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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 RIGHT NOS. 36-
02356A, 36-7210, AND 36-07427,

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHT NOS. 36-
4013A, 36-04013B, AND 36-07148

(Clear Springs Delivery Call)

**CM-DC-2010-002
CM-DC-2010-003**

**GROUND WATER USERS' SECOND
PETITION FOR RECONSIDERATION
AND REQUEST FOR HEARING**

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT (collectively "Ground Water Users"), through counsel and hereby petitions for reconsideration and requests a hearing of the Director's *Amended Final Order Regarding Seasonal Variability* dated January 10, 2011 ("*Amended Final Order*").

The Ground Water Users acknowledge that on November 4, 2010, the Director issued an *Order Continuing Proceeding Based on Agreement of Parties* continues this contested case until a decision is issued by the Idaho Supreme Court in Docket Number 37308-2010. However, because the Director issued an *Amended Final Order* and in order not to waive their opportunity to a hearing and request for reconsideration, the Ground Water Districts are filing this *Second Petition for Reconsideration and Request for Hearing* with the understanding that no proceeding in this matter will immediately occur and that provisions of the *Order Continuing Proceeding Based on the Agreement of the Parties* is still in effect.

BACKGROUND

The Director issued his *Amended Final Order* amending the *Final Order* dated July 19, 2010 (“*2010 Order*”) in order to correct some typographical errors and to correct the “order” part of the *2010 Order* by making it match the substance of the findings of fact. Specifically, the *2010 Order* finding of facts found injury to Blue Lakes’ 1971 water right, and ordered delivery of 18 cfs to the reach or direct delivery of 3.5 cfs. *Id.* at 12, ¶ 31. The *2010 Order* also found injury to Clear Springs’ 1955 water right, and ordered delivery of 18 cfs to the reach or direct delivery of 1.2 cfs. *Id.* at 18, ¶ 54. However, on page 23, the “order” paragraph recited IGWA’s direct delivery obligations to Blue Lakes as follows, for years 1-5: “0.2 cfs, 0.4 cfs, 0.6 cfs[,] 0.8 cfs and 1.0 cfs” *Id.* at 23 (emphasis added). For Clear Springs, the phased-in direct delivery requirement was: “0.25 cfs, 0.5 cfs, 0.74 cfs[,] 0.99 cfs and 1.2 cfs” *Id.* (emphasis added). The Blue Lakes “order” is not consistent with the findings of fact. Whereas the findings of fact require 3.5 cfs (page 12), the fifth year of the five-year phased-in curtailment only requires 1.0 cfs (page 23). The model simulations attached to the *2010 Order* are consistent with the findings of fact (obligation is 3.5 cfs). Upon the

Director's re-examination of the *2010 Order*, the Director realized the inconsistencies between the findings of fact and the "order" paragraph. Thus, on January 10, 2011, the Director issued the *Amended Final Order*.

Both the *2010 Order* and the *Amended Final Order* were issued as a result of the District Court's *Order on Petition for Judicial Review* dated June 19, 2009, and *Order on Petitions for Rehearing*, dated December 4, 2009. The District Court remanded the question of seasonal variability back to the Director so that he "may apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination...." *Order on Petition for Judicial Review* at 58. The Court stated that the Director "needs to examine evidence that would show what those seasonal variations looked like before pumping by hydraulically connected juniors – i.e. what were the seasonal variations at the time of the senior's appropriation?" *Order on Petition for Judicial Review* at 22.

There has not previously been a hearing on the new information, conclusions, methods, facts, evidence or assumptions contained in the *Amended Final Order*, as such, the Ground Water Users are requesting a hearing. However, in the event the Director is unwilling to grant a hearing, the Ground Water Users are also requesting reconsideration of the Director's *Amended Final Order* and would expect to provide additional briefing in support of reconsideration.

INTRODUCTION

Although the Director acknowledges in his *Amended Final Order* that diversion records for Blue Lakes and Clear Springs are not available when their respective water rights were developed in 1971 and 1955 (FF 8, 11, 40) and are not contained in the record before the agency, he proceeds, using unarticulated assumptions and incomplete data, to estimate daily diversions that might have

been made 39 to 55 years ago. He uses these estimated diversions to conclude that Blue Lakes' 1971 water right (36-7210) and Clear Springs' 1955 water right (36-4013A) were materially injured by junior ground water pumping in 2005 and that curtailment is now appropriate. (FF 27 and 50). He bases these conclusions on the fact that the estimates purport to show that water might have been diverted in 1971 to supply Blue Lakes' 1971 water right (FF 24-26) and that water might have been diverted in 1955 to supply Clear Springs' 1955 water right (FF 47-49). The conclusion that curtailment is warranted is contrary to Idaho Law and violates the Ground Water Act's mandate that priority of right shall not block full economic development of the state's ground water resources. I.C. § 42-226. Yet, without any analysis or findings on whether it is reasonable to curtail over 100,000 acres of ground water irrigated lands to provide an estimated increase in supply, over many years, of only a few percent to two water users, the Director determines that "curtailment is warranted."

The Director's conclusions are based upon a methodology that is flawed and leads to misleading results; as such, the conclusions are beyond the scope of the Director's authority, are contrary to the public interest, and do not optimize the use of the state's water resources as contemplated by the Idaho Constitution, Article XV, §§ 5 and 7. Further, the Director's *Amended Final Order* does not provide for the "just apportionment to, and economical use by, those making beneficial application" of the use of water and does not "equally guard all the various interests involved." I.C. § 42-101. Further, the Director allows the monopolization of the aquifer by two water users in violation of the public interest and the holding of the Supreme Court in *Schodde v. Twin Falls Land & Water Co.* 224 U.S. 107 (1912). As such, the Director's *2010 Order* exceeds his authority and is arbitrary, capricious and an abuse of discretion.

INITIAL ISSUES FOR RECONSIDERATION AND HEARING

1. Without any evidence in the record of actual water use, beneficial use, water need or physical limitations that may have existed within the facilities at the time of appropriation, the Director assumed that the relationships between the diversion of water by Blue Lakes and Clear Springs, the availability of water in their respective sources, and the diversions of other users sharing those sources, were identical in 1995-2008 to those in 1970s (Blue Lakes) and 1955 (Clear Springs). This assumption is without any supporting evidence in the record, is arbitrary, capricious and an abuse of discretion.
2. Although there is only a modest correlation in the flawed multiple linear regression model ($R^2= 0.62$), the Director concludes that curtailing 99,000 acres for an estimated 16 cfs benefit to Blue Lakes Trout, over time, is proper. Evidence in the record clearly shows that prior to the influence of ground water pumping, the discharge at Blue Lakes' Springs was not sufficient to supply Blue Lake's 1971 water right. **Exhibits, 405, 420**, Brendecke Direct Testimony, p. 9, L. 1 – p. 30, L. 5 (Supp. R. Vol. 3, p.p. 4415-4436.) This conclusion is thus contrary to evidence in the record, is arbitrary, capricious and an abuse of discretion. It further violates the futile call doctrine, the public interest and the Ground Water Act and Idaho law.
3. For Clear Springs, the Director correlates Spring Flows with the Box Canyon Springs (several miles away) and uses data from 1988-2005 to predict what diversions might have been made in 1955. From this he concludes that curtailing 86,000 acres to gain an estimated 3.9 cfs, over time, at Snake River Farms is appropriate. This conclusion is arbitrary, capricious and an abuse of discretion. It further violates the futile call doctrine, the public interest and the Ground Water Act and Idaho law.
4. The Director fails to make any findings or comment on futile call, makes no analysis of full economic development and ignores the public interest in his *Amended Final Order* although he concludes that curtailing over 125,000 acres of irrigated agriculture for a possible increase of between 3.9 cfs to 16 cfs to Clear Springs and Blue Lakes, respectively, is warranted. These conclusions are contrary to Idaho law and the Ground Water Act, and are arbitrary, capricious and an abuse of discretion.
5. The CM Rules require the Director to determine whether or not the use of water is needed, reasonable and to manage the aquifer in a manner that does not result in “an appropriator [commanding] the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to public policy of reasonable use of water as described in this rule.” CM Rule 20.03 and required by *Schodde*. Yet, the Director has determined that curtailing nearly 100,000 acres and foregoing the diversion and use of 400,000 acre-feet of water, to supply 16 cfs (11,600 acre-feet), over time, to Blue Lakes does not constitute the commanding of

“large volumes of water” contrary to the public interest. Even more outrageous, he concludes that drying up 86,000 acres and foregoing the use of 344,000 acre-feet of water to supply a mere 3.6 cfs (2,600 acre-feet), over time to Clear Springs does not violate Idaho law. The Director’s conclusions exceed his authority under the law and are arbitrary, capricious and an abuse of discretion.

6. The *Amended Final Order* finds that there was a possible diversion shortage in 2005, however, it does not address recent data and information that shows greater supplies in 2010 due to improved spring discharge. Instead, it proposes additional curtailment without finding or analyzing current shortages. This exceeds the Director’s authority under Idaho law and is arbitrary, capricious and an abuse of discretion.
7. The methodology in the *Amended Final Order* uses data that is acknowledged to be inadequate for determining variability to validate model predictions and fails to preserve the full variability in predictions of diversions when that variability is the specific characteristic that the Director was instructed to analyze. As such, the Director’s *Amended Final Order* is contrary to the Court’s instruction on remand and is arbitrary, capricious and an abuse of discretion.
8. The methodology in the *Amended Final Order* relies on a regression equation for Blue Lakes that fails to account for nearly 40% of the variability in historical diversions and that relies on independent variables that are cross-correlated, thus suggesting its predictive strength is greater than it actually is. As such, the Director’s conclusions are arbitrary, capricious and an abuse of discretion.

CONCLUSION

The above initial list of issues may be modified or added to once the Ground Water Users have been fully able to analyze the *Amended Final Order*. Based on the foregoing, the Ground Water Users request reconsideration, a hearing and discovery, including discovery of Department employees who assisted in the analysis used in the *Amended Final Order*.

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DATED this 21st day of January, 2011.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By 

RANDALL C. BUDGE
CANDICE M. MCHUGH
THOMAS J. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 2011, the above and foregoing, was served by the method indicated below, and addressed to the following:

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