of likely injury after April 1, 2005, when the U. S. Bureau of Reclamation and U. S. Army Corps of Engineers release their jointly prepared operating forecasts for inflow from the Upper Snake River Basin for the period April 1 through July 31, 2005. The forecasts are expected to be released on or about April 8, 2005. The Director expects to be able to issue an order addressing the extent of likely injury during the week of April 18, 2005.

Additional Petitions to Intervene

In addition to IGWA, other entities have filed timely petitions to intervene in this matter including the Idaho Dairymen's Association ("IDA"), the United States Bureau of Reclamation ("USBR"), and the Idaho Power Company ("Idaho Power"). IDAPA 37.03.01.353 provides as follows:

> 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.

The IDA represents entities holding ground water rights that, based on the Coalition's water delivery call, are potentially subject to curtailment. Therefore, the IDA has a direct and substantial interest in the subject of the proceeding that may not be adequately represented by the present parties. Because the interests of the IDA will not unduly broaden the issues, the IDA is granted intervention.

The USBR is the legal owner of some of the water rights directly at issue in this proceeding as stated in Finding of Fact 54 of the Order of February 14, 2005. Therefore, the USBR has a direct and substantial interest in the subject of the proceeding that is not adequately represented by the present parties. Because the interests of the USBR will not unduly broaden the issues, the USBR is granted intervention.

Unlike the USBR, Idaho Power does not identify in its petition any water rights it holds that are the subject of this proceeding. Furthermore, unlike the IDA, Idaho Power does not state in its petition that it holds ground water rights that are potentially subject to the actions and relief requested. Therefore, Idaho Power has not demonstrated a direct and substantial interest in the subject of the proceeding and is denied intervention. Additionally, to the extent Idaho Power believes its water rights are being interfered with by the exercise of junior priority ground water rights, it has other adequate forms of relief available, such as the filing of a separate delivery call.

Motion for Summary Judgment

On March 23, 2005, IGWA filed *Idaho Ground Water Appropriators' Motion for Summary Judgment and Memorandum in Support*. IGWA also filed the *Affidavit of Dr. Charles M. Brendecke* ("Brendecke Affidavit") and the *Affidavit of Mr. John Church* ("Church Affidavit") in support of the summary judgment motion. The motion asks the Director to dismiss the Coalition's delivery call based upon the supporting affidavits and numerous factual and legal arguments. On March 28, 2005, the Coalition submitted a letter to the Director objecting to the filing of the summary judgment motion by IGWA. The Coalition argues that the motion for summary judgment is inappropriate at this informal stage of the proceeding and

should be stricken, or if not stricken the Director should inform the Coalition as to whether it is expected or required to respond to the motion pursuant to Rule 270 of the Department's Rules of Procedure.

The Order issued by the Director on February 14, 2005, designated this matter as a contested case and did not specify that the matter would proceed under the Informal Proceedings provided for by Rules 100 through 103 of the Department's Rules of Procedure. IDAPA 37.01.01.100 - 103. The Order did state, however, that the Director intended to make a determination of the extent of likely injury to the rights held by or for the benefit of members of the Coalition after April 1, 2005, which will be prior to any opportunity for a hearing in the contested case. Once the Director has issued a further order addressing the merits of the delivery call, the parties will have an opportunity to request a hearing and engage in the normal steps of a contested case provided for under the Department's Rules of Procedure. IGWA's *Motion for Summary Judgment* will, therefore, be denied without prejudice at this time, and the Coalition shall have no duty to respond. The Director has reviewed the *Motion for Summary Judgment* and the Brendecke Affidavit, but does not intend to rely upon the information contained therein in making a determination of the extent of likely injury to the members of the Coalition. The Director has not reviewed the Church Affidavit and does not intend to do so.

Renewed Request for Information

The Order of February 14, 2005, required that each member of the Surface Water Coalition file with the Director certain information called for under Conclusion of Law No. 38 of the Order for the past fifteen (15) irrigation seasons, 1990 to 2004, within thirty (30) days of the Order. The Coalition members filed information in response to this request on March 15 and 18, 2005.

The response filed by the Coalition members relied heavily on data obtained from the Department (total monthly diversions of natural flow and total monthly diversions of water released from reservoir storage), failed to identify members or shareholders holding individual ground water rights (alleging that such information is "irrelevant for purposes of the request for water right administration of Petitioners' surface water rights"), referred the Director to his own staff or the watermaster for Water District 01 (total amount of reservoir storage carried over to the subsequent year, quantity of water leased to other users through the water supply bank and the Water District 01 Rental Pool, and quantity of water made available to other users through means other than the water supply bank or the Water District 01 Rental Pool), provided data or estimates for the total number of acres irrigated by flood irrigation and the total number of acres irrigated by sprinkler irrigation for one year only (Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company), and a single list of crops for each member of the coalition (no acreage numbers and no history of crop rotation).

All of the information that was to have been provided pursuant to the Order of February 14, 2005, is relevant for the determination of the extent of material injury to surface water rights held by or for members of the Coalition. Ground water rights held by individual members of the entities comprising the Coalition (landowners in irrigation districts and shareholders in canal

companies) is especially relevant since such rights may have been established and used to supplement surface water supplies during times of shortage. If information about the ground water rights held by individuals within the Coalition members is not available, the Coalition may, as an alternative, supply documented information to the Director identifying the number and location of acres served by each Coalition member for which an inadequate water supply was available to irrigate or finish crops in specific years from any available water source.

The Coalition alleges that: "Since the Department 'maintains complete records for all claimed, permitted, licensed, and decreed water rights authorizing the diversion and use of ground water from the ESPA', the Department is capable of determining whether or not any landowners or shareholders of the respective Petitioner entity hold individual ground water rights." With the exception of the North Side Canal Company, the Department does not have records of the landowners and shareholders that receive water delivered by the member entities comprising the Coalition. Consequently, with the exception of the North Side Canal Company, the Department cannot determine whether landowners or shareholders of the respective member entity of the Surface Water Coalition hold individual ground water rights.

The Director hereby reiterates the request of the members of the Surface Water Coalition for submission of all information called for under Conclusion of Law No. 38 of the Order of February 14, 2005, to the extent that information has not been submitted to date. The failure to fully comply with this request will limit the Director's ability to fully address the relief requested by the Coalition.

Request for Briefs

In preparing the forthcoming order determining the extent of likely injury that will be experienced by the members of the Surface Water Coalition, the Director has identified a legal issue for which briefing by the parties is requested. The issue is whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party.

The Director requests that the parties review the cases of *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921); *Scott v. Nampa Meridian Irr. Dist.*, 55 Idaho 672, 45 P.2d 1062 (1934); *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997), and any other Idaho Supreme Court decisions that may be relevant to the issue raised. The Director requests that the parties provide simultaneous briefing on this issue to the Director within seven (7) days from the date of this order.

ORDER

Based upon and consistent with the foregoing,

IT IS HEREBY ORDERED as follows:

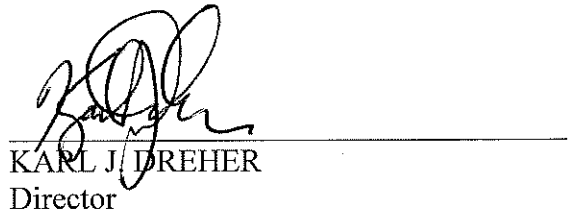
1. The Petitions to Intervene as parties in this matter filed by the Idaho Dairymen's Association and the United States Bureau of Reclamation are GRANTED, and the Petition to Intervene filed by the Idaho Power Company is DENIED.

2. The Motion for Summary Judgment filed by the Idaho Ground Water Appropriators is DENIED without prejudice.

3. The Director renews his request of the members of the Surface Water Coalition for submission of all information called for under Conclusion of Law No. 38 of the Order of February 14, 2005, to the extent that information has not already been submitted to the Director.

4. The parties are requested to provide simultaneous briefing to the Director within seven (7) days from the date of this order on whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party.

DATED this 6th day of April 2005.



KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of April 2005, the above and foregoing, was served on the following by facsimile and by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

JOHN K. SIMPSON
BARKER ROSHOLT
205 N 10TH STE 520
PO BOX 2139
BOISE ID 83701-2139
FX 208-344-6034

SCOTT L. CAMPBELL, ESQ.
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.
101 S. CAPITOL BLVD., 10TH FLOOR
PO BOX 829
BOISE ID 83701-0829
FX 208-385-5384

ROGER LING
LING ROBINSON
615 H ST
PO BOX 396
RUPERT ID 83350
FX 208-436-6804

KATHLEEN MARION CARR, ESQ.
OFFICE OF THE FIELD SOLICITOR
U.S. DEPARTMENT OF THE INTERIOR
550 WEST FORT STREET, MSC 020
BOISE ID 83724-00020
FX 334-1918

TOM ARKOOSH
ARKOOSH LAW OFFICES
PO BOX 32
GOODING ID 83330
FX 208-934-8873

E. GAIL MCGARRY, P.E.
PROGRAM MANAGER
WATER RIGHTS & ACQUISITIONS
PN-3100
U.S. BUREAU OF RECLAMATION
PACIFIC NORTHWEST REGION
1150 N. CURTIS ROAD
BOISE ID 83706-1234
FX 208-378-5305

KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318
FX 208-878-2548

JAMES C TUCKER ESQ
IDAHO POWER COMPANY
1221 WEST IDAHO
PO BOX 70
BOISE ID 83707
FX 208-388-6936

JEFFREY C. FEREDAY
MICHAEL C. CREAMER
GIVENS PURSLEY LLP
601 BANNOCK ST STE 200
PO BOX 2720
BOISE ID 83701-2720
FX 208-388-1300

JAMES S. LOCHHEAD
ADAM T. DEVOE
BROWNSTEIN HYATT & FARBER PC
410 17TH ST., 22ND FLOOR
DENVER CO 80202
FX 970-384-2360

IDWR - EASTERN REGION
900 N SKYLINE DR STE A
IDAHO FALLS ID 83402-1718
FX 208 525-7177

IDWR – SOUTHERN REGION
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
FX 208-736-3037

Patsy McGourty
Administrative Assistant to the Director
Idaho Department of Water Resources