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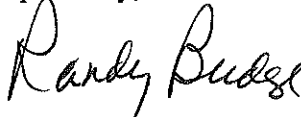
Victoria Wigle
Idaho Department of Water Resources
322 E. Front Street
Boise, Idaho 83702

Re: *IDWR: Blue Lakes/Clear Springs Delivery Calls Proceedings*

Dear Justice Schroeder and Ms. Wigle:

Enclosed please find for filing IGWA's Response to Spring Users' Joint Petition for Clarification. It has been served per the attached Certificate of Mailing. Thank you for your consideration.

Respectfully,



RANDALL C. BUDGE

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Enclosure

cc: Service List (w/encls.)

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Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

**BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION)
 OF WATER TO WATER RIGHTS NOS.)
 36-07210, 36-07427, AND 36-02356A)
)
(Blue Lakes Delivery Call))
)
 IN THE MATTER OF DISTRIBUTION)
 OF WATER TO WATER RIGHTS NOS.)
 36-04013A, 36-04013B, and 36-07148)
)
(Clear Springs, Snake River Farm)
Delivery Call))
 _____)

**IGWA'S RESPONSE TO SPRING
 USERS' JOINT PETITION FOR
 CLARIFICATION**

COME NOW Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively "IGWA"), through counsel, and file this Response to Spring Users' Joint Petition for Clarification filed March 12, 2008, ("Petition"). On January 11, 2008, the Hearing Officer issued his *Opinion Constituting Findings*

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of Fact, Conclusions of Law and Recommendation (the “Recommended Order”). On February 29, 2008, the Hearing Officer filed his *Responses to Petitions for Reconsideration and Clarification and Dairymens’ Stipulated Agreement* (the “Response Order”).

INTRODUCTION

The Spring Users’ Petition seeks clarification of the outcome of the Hearing Officer’s revised determination in the Response Order that found: “A portion of the declines [to water right nos. 36-07120 and 36-04013A] is attributable to ground water pumping. Consequently, there should be a finding of injury to those water rights.” Response Order 9.

Blue Lakes requests that the Hearing Officer revise his Response Order “to require curtailment or mitigation from ground water rights junior to Blue Lakes’ November 17, 1971 priority water right no. 36-07120” Joint Petition at 6. Clear Springs requests that the Response Order be modified to “require curtailment or mitigation from ground water rights junior to Clear Springs’ September 15, 1955 priority water right 36-0413A.” The Spring Users request the clarification because it is “clear that the curtailment and the mitigation alternatives prescribed by [Director Dreher’s orders in the respective cases] are inadequate to address the full extent of . . . injury.” *Id.* at 4 and 5.

The Springs Users have the misconception that they are entitled to curtailment to fulfill their entire water rights even though the evidence, at best, only shows that the spring sources may have discharged that much historically during seasonal high flow or following good water years, not that the Spring Users actually needed, diverted or used their entire water rights year-round to raise fish. The extent, measure and limit of a water right is the extent of its beneficial

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use. *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 fn5, 546 P.2d 381, 390 fn.5 (1976) and *Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 59 F.2d 19, 23 (9th Cir. 1932) (“The extent of beneficial use is an inherent and necessary limitation upon the right.”)

It is important to not elevate the partial decrees to mean more than what they were intended. “[W]ater rights adjudications neither address, nor answers, the questions presented in delivery calls.” *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources*, 143 Idaho, 862, 876, 154 P.3d 433, 447 (2007). Former Director Dreher testified that the partial decrees in the SRBA did not confirm what amount was actually needed, but rather, the recommendations contained the maximum quantity, even if that maximum quantity was only available for a very short period of time during the year at seasonal highs. Dreher Testimony Tr. pg. 1144 ln.13- pg. 1145 ln. 15. Further, Director Dreher testified that the partial decrees simply confirmed prior licensed amounts and there was a presumption that the investigations underlying the licenses were correct, however, that was not always the case. Testimony Tr. pg.1348 ln. 9 – pg. 1350 ln. 22. Testimony from Timothy Luke confirmed that the Department will issue licenses for quantities that are not always available under the water right and that not all relevant and necessary conditions for water rights administration are contained on the partial decree or license. Luke Testimony Tr. pg. 748 ln. 15-18 and Tr. pg. 750-5-9. As Former Director Dreher noted that at the time the water rights to the springs were appropriated they were looking to appropriate the “maximum use of the water that was available at any point in time,” and that the seasonal flows existed when the Spring Users appropriated their water rights. Dreher Testimony Tr. pg. 1144 ln. 23- pg. 1145 ln. 13.

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The question in administration is “at what point were they appropriated and how were they used.” Dreher Testimony Tr. pg. 1145 ln.13-15. The face of the partial decrees for the Spring Users’ water rights does not end the inquiry into whether there is material injury or whether and to what extent curtailment is warranted. See *Order Granting in Part and Denying in Part Motion for Summary Judgment and Motion for Partial Summary Judgment* (“Summary Judgment Order”) at 5. Further, a key question in this case that is unanswered is whether or not the curtailment of junior groundwater users will actually provide enough water to the Spring Users at a time when they can “grow more fish.”¹ Although the Hearing Officer acknowledged that “inferences may be drawn from historical data as to water use and need” the historical data in this case does not actually support the amount of water used and needed, rather it only shows, at best, that in years when there was more water in the aquifer due to incidental recharge or preceding wet years, that the source may have produced more water for some periods of time, not that the seniors needed and used that water. See *Id.* at 8.

In this case, the Spring Users refused to produce or allow any discovery into their historical use and diversion of water. Yet, now, they want every inference to be made to reach the conclusion that at the time of appropriation they used and needed all of their water rights, year-round to raise fish because there may have been water in the spring source itself. The evidence does not support such a conclusion and changing the curtailment date or mitigation

¹ The record in this case on what amount of water is needed and will be put to beneficial use is not clear given the fact that discovery into the historical diversion and use was denied. Although the hearing officer found that fish grow in water and more water is presumed to grow more fish, the evidence of whether the amount of water that will result to the senior from curtailment will result in more fish or beneficial use is speculative. IGWA’s full argument on this issue will be contained in the exceptions filed with the Director.

requirements is not justified.

There is no dispute that the amount of water emanating from the springs in the Thousand Springs area increased up to the 1950s due to massive incidental recharge from surface irrigation practices. Exhibit 154. There is also no dispute that the amounts of water at the spring sources are still above pre-1950 levels. Exhibit 154 (showing that pre-ground water development levels of spring discharge were around 4000 cfs, 2006 discharge levels are above 5000 cfs). If, as the Response Order appears to indicate, the amount of water in the source is to be the measure of injury to a water right that diverts from that source, then logically any time there is less water in the source then any water right diverting from that source is suffering material injury. When one applies this logic to the ground water context that means that there is no ability for ground water users to divert from the aquifer at any time and the Legislature's passage of the Ground Water Act was pointless because any diversion and use of water from the aquifer reduces the amount of water in the aquifer. Yet, it is without dispute that the Legislature, in 1951 passed the Ground Water Act and qualified the "first in time first in right" principle so that one or two spring users, for example, could not unreasonably use strict priority as the only applicable administrative principle when there was a dispute between surface and ground water users. See I.C. 42-226 et seq. Yet, the Spring Users are advocating just that.

DISCUSSION

Blue Lakes Water Right No. 36-07210 (November 17, 1971 Priority Date)

Exhibit 205 used to support the claim by Blue Lakes that there was enough water to fill its water rights is misleading. Former Director Dreher testified that these were single point

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measurements that “raised questions” because they are so “out of sequence with the general trend . . . being that the springs generally are at their seasonal lows in the spring and t [sic] their seasonal highs in the fall. And these two points . . . are actually opposite that general – that general trend.” Tr. pg. 1435 ln. 12 – pg. 1436 ln. 21. Given former Director Dreher’s testimony about the exhibit, a finding of material injury to Blue Lake’s 1971 water right based only on the fact that the spring source may have discharged enough water a few times in one year for one day does not support a finding of material injury or justify curtailment back to 1971. In addition, such action would not be a reasonable exercise of “the first and time first in right principle” as required by I.C. § 42-226. The same is true for Exhibit 18; all it shows are measurements from the spring source itself, not the amount of water diverted, used and needed by Blue Lakes to raise fish.

Clear Springs Water Right No. 36-04013A (September 15, 1955 Priority Date)

The same is true for Clear Springs’ claim of material injury.² Clear Springs argues that Exhibit 128A “demonstrates that Clear Springs’ 1955 water right was likely met on a year-round basis during 1971-72.” Exhibit 128A shows only that there may have been some water available to fill Clear Springs’ water right one month in 1971 and potentially three months in 1972, however, there is no evidence that the water was actually needed or used during those months. As former Director Dreher points out in his testimony, the measurements on Exhibit 128A are not fully convincing if you consider the jump from June of 1972 to July of 1972 of 10 cfs in just

² Reference to Exhibit 128 appears to be a mistake since that exhibit as marked by IDWR is a 2005 Memo to Terry Huddleston from Timberly Maddox and Tom Scott and does appear to contain any reference to historical spring discharges. It seems the correct exhibit is Exhibit 128A which is a memo dated August 2, 1972.

one month. Dreher Testimony, Tr. pg. 1399 ln. 11-16. A more reasonable conclusion is in line with the finding in Clear Springs' Order that found no material injury because although there is evidence showing seasonal fluctuation in 1971 and 1972 and that in some months there may have been water to fill the 1955 priority date, there still is water to meet that water right during seasonal highs, and therefore there is no substantial and competent evidence to support a finding of material injury. Further, when one compares the measurements in the August 2, 1972 memo with Exhibit 154 Average Annual Spring Discharges to the Snake River in the Thousand Springs Area from 1902 to 2006, one can see that the discharge to from the springs was increasing in 1971 and 1972 generally. Ground water users cannot be curtailed to make up for year-to-year fluctuations in discharge that are not due to ground water depletion but are caused by climatic conditions or other causes.³ Sporadic, time specific measurements do not show that ground water diversion is the cause of decreased spring discharges. At best, such measurements support the fact that the springs provide fluctuating amounts of water to the Spring Users' water rights, some of which is assumed to be diverted and applied to beneficial use during some months of the year.

Clear Springs also argues that Exhibit 156 shows that its 1955 priority date water right was "satisfied on a year-round basis form 1988 to 2001" and thus, curtailment of ground water users back to 1955 is required. However, curtailment of ground water users is only justifiable if they are causing the material injury. In this case, the claim that ground water users are causing

³ Further examination of Exhibit 154 shows how dependent spring flows in the Thousand Springs area really are on drought and climate. The driest year on record is 1977 and if one examines Exhibit 154, the years following 1977 show a dramatic decrease in spring discharge. This is again seen in 1997 when there was big water years and the spring discharge rebound.

the declines in the amount of water diverted under Clear Springs' water rights is flatly contradicted by the Department's expert Dr. Wylie and IGWA's expert Dr. Brendecke. Ground water development has stopped since the 1992 moratorium went into affect. The ESPA is at or near equilibrium, meaning that the vast majority of the effects of ground water depletions have been fully realized. Brendecke Testimony Tr. pg. 1889 ln. 14-21. Dr. Wylie testified:

Q. Have most of the effects of pumping been realized in the Snake River?

A. Yes. I've done a number of transient response functions, and most of the impact from areas where there's ground water pumping are realized within 20 years. And R.D. Smith, formally of the US Bureau of Reclamation did a scenario of his own where he concluded that most of the impact would be realized from the onset of pumping until now, most of the impact of that pumping would be realized by now.

Q. And that comports with what you found as well?

A. That does.

Q. And isn't it true that new ground water permits haven't been issued by the Department since the early '90s?

A. Yes, I understand there's a moratorium.

Q. Based on that, isn't it true that the primary reason that reach gains continue to be reduced is because of drought and conversion from flood irrigation to sprinkler irrigation?

A. Yes. Drought is a significant component. The aquifer responds to drought. It's rather sensitive to that. And conversion from flood irrigation to sprinkler irrigation has -- has a significant impact also.

Wylie Testimony Tr. pg. 845 ln. 2-25 (emphasis added). Declines to the spring sources in recent years are not due to ground water pumping because those effects have been nearly fully realized, rather, they are due to drought and reduction in incidental recharge on the plain. "To justify curtailment there must be a relationship between the use by the junior water right holder and a shortage by the senior water holder of water that could be put to a beneficial use." *Summary*

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Judgment Order at 13. Exhibit 154 shows that the amount of water discharging from the springs is actually increasing. Further, since August of 2006 there appears to be no shortage to Clear Springs' 1955 water right since they are diverting more than 89 cfs, the combined total of water right nos. 36-02703, 36-02048, 36-04013C, and 36-04013A. See Exhibit 157 at page for calendar year 2006 and 2007.

Clear Springs' request to curtail nearly all ground water use on the Eastern Snake Plain (back to 1955) directly contradicts the mandate in I.C. § 42-226 that "the first in time first in right" principle be exercised in a reasonable manner so as to not block full economic development and is not justified in this case.

CONCLUSION

Curtailing nearly all ground water use on the Eastern Snake Plain will not provide the Spring Users' full water rights because "more than ground water pumping went wrong." Wylie Testimony Tr. 879 ln. 1-2. The Conjunctive Management Rules as a whole contain the entire body of law surrounding the prior appropriation doctrine in Idaho and this includes the considerations in the Ground Water Act of full economic development, the Constitutional requirement of optimum use of the resource in the public interest, and the reasonable use and diversion of water along with considerations of material injury. Thus, given the fact that the prior appropriation doctrine in Idaho is not simply "strict priority" but rather must consider the mandate set forth in the Constitution and the Ground Water Act that requires optimum utilization and full economic development of the resource, the extent of curtailment is within the Director's discretion and is not solely driven by priority date. These considerations coupled with the fact

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that there is no evidence to support that the additional amount of water resulting from curtailment will actually be applied to beneficial use because it is unknown how much additional water is needed during what times of the year to "grow more fish" supports a finding that water right nos. 36-04013A 36-07210 are not materially injured⁴ by ground water pumping nor is a change to the curtailment date or mitigation requirements warranted.

Dated this 20th day of March, 2008.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By Randall C. Budge
RANDALL C. BUDGE

⁴ IGWA does not concede that there is evidence in the record to find material injury of any of Blue Lakes' or Clear Springs' other water rights, either, but limited this response to the water rights specifically raised in the Spring Users' Joint Petition for Partial Reconsideration and Joint Petition for Clarification.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 2008, the above and foregoing document was served in the following manner:

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