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DEPARTMENT OF
WATER RESOURCES

ATTORNEYS FOR THE IDAHO GROUND WATER APPROPRIATORS

BEFORE DEPARTMENT OF WATER RESOURCES

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

Docket No. CM-DC-2010-001

**GROUND WATER USERS' MOTION FOR
RECONSIDERATION, MOTION FOR
STAY, MOTION TO CONDUCT
DISCOVERY, MOTION FOR IMMEDIATE
ACTION, AND REQUEST FOR HEARING**

Idaho Ground Water Appropriators, Inc., acting for and behalf of its members ("Ground Water Users"), hereby move the Director to (1) reconsider the *Order Regarding April 2010 Forecast Supply (Methodology Steps 3 and 4)* ("As-Applied Order"), pursuant to Idaho Code § 67-5246; (2) stay enforcement of the As-Applied Order until a hearing is held and a final order is entered on the pending petitions for reconsideration of the *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carry-Over* ("Methodology Order"), pursuant to IDAPA 37.01.01.780 ("Rule 780") and a hearing is held and

a final order is entered on IGWA's Mitigation Plan for the Surface Water Coalition Delivery Call, IDWR Docket No. CM-MP-2009-007 which has been pending since November of 2009; (3) authorize discovery, pursuant to Rule 521; (4) alternatively, extend the May 13, 2010 deadline for the Ground Water Users to prove to the "satisfaction of the Director, that they have secured 84,300 acre-feet of storage water to mitigate for the predicted material injury" to June 13, 2010, or seven days after the date of allocation in Water District 01; (5) enter an immediate decision concerning the foregoing motions for a stay and for authorization to conduct discovery, pursuant to Idaho Code § 67-5247; and (6) schedule a hearing on the As-Applied Order, pursuant to Idaho Code § 42-1701A(3) and Rule 740.02b.

The As-Applied Order, which implements the Methodology Order, violates Idaho law and the District Court's *Order on Petition for Judicial Review* on p. 26 that states "senior right holders are authorized to divert and store up to the full decreed or licensed quantities of their storage rights, but in times of shortage juniors will only be regulated or required to provide mitigation subject to the material injury factors" in the CM Rules, and will cause substantial and irreversible economic devastation by wrongfully curtailing irrigation water to thousands of acres that have crops in the ground. These motions are supported by the *Affidavit of Charles Brendecke* and *Affidavit of Tim Deeg* filed contemporaneously herewith, the *Corrected Petition for Reconsideration of the Director's Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* filed April 14, 2010, ("Corrected Petition") and the *Supplemental Information To Be Considered With The Corrected Petition For Reconsideration And Request For Additional Information* filed April 29, 2010, to the Methodology Order, and the following facts and argument:

1. The District Court remanded to the Director a portion of the case pending on appeal for the limited purpose of curing one deficiency in the Department's September 2008 Final Order: the failure of the Director to make a determination *on the record* regarding the methodology to be used to determine whether the Surface Water Coalition's (SWC) water rights were injured as a result of ground water pumping such that the SWC had insufficient water to meet its crop irrigation requirements. *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order* at 2-3.
2. Upon remand, the Director issued the Methodology Order on April 7, 2010. The Methodology Order contains critical errors. The Ground Water Users, the City of Pocatello and the SWC all filed Motions to Reconsider the Methodology Order.
3. The Director has effectively denied the Motions to Reconsider and perpetuates the errors in the Methodology Order by applying the Methodology Order—without any of the modifications suggested by the parties in their Motions to Reconsider—to the As-Applied Order.
 - A. Contrary to the *Order on Petition for Judicial Review*, Gooding County Civil Case No. 2008-551 (June 19, 2009), the Methodology Order erroneously relied upon 2008 data that is *outside* the record.
 - B. In violation of the Conjunctive Management Rule 42(e) and Idaho case law, the Methodology Order fails to determine the amount of water actually needed by the Surface Water Coalition to accomplish their designated beneficial uses. IDAPA 37.03.11.042(e) (Director has an obligation to consider and “the amount of water diverted and used compared to the water rights.”); *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 876 (2007) (the Director has a duty “to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right.”) In addition to these problems, the Methodology Order assumes that gross diversions at the SWC headgates are an appropriate measure of beneficial use for purposes of curtailing juniors in contravention to the constitutional principles of optimum use and the public interest. Article XV, Section 7, Idaho Const.
 - C. It requires the Ground Water Users to provide more water to the Surface Water Coalition as mitigation than they would receive from curtailment. *Brendecke Aff.* at ¶¶ 5-6.
 - D. It requires the Ground Water Users to provide 27,000 acre-feet to American Falls Reservoir District No. 2 as mitigation even though curtailment will not provide any water to American Falls Reservoir District No. 2 and they would not expect any natural flow water in a low run-off year. *Brendecke Aff.* at ¶¶ 10-16.

4. To avoid violation of constitutional rights and the erroneous curtailment of water rights for crops that are in the ground, the Ground Water Users ask the Director to stay enforcement of the As-Applied Order
5. In light of the serious legal and factual problems with the Methodology and As-Applied Orders, a hearing must be held on the Methodology Order and the As-Applied Order.
6. The Orders also deprive IGWA of a fair hearing on *IGWA's Mitigation Plan for the Surface Water Coalition Delivery Call* ("IGWA's Mitigation Plan").
 - a. IGWA's Mitigation Plan has been pending since November and IGWA is prepared to begin hearing on May 24, 2010.
 - b. This mitigation plan was intended to avoid the very crisis that we are currently in. However, the Department failed to act on the filing timely. Now the Department's dilatory response to its statutory and regulatory obligation to set matters timely for hearing has the appearance of setting up the Ground Water Users—certainly the Department had full knowledge that the date of the Mitigation Plan Hearing was set 10 days after its deadline for the Ground Water Users to comply with the erroneous order or be curtailed.
 - c. The Ground Water Users should be provided a reasonable opportunity to present evidence on their pending mitigation plan before having to suffer curtailment or to lease water that may prove unnecessary.
7. The As-Applied Order should be stayed until a hearing is held and a final order is entered on the pending petitions for reconsideration of the Methodology Order and IGWA's Mitigation Plan.
8. Idaho Code § 67-5274 states that the "agency may grant a stay upon appropriate terms." Staying enforcement of the As-Applied Order to allow the parties an opportunity to develop evidence and have a hearing on the petitions for reconsideration of the Methodology Order and As-Applied Order and to determine whether the Ground Water Users' pending Mitigation Plan is appropriate is amply justified by the facts alleged herein and in the accompanying affidavits.
9. Idaho Code § 67-5247 authorized the Director to take immediate action without a hearing "to prevent or remove the immediate danger that justifies the use of emergency contested cases." Failure to take immediate action on the Ground Water Users' request for stay will necessarily result in enforcement of the As-Applied Order, causing water to be shut off to thousands of planted acres of farmland. The damage that will unjustly result from erroneous curtailment is extreme and an immediate danger to the state and local economies of southern Idaho. Deeg Aff. In contrast, curtailment will not provide a significant amount of water to the SWC during the 2010 irrigation season.
10. At the very least, if the Director is not inclined to stay further action and enforcement on his As-Applied Order, then the Ground Water Users request that they have until June 13,

2010, or 7 days after the day of allocation to provide evidence that they have “secured 84,300 acre-feet of storage water to mitigate for the predicted material injury.” April 2010 Order at 4. Without the extension, the Ground Water Users are likely to suffer immediate and irreparable harm through the threatened curtailment order. A curtailment order will be devastating to the Ground Water Users because most of the crops are already planted, the fertilizer already applied and substantial contracts and investments already made. As such, the Ground Water Users request an extension of time to submit information regarding their storage water leases.

11. IDAPA 37.01.01.521 requires that a party request that discovery be authorized and that the agency grant discovery. The Ground Water Users request that the Director authorize discovery in this matter, including the taking of depositions of Department employees or contractors as well as that of other parties, to provide all the information used, considered, or reviewed by the Director in developing the As-Applied Order. Without discovery, and information and/or data from the department employees, it will be difficult, if not impossible, for the Ground Water Users to evaluate and determine how the Director arrived at the findings and conclusions in the Methodology Order and the As-Applied Order. The Ground Water Users have filed requests to depose Lyle Swank and Tony Olenichak on Wednesday, May 12, 2010 in Idaho Falls. These depositions are necessary for the Ground Water Users to properly address the Methodology Order and the As-Applied Order.

Based on the foregoing, the Ground Water Users ask the Director to (1) reconsider the “As-Applied Order”; (2) stay enforcement of the As-Applied Order until a hearing is held and final order entered on the pending petitions for reconsideration of the Methodology Order and in IGWA’s Mitigation Plan; (3) authorize discovery; (4) to extend the deadline from the May 13 deadline to June 13 or seven days after the date allocation; (5) enter an immediate decision on the requests to stay enforcement of the As-Applied Order and for authorization to conduct discovery; and (6) schedule a hearing on the As-Applied Order.

RESPECTFULLY SUBMITTED this 6th day of May, 2010.



Randall C. Budge
Candice M. McHugh

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2010, 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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