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**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)	IGWA'S PRE-HEARING
A&B IRRIGATION DISTRICT, AMERICAN)	BRIEF
FALLS RESERVOIR DISTRICT #2, BURLEY)	
IRRIGATION DISTRICT, MILNER)	
IRRIGATION DISTRICT, MINIDOKA)	
IRRIGATION DISTRICT, NORTH SIDE)	
CANAL COMPANY AND TWIN FALLS)	
CANAL COMPANY)	
_____)	

COME NOW Idaho Ground Water Appropriators, Inc., Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District (collectively "IGWA"), on behalf of their respective members, through counsel, and submit this Pre-Hearing Brief for the purpose of refining and clarifying the legal and factual issues to be decided in this case. This brief is further supported by *IGWA's Proposed Findings of Fact and Conclusions of Law* filed contemporaneously herewith.

BACKGROUND

By letter and petition dated January 14, 2005 (the “SWC delivery call”), the Surface Water Coalition (“SWC”) demanded that the Director of the Idaho Department of Water Resources (“IDWR” or the “Department”) curtail junior-priority ground water diversions in an attempt to increase the supply of surface water available to senior-priority water rights held by the SWC. The Director issued an *Order in Response to Surface Coalition Water Call* on February 14, 2005. On April 19, 2005, the Director issued another *Order in Response to Surface Water Coalition Water Call*. On May 2, 2005, the Director issued an *Amended Order in Response to Surface Water Coalition Water Call* (the “May 2005 Order” or “Curtailement Order”). The Curtailement Order required junior priority ground water appropriators to provide the SWC with replacement water to eliminate alleged material injury or face involuntary curtailement. (*Curtailement Order* at 45.) The May 2005 Order was issued on an emergency basis without a prior hearing. IGWA and multiple other parties dispute the Curtailement Order and filed petitions for reconsideration of the Order. The Order remained in force since 2005 without any hearing granted by IDWR on the petitions for reconsideration.

The Curtailement Order left IGWA with no choice but to purchase replacement water at great expense in order to avoid involuntary curtailement of their ground water rights. On April 29, 2005, IGWA filed its *Initial Plan for Providing Replacement Water* providing for substantially more water than ordered by the Director (“2005 Replacement Water Plan”). The 2005 Replacement Water Plan was approved by the Director. IGWA submitted another replacement plan on May 8, 2007. Thereafter, the *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007* was issued by the Director on

May 23, 2007. Yesterday, December 20, 2007, the Director filed yet another supplemental order, the *Seventh Supplemental Order Amending Replacement Water Requirements*.

ISSUES

The issues set forth below must be determined by the Hearing Officer at the conclusion of the hearing. *IGWA's Proposed Findings of Fact and Conclusions of Law (Pre-Hearing)* filed contemporaneously herewith correspond to and support each issue. A brief summary of each issue is provided herein.

I. THE DIRECTOR'S CURTAILMENT ORDER VIOLATES THE STATUTORY REQUIREMENT THAT A LOCAL GROUND WATER BOARD BE CONVENED WHENEVER A CALL IS MADE UPON GROUND WATER DIVERTERS.

Pursuant to Idaho Code § 42-237B, the Director of the Department of Water Resources is to convene a local ground water board any time a dispute arises over the effects of ground water pumping. IDWR did not comply with the statute prior or subsequent to issuing the Curtailment Order.

Findings of Fact Nos. 1-10.

Conclusions of Law Nos. 1-18.

II. SENIOR SURFACE WATER RIGHT HOLDERS ARE NOT ENTITLED TO A WATER SUPPLY THAT IS ENHANCED OVER WHAT WAS HISTORICALLY AVAILABLE AT THE TIME OF THEIR ORIGINAL APPROPRIATIONS.

The water supply contemporaneously available to the SWC is as good or better than the water supply that existed at the time of the subject appropriations. The diversion of surface water for irrigation on the Eastern Snake Plain resulted in substantial incidental recharge of water to the East Snake Plain Aquifer ("ESPA"). The Director's May 2005 Order fails to account for enhanced hydrologic conditions made available to the SWC which cannot be restored absent a return to more wasteful and inefficient irrigation methods such as flood irrigation. SWC

members have received and are anticipated to receive a water supply equivalent or greater than their historical full water supply. Material injury does not exist if the party marking the delivery call is receiving or is anticipated to receive a water supply equal to or greater than what was historically diverted.

Findings of Fact Nos. 11-41

Conclusions of Law Nos. 19-29

III. THE DELIVERY CALLS MADE BY THE SURFACE WATER COALITION MUST BE DENIED BECAUSE THEY HAVE NOT SUFFERED MATERIAL INJURY AS A RESULT OF JUNIOR PRIORITY GROUND WATER PUMPERS.

When considering material injury, the total water supply under natural flow rights, reservoir storage, and supplemental ground water rights must be considered. The Curtailment Order fails to consider ground water rights held by the SWC or the shareholders of its members. The SWC benefits from a system of storage reservoirs which was never expected to prevent or eliminate water shortages in dry years; rather, the system was designed simply to supplement the SWC's natural flow supplies. That the SWC's storage leases reduced the amount of natural flow in some years does not mean that the SWC has suffered material injury due to ground water diversions from the ESPA. There is no evidence suggesting that the SWC members have had to dry up acreage or have suffered any loss of crop yields due to short water supplies. Further, the natural flow rights of the SWC have never been adequate to provide a full water supply for the entire irrigation season and have not been materially injured by junior ground water users. IGWA's members should not be shackled with an unjust obligation of insuring a water supply for the SWC of greater quantity and greater certainty than existed historically. IGWA's members should not be obligated to insure carryover storage for the SWC.

Findings of Fact Nos. 42-68

Conclusions of Law Nos. 30-36

IV. THE DIRECTOR'S MAY 2005 ORDER FAILED TO PROPERLY CALCULATE THE THRESHOLD INJURY VALUE.

The Director's two threshold criteria for determining the degree to which pumping by ground water rights caused material injury to senior surface water rights of the SWC members was based upon incorrect calculations. The Director relied upon data and information provided only by members of the SWC.

Findings of Fact Nos. 69-81

Conclusions of Law Nos. 37-39.

V. IT IS REASONABLE BASED UPON HISTORICAL EXPECTATIONS FOR CARRYOVER STORAGE TO BE ZERO.

Carryover storage (i.e. water stored in reservoirs which is unused during the irrigation season and remains in storage for the following year), reflects a surplus water supply. The SWC historically experienced shortages in their natural flow supply due to climatic conditions. During consecutive drought years, the SWC members could never have expected to have any carryover storage left. It is unreasonable to guarantee the SWC any quantity of carryover storage during extended drought periods, during which a reasonable amount of carryover would be zero.

Findings of Fact Nos. 82-88

Conclusions of Law Nos. 40-45

VI. THE DIRECTOR'S MAY 2005 ORDER FAILS TO CONSIDER ACTUAL CROP IRRIGATION REQUIREMENTS AND ACTUAL OR CLAIMED IRRIGATED ACREAGE WITHIN THE SURFACE WATER COALITION SERVICE AREAS.

The Director's May 2005 Order fails to account the variation in the irrigation requirement from year-to-year as a result of climate, crop selection, irrigated acreage, and other factors, nor does the Order account actual or claimed irrigated acreage with the SWC service areas. Non-

irrigated acres must not be used to determine irrigation water supply requirements. In addition, on-farm efficiencies should be considered and analyzed when determining water supply requirements.

Findings of Fact Nos. 89-94

Conclusions of Law Nos. 46-50

VII. THE DELIVERY CALLS MADE BY THE SURFACE WATER COALITION UNREASONABLY INTERFERE IN VIOLATION OF LAW WITH THE OPTIMUM BENEFICIAL USE AND FULL ECONOMIC DEVELOPMENT OF THE EASTERN SNAKE PLAIN AQUIFER.

The economic harm to Idaho's economy as a result of farms or other enterprises being put out of business as a result of junior ground water right holders being curtailed will have a far-reaching and long term impact. Drying up thousands of acres of agricultural land for a small benefit to senior surface water supplies fails to comport with the law of optimum beneficial use of Idaho's water resources and full economic development of its underground resources. Measures to maximize economic benefits and increase recharge to the ESPA are consistent with state policies to optimize and maximize the beneficial uses of the State's water resources.

Findings of Fact Nos. 95-114

Conclusions of Law Nos. 51-56

VIII. THE DELIVERY CALLS MADE BY THE SURFACE WATER COALITION MUST BE DENIED BECAUSE CURTAILMENT BASED ON THOSE CALLS WOULD BE UNREASONABLY WASTEFUL AND THEREFORE FUTILE UNDER THE CONJUNCTIVE MANAGEMENT RULES.

The Conjunctive Management Rules define a futile call in *CM Rule 42.0-10.08*. The facts of this case estimate that 95% of the reach gains from curtailment will pass Milner dam unused. This constitutes an unreasonable waste of the water and is therefore a futile call. The delivery call must be denied.

Findings of Fact Nos. 115-122

Conclusions of Law Nos. 57-63

IX. IDAHO LAW ALLOWS FOR REPLACEMENT OF WATER FROM ALTERNATIVE SOURCES TO MITIGATE MATERIAL INJURY, IF ANY IS FOUND TO EXIST.

The Director has amended his replacement water requirements several times, and, as recently as yesterday, issued a revised requirement for replacement water. The Director fails to recognize replacement credit for all mitigation activities undertaken by IGWA.

Findings of Fact Nos. 123-126

Conclusions of Law Nos. 64-68

X. FORCING GROUND WATER USERS TO SPEND MILLIONS OF DOLLARS TO AVOID CURTAILMENT WITHOUT PROVIDING THEM A HEARING IS A VIOLATION OF DUE PROCESS AND CONSTITUTES A TAKING.

IGWA's members were forced to spend millions of dollars to avoid immediate physical curtailment without the benefit of a hearing as required by law. By ignoring the hearing requirement, the Department violated IGWA's members' right to due process as guaranteed by the constitutions of the State of Idaho and the United States. The Department's effective curtailment of IGWA's members water rights without due process constitutes a physical or regulatory taking of private property rights for which just compensation is due.

Findings of Fact Nos. 127-130

Conclusions of Law Nos. 69-76

**RACINE, OLSON, NYE, BUDGE &
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By 
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CERTIFICATE OF SERVICE

I hereby certify that on this 21th day of December, 2007, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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