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JUL 25 2006

DEPARTMENT OF  
WATER RESOURCES

*Attorneys for Idaho Ground Water Appropriators, Inc.*

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

IN THE MATTER OF THE 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

**IGWA'S MEMORANDUM IN RESPONSE  
TO SURFACE WATER COALITION'S  
PETITION FOR RECONSIDERATION OF  
*THIRD SUPPLEMENTAL ORDER  
AMENDING REPLACEMENT WATER  
REQUIREMENTS FINAL 2005 AND  
ESTIMATED 2006***

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP, and on behalf of its Ground Water District members, hereby files this memorandum in response to the Surface Water Coalition's ("SWC") Petition for Reconsideration of *Third Supplemental Order Amending Replacement Water Requirements Final 2005 and Estimated 2006*.

IGWA opposes SWC's efforts to vacate the hearing schedule in this matter and require the Department to immediately administer water rights. IGWA's grounds for opposition to any vacations or further postponement of a hearing are: (1) the parties are nearly prepared for the scheduled administrative hearing, and the hearing should not be further delayed because of a pending appeal before the Idaho Supreme Court, which will have no effect upon the procedures employed by the Department; (2) the Gooding County District Court has not ordered the Department to administer water rights in the absence of conjunctive management rules and an adequate hearing; (3) there are substantial questions whether there has been any injury to the water rights of Twin Falls Canal Company (TFCC"); and (4) SWC and/or TFCC may present objections to the Department's June 29, 2006 Order at the scheduled administrative hearing.

#### **Procedural Background**

On January 14, 2005, the SWC filed its delivery call with the Idaho Department of Water Resources ("IDWR" or "Department"). On May 2, 2005, the Department issued an order concluding that the water rights held by some of the SWC districts or canal companies were likely to suffer material injury in 2005 due to junior ground water diversions. The May 2 Order required junior ground water users, including IGWA and its members, to submit a replacement water plan if they wished to avoid curtailment by the Department. IGWA timely sought reconsideration of the May 2 Order and requested a hearing. Its request for reconsideration and hearing notwithstanding, IGWA timely submitted a replacement water plan on behalf of its Ground Water District members, which the Department ultimately approved.

An unusual amount of precipitation fell in the early summer of 2005, requiring the Department to revisit the replacement water requirements imposed upon junior ground water users. On July 22, 2005, the Department issued a supplemental order amending IGWA's

replacement water requirements for 2005. On that same day, because the parties had requested a hearing on the May 2 Order, the Department issued a scheduling order setting the hearing to begin January 30, 2006.

On August 5, 2005, IGWA sought reconsideration of the Director's July 22 Order regarding its replacement water requirements and requested a hearing. IGWA has preserved the issues raised in that petition for the forthcoming administrative hearing.

On August 15, 2005, the SWC filed a complaint in the Fifth Judicial District of the State of Idaho, Gooding County, seeking a ruling that the Department's conjunctive management rules are unconstitutional, Case No. CV-2005-600 (the "Gooding County Case"). The parties since have pursued both the administrative proceedings before the Director and the judicial proceedings before the district court.

On October 7, 2005, SWC filed a motion with the Department asking that the date of the administrative hearing be extended six months. IGWA's October 13, 2005 response opposed any further delay of the hearing.

On October 14, 2005, the SWC filed a Motion for Summary Judgment in the Gooding County Case, giving rise to extensive briefing and motion practice into early 2006.

On October 17, 2005, the Director issued an Order Extending Time for Filing Expert Reports and for Hearing, extending the administrative hearing date to March 6, 2006.

On December 27, 2005, after reviewing preliminary diversion data for the 2005 irrigation season, the Director issued a second supplemental order amending IGWA's replacement water requirements for 2005. On January 11, 2006, IGWA filed a Petition for Reconsideration of the December 27 Order and again requested a hearing. IGWA's opportunity to address the issues raised in that petition are to be taken up in the forthcoming administrative hearing.

The contested case proceedings thereafter were stayed for a time by stipulation of the parties while they attempted to settle without the need for a hearing. On May 19, 2006, however, after the parties' settlement efforts failed, the Department rescheduled the administrative hearing to commence September 26, 2006.

On June 2, 2006, District Judge Barry Wood issued his Order on Plaintiffs' Motion for Summary Judgment, concluding that certain portions of the Department's conjunctive management rules are unconstitutional.

On June 14, 2006, in response to a Motion for Stay filed by Pocatello, the Department issued a Fourth Amended Scheduling Order and again rescheduled the administrative hearing—this time for October 30, 2006. IGWA supported a temporary stay of proceedings, including discovery pending the Department's resolution of the effect of the court's order in the Gooding County Case on the SWC delivery call.<sup>1</sup> While IGWA's Response to Pocatello's motion contemplated that even a temporary stay might affect the scheduled hearing date, IGWA did not propose or support any extended stay or the concept of vacating the scheduled hearing.

On June 29, 2006, the Director issued his Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006 ("Third Supplemental Order"). IGWA timely requested reconsideration of the Third Supplemental Order and renewed its request for a hearing.

On June 30, 2006, the District Court entered its Judgment Granting Partial Summary Judgment in the Gooding County Case. The District Court certified the Judgment as final on July 11, 2006. The State of Idaho filed its notice of appeal of the judgment that same day.

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<sup>1</sup> As stated in its Response to Pocatello's Motion for Stay, given the certainty that some form a stay of proceedings was imminent as a result of the court's order in the Gooding County Case, IGWA wanted a temporary stay of *all* proceedings, including expert depositions, to avoid having to make its experts available to be deposed, only to then be prejudiced by being prevented from deposing other parties' experts.

On July 12, 2006, the SWC filed its Petition for Reconsideration of the Third Supplemental Order, asking that the Director stay or vacate the administrative hearing and immediately administer water rights consistent with Idaho's Constitution and statutes.

### Argument

**A. An administrative hearing is both required and inevitable. It should proceed as scheduled, regardless of the outcome of the appeal to the Idaho Supreme Court.**

Under Idaho's Administrative Procedure Act (Idaho Code § 67-5242) or the court's order in the Gooding County Case, IGWA and other junior water right holders are entitled to a hearing to determine their rights under the SWC delivery call and prior to any curtailment. A hearing is required and inevitable, no matter the outcome of the appeal of the District Court's Judgment currently before the Idaho Supreme Court. The only effect of the Idaho Supreme Court's forthcoming opinion would be to clarify what facts the Director may consider in answering the SWC's delivery call and/or the weight to be given the facts. The Director, therefore, can and should proceed to hearing on the broadest grounds possible (i.e., those contemplated by the Conjunctive Management Rules) while the facts concerning the 2005 water supply remain relatively fresh and key witnesses still are available and prepared to testify. As necessary,<sup>2</sup> all relevant portions of this comprehensive record then can be considered and addressed by the Director after giving appropriate weight to the permissible and relevant evidence.

A hearing is inevitable because even if the Idaho Supreme Court completely affirms the District Court's Judgment, that Judgment provides: "The parties who may be curtailed are

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<sup>2</sup> It is entirely conceivable that the Judgment in the Gooding County Case will be reversed and remanded by the Supreme Court on purely procedural grounds. In that case, the judgment voiding the rules itself would be vacated, the Conjunctive Management Rules would remain valid, no substantive clarification concerning the prior appropriation doctrine would be forthcoming, and IGWA's ground water user members would still be under the weight of emergency curtailment orders without the prospect of being able to present their defenses.

entitled to at least minimal due process of law, notice of the proposed action, and the opportunity to be heard.” June 2 Order, p. 101. The District Court also advised that the Director:

conduct a hearing whereby juniors and seniors would have the opportunity to put on evidence and try to rebut the preliminary findings of the Director based on the results of either the ground water model or other suitable methods. Juniors would also have the opportunity to put on evidence to try and establish that the senior is wasting water contrary to the partial decree as well [sic] provide a mitigation plan for replacement water; or try to establish a futile call.

June 2 Order, p. 101. This is the type of hearing that IGWA has been preparing for during the last year. And the hearing procedures envisioned by the District Court in any event are quite similar to those provided for in the Department’s own procedural rules. IDAPA 37.01.01.

IGWA has, at considerable expense, been building its case to address just such issues in a hearing. These issues, along with all other issues concerning SWC’s delivery call, are ripe for a hearing in the near future regardless of the Idaho Supreme Court’s decision on appeal.

With the exception of about nine expert depositions (most of which are currently scheduled for August), and the preparation of expert rebuttal reports after the depositions, the parties are prepared to begin the administrative hearing on October 30, 2006. Given the considerable delay that already has occurred in this matter, the fact that the parties essentially are ready for the hearing, and that IGWA’s members remain under significant mitigation obligations imposed by the Director, the current hearing schedule should be maintained.

Following the hearing, the Director can issue an order based on a complete factual record and impose by order (subject to judicial review) whatever requirements he finds appropriate. If the Idaho Supreme Court subsequently rules on the substantive prior appropriation doctrine issues in a way that requires modification of the Director’s order, such modifications can be made then. This would not substantially different from what has occurred to date—subsequent

modifications of existing orders as the Director, applying his emergency powers, preliminarily determines and applies additional (albeit limited) facts during the course of the 2005 and 2006 irrigation seasons.

On the other hand, if the Director grants SWC's Petition for Reconsideration and vacates the current hearing schedule, it likely will be many months before the Idaho Supreme Court rules on the State of Idaho's appeal and before for the Director can reschedule the administrative hearing. This will require the parties to start this entire process over, and begin preparing anew for the hearing. This would be a waste of the resources of the State, the judiciary, and the parties.

SWC quotes IGWA as previously arguing that the "Department's approach to these matters is called into question by Judge Wood's recent order" (SWC Petition, p. 2) as if IGWA recognizes SWC's arguments for vacating the hearing. SWC ignores the next sentence of IGWA's brief stating that "[i]t would be prejudicial for IGWA and its members to have remedies imposed against them without the opportunity for hearing." IGWA's Reply to the Surface Water Coalition's Response to Pocatello's Motion for Stay, p. 2. SWC should not be permitted to have it both ways, i.e., administration of junior water rights without a hearing. Either all of the contested case proceedings based on the Conjunctive Management Rules must be stayed (including orders based on those rules requiring curtailment or replacement water) or none of the proceedings can be stayed (proceed to hearing as scheduled).

The administrative hearing can and should go forward, with the express understanding that the Director will make findings and conclusions following the hearing, subject to amendment or supplementation as may be appropriate if Idaho Supreme Court decides the pending appeal on the merits.

**B. Immediate administration of water rights is not warranted or envisioned by the District Court's June 2 Order or June 30 Judgment.**

SWC argues that: "the Director is in possession of the necessary information from prior submittals in the May 2, 2005 Amended Order administrative case, prior decrees and licenses, and from the Director's Reports for the Coalition members' water rights to begin lawful water right administration in 2006." SWC Petition, p. 6. This argument completely ignores those portions of the District Court's June 2 Order cautioning that junior water right holders are entitled to due process and that conjunctive management is complex. As discussed above, the District Court's June 2 Order specifically provides that junior right holders are entitled to a hearing before their rights are administered. The June 2 Order also states: "[t]he determination of which specific juniors are causing injury with respect to ground water is infinitely more complex than making the same determination as between surface users, and the methodology and science is not exact." June 2 Order, p. 99. The District Court recognized that "[r]ules for the administration of hydraulically connected ground and surface water sources are not only specifically authorized by the Legislature, *they are essential to proper administration* and to protect vested property rights." June 2 Order, p. 124 (emphasis added). The Court also observed that, as a constitutional matter, the Director has the authority to require the SWC members to provide by affidavit facts concerning their actual beneficial use and need (i.e., something the SWC has yet to provide, and something the Director has the authority to consider at hearing).

In other words, not all of the relevant facts are before the Director to properly respond to the SWC delivery call. But more to the point, neither the June 2 Order nor the Judgment entered on June 30<sup>th</sup> requires the Director to do anything. The District Court only has ruled on SWC's motion to find the Conjunctive Management Rules facially invalid. If one could construe the

District Court as mandating anything, it would be to conduct a hearing before juniors are subject to curtailment.

**C. SWC's objections to the Third Supplemental Order should be heard at the scheduled administrative hearing.**

As Pocatello correctly argues in its response to the SWC's Petition for Reconsideration, the issue of whether the Director's Third Supplemental Order is consistent with Idaho law is *an issue for the administrative hearing set to begin on October 30, 2006*. Much like the SWC, IGWA too is not satisfied with the Director's prior orders in this contested case, including the Third Supplemental Order.<sup>3</sup> IGWA has filed petitions for reconsideration concerning those several orders on the basis that certain findings or conclusions were not consistent with Idaho law—the same basis now asserted by SWC. IGWA has preserved these arguments for the

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<sup>3</sup> As asserted in its own petition for reconsideration filed on July 13, 2006, IGWA previously has filed the following petitions, briefs and/or affidavits with the Department in connection with previous orders issued in this proceeding:

1. Petition for Reconsideration and/or Clarification of Director's May 2, 2005 Amended Order; Request for Hearing; Motion for Stay of Amended Order, dated May 16, 2005;
2. Petition for Reconsideration of Order Approving of Order Approving IGWA's Replacement Water Plan for 2005 dated July 8, 2005;
3. Petition for Reconsideration of the July 22, 2005 Supplemental Order Amending Replacement Water Requirements dated August 5, 2005;
4. Petition for Reconsideration of the December 27, 2005 Second Supplemental Order Amending Replacement Water Requirements dated January 10, 2006;
5. Affidavit of Charles M. Brendecke in Support of IGWA's Petition for Reconsideration of Second Supplemental Order dated January 10, 2006;
6. IGWA and Pocatello's Joint Response to the Surface Water Coalition's Motion for Partial Summary Judgment dated April 28, 2006; and
7. Affidavit of Charles M. Brendecke in Support of IGWA's and Pocatello's Response to Motion for Partial Summary Judgment dated April 28, 2006.

Because the June 29, 2006 Order replicates the errors identified in the above-referenced IGWA filings, and fails to give due consideration to, or otherwise take into account, the issues, arguments and facts presented therein, IGWA has respectfully requested in its own petition for reconsideration that it be permitted to fully present such issues, arguments and facts beginning October 30, 2006, at the scheduled administrative hearing before the Director.

October 30, 2006 hearing. SWC likewise should be required to reserve its arguments concerning reconsideration until the hearing before the Director.

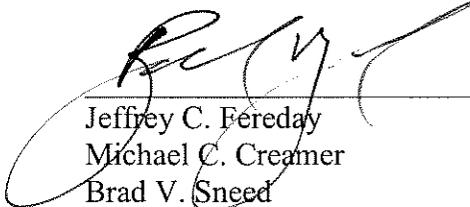
**Conclusion**

Because of the substantial delay that has already occurred in this contested case, the fact that the Idaho Supreme Court's decision will not affect the procedure employed by the Director at the administrative hearing, the parties are nearly prepared for the hearing, and IGWA's members are being prejudiced by existing administrative orders on which they have yet to be heard, the hearing should proceed as scheduled. Contrary to SWC's requested relief, the administration of ground water rights for the benefit of SWC cannot continue without an adequate opportunity for junior water right holders to be heard. Like all parties, SWC will have sufficient opportunity at the hearing to present evidence contesting the Director's orders entered thus far in the case as well as evidence they deem relevant under their theory of the law of prior appropriation, and to object to evidence offered by IGWA and its ground water district members.

For all of the foregoing reasons, IGWA requests that the Director deny SWC's Petition for Reconsideration and proceed to hearing on October 30, 2006.

Respectfully submitted this 25<sup>th</sup> day of July, 2006.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 25<sup>th</sup> day of July 2006, 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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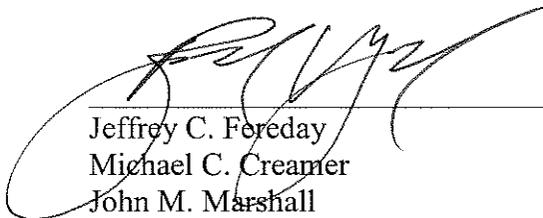
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