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

IN THE MATTER OF THE SECOND)	
MITIGATION PLAN OF THE NORTH)	SURFACE WATER COALITION'S
SNAKE AND MAGIC VALLEY GROUND)	MEMORANDUM REGARDING
WATER DISTRICTS TO COMPENSATE)	IDWR'S LACK OF AUTHORITY TO
SNAKE RIVER FARMS)	ORDER A JUNIOR WATER RIGHT
)	HOLDER TO PAY "MONEY"
(Water District Nos. 130 and 140))	INSTEAD OF DELIVERING
)	"WATER" TO AN INJURED
)	SENIOR SURFACE WATER RIGHT
_____)	

COME NOW, 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, (hereinafter "Surface Water Coalition" or "Coalition"), by and

through their attorneys of record, BARKER ROSHOLT & SIMPSON LLP, FLETCHER LAW OFFICE, and CAPITOL LAW GROUP PLLC, and pursuant to the Director's February 20, 2009 *Order on Status Conference and Providing Briefing Schedule on Second Mitigation Plan for Monetary Compensation* hereby provide the following *Memorandum Regarding IDWR's Lack of Authority to Order a Junior Ground Water Right Holder to Pay "Money" Instead of Delivering "Water" to an Injured Senior Surface Water Right*.

INTRODUCTION

The Idaho Department of Water Resources (IDWR) is a state agency created by statute with limited power, jurisdiction and authority. Water Districts, like IDWR, are also created by state law and are similarly limited. Both entities were created to distribute "water" to water rights pursuant to the constitution's law of prior appropriation. Nothing in Idaho law allows IDWR to transform itself into a "claims court" and determine monetary damages that would result from a senior water right holder being forced to accept, as mitigation, money in lieu of water. IDWR is not an appraiser of property rights and has no constitutional, statutory or common law authority that would allow it to authorize the taking of a senior water right by a junior water right holder and allow the payment of "money" instead of providing water when demanded by the senior. *See Lockwood v. Freeman*, 15 Idaho 395, 398 (1908) ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to any other person. Vested rights cannot thus be taken away.") (emphasis added).

If IDWR were to pursue this type of "administration", it would be a party to the taking and conversion of private property by private persons and entities, would violate constitutional protections and would exceed its jurisdictional authority. The Director must follow the existing law and refuse the Ground Water Districts' offer to enter this "gingerbread house" concept of

non-water right administration. The Ground Water Districts' Second Mitigation Plan should be dismissed accordingly.

I. IDWR, the Director, and the Water District 130 Watermaster Are Limited by Statute and Cannot Order a Distribution of “Money” Instead of “Water to an Injured Senior Surface Water Right.

Various statutes in Title 42, Idaho Code define the authority and jurisdiction of IDWR, its Director, and the watermasters. Pursuant to Idaho law administrative agencies like IDWR are “tribunals with limited jurisdiction dependent upon the statutes conveying power to them.” *Young Electric Sign Co. v. Winder*, 135 Idaho 804, 809 (2001).

In this matter the Director and the Water District 130 Watermaster are charged to distribute water pursuant to the authorities set out in Chapter 6, Title 42, Idaho Code. The law is clear with respect to the Director’s and the Watermaster’s mandate:

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, Title 42, Idaho Code, shall apply only to distribution of water within an water district.

I.C. § 42-602 (emphasis added).

The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. . . .

I.C. § 42-603 (emphasis added).

It shall be the duty of said watermaster to distribute the waters of the public stream, streams, or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively . . . and to shut and fasten . . . the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; . . .

I.C. § 42-607 (emphasis added).

In addition, under Idaho Code § 42-1417, the SRBA Court has further granted the Director authority to perform interim administration pursuant to the Court's January 8, 2002 order, which allowed for the Director's February 18, 2002 order creating Water District 130. In construing the duties conferred upon the Director and the state's watermasters, the Idaho Supreme Court has been equally clear. Simply stated, they have a legal duty to distribute "water" to water rights. See *Musser v. Higginson*, 125 Idaho 392, 395 (1994) ("We conclude that the director's duty to distribute water pursuant to this statute is a clear legal duty."); *Jones v. Big Lost Irr. Dist.*, 93 Idaho 227, 229 (1969) ("The duties of a water master are to determine decrees, regulate flow of streams and to transfer the water of decreed rights to the appropriate diversion points, I.C. § 42-607."); *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20 (1935) ("The defendant water master is only an administrative officer and has no interest in the subject of the litigation - his only duty is to distribute the waters of his district in accordance with the respective rights of appropriators").

The common theme running throughout the above-referenced law is "water". Where a statute is clear, the Director must follow the law as written and the expressed intent of the legislature must be given effect. *Hayes v. Kingston*, 140 Idaho 551, 553 (2004). The Legislature did not intend IDWR and the Director to distribute "money", particularly to a senior appropriator injured by out-of-priority diversions under junior rights. Contrary to Idaho law and rather than curtailing junior water rights or mitigating with water, the Ground Water Districts seek to take water first (out-of-priority) and then have the Director conduct a contested hearing over how much money, representing alleged "lost profit" resulting from the taking of the senior's water, should be paid to the senior water right holder, Clear Springs.

Again, the law governing IDWR's, the Director's, and the watermaster's authorities do not allow such a result and instead require each to distribute water to a senior's water right, not "money" to a senior's "bank account".

II. The Idaho Constitution Prohibits IDWR From Delivering Water to a Junior Water Right First and then "Money" to an Injured Senior Water Right.

The Idaho Constitution and statutes governing water distribution plainly provide that IDWR, the Director, and state watermasters are to distribute water by priority:

"Priority of appropriations shall give the better right as between those using the water;"

IDAHO CONST. art. XV, § 3.

"As between appropriators, the first in time is first in right."

Idaho Code § 42-106.

The Idaho Supreme Court has consistently reaffirmed this guiding principle in the State's water law. *Silkey v. Tiegs*, 51 Idaho 344, 353 (1931) ("a valid appropriation first made under either method will have priority over a subsequent valid appropriation"); *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9 (1944) ("It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water."); *Nettleton v. Higginson*, 98 Idaho 87, 91 (1977) ("it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation; i.e. first in time is first in right."). Indeed, a senior water right holder is entitled to protection as against interfering juniors, and this right is constitutional. *See Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 219 (1911) ("priority of appropriation shall give the better right as between those using the water . . . the appropriation of water to a beneficial use is a constitutional right") (emphasis added).

The Coalition is concerned that the Ground Water Districts are asking IDWR and the Director to lose sight of one of the most basic components of the prior appropriation doctrine: senior water rights are to be satisfied prior to allowing diversions by junior water rights. The Ground Water Districts' mitigation plan would turn this principle and the constitution upside down and have juniors continually diverting out-of-priority, with the understanding that at some point the senior would receive an amount of money as determined appropriate by the Director. Where a senior water right holder is entitled to "water" to satisfy its senior right and requests administration, IDWR has no discretion or jurisdiction to refuse that delivery of water on the basis that a post-hoc hearing will be held to determine monetary damages resulting to the senior. Such a scheme is unconstitutional and further injures a senior's water right by diminishing the priority date that should be used for administration and delivery of water. *See Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) ("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder."); *A&B Irr. Dist. v. Aberdeen-American Ground Water District*, 141 Idaho 746, 752 (2005) (injury to a water right's priority is a per se injury).

Moreover, the scheme would create an unlawful preference for non-domestic junior ground water rights. The Idaho Constitution sets out a preference for water uses (not in a mining district) in times of shortage in the following order: 1) domestic; 2) agricultural purposes; 3) manufacturing. IDAHO CONST. art. XV, § 3. In this case, distributing water to a junior "irrigation" water right for growing crops is not preferred over distributing water to a senior "fish propagation" water right for raising fish. Both pursuits are for "agricultural" purposes, and therefore on equal footing in the constitution's preference system. Stated another way, the Ground Water Districts do not have a "domestic" preference to take water away from a senior

“fish propagation” water right. Even if they did, IDWR could not simply authorize the taking of that water; it would not only need to be determined that the junior water right holder had a right to take the senior’s water right, the junior would then be required to follow the statutory procedures for condemnation proceedings. In interpreting the constitution’s preference provision, the Idaho Supreme Court clarified that a taking of a water right is subject to the provisions of law pertaining to judicial condemnation proceedings:

This clearly declares that the appropriation of water to a beneficial use is a constitutional right, and that the first in time is the first in right, without reference to the use, but recognizes the right of appropriations for domestic purposes as superior to appropriations for other purposes, when the waters of any natural stream are not sufficient for the service of all those desiring the same. This section clearly recognizes that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of private property for public and private use as referred to in sec. 14, art. 1 of the constitution.

It clearly was the intention of the framers of the constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrarily and without compensation be appropriated for domestic purposes. This would manifestly be unjust, and clearly in contravention of the provisions of this section, which declare that the right to divert and appropriate the unappropriated waters of any natural stream for beneficial use shall never be denied, and that priority of appropriation shall give the better right.

See Montpelier Milling Co. v. Montpelier, 19 Idaho 212, 219 (1911) (emphasis added).

Accordingly, even if the Ground Water Districts’ water rights were for “domestic” and not “irrigation” purposes, they would still have to follow the constitutional and statutory condemnation proceedings in order to receive “water” ahead of a senior’s non-domestic water right. *See* IDAHO CONST. Art. I, § 14; Idaho Code § 7-701 *et seq.*; *see also, Montpelier Milling Co., supra.*

In addition to violating a senior's constitutional right, if IDWR were to embark on a process to deliver "water" first to juniors and "money" instead to seniors, it is clear that action would constitute an unlawful taking of a senior's property right and would further violate the separation of powers doctrine since IDWR would assume the role of a district court in a de-facto condemnation proceeding. Both reasons further demonstrate the legal error in proceeding as suggested by the Ground Water Districts.

First, water rights are real property rights in Idaho. *See* I.C. §55-101; *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977); *State v. Nelson*, 131 Idaho 12, 16 (1998). As private property rights, water rights cannot be taken for a public purpose without due process and "just compensation" in "the manner prescribed by law". *See Bennett v. Twin Falls North Side Land & Water Co., et al.*, 27 Idaho 643, 651 (1915); *KMST, LLC v. County of Ada*, 138 Idaho 577, 580-81 (2003) ("The Takings Clause of the Fifth Amendment of Constitution of the United States, made applicable to the states through the Fourteenth Amendment . . . provides: '[N]or shall private property be taken for public use, without just compensation.' . . . Article 1, § 14, of the Constitution of the State of Idaho provides: 'Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore.'") (emphasis added).

District Court Judge R. Barry Wood succinctly described the property right interest in water rights and how unlawful water right administration could constitute a prohibited taking in his *Order on Plaintiffs' Motion for Summary Judgment* at 122 (*AFRD #2 v. IDWR*, Case No. 2006-600, Gooding County Dist. Ct., Fifth Jud. Dist., June 2, 2006). In that decision, Judge Wood explained that the "United States Supreme Court has recognized that any permanent, physical invasion of one's property constitutes a taking, no matter how minor or de minimus the

invasion may be.” *Order* at 121 (citing *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419, 434-45 (1982)). Judge Wood held that “a diminishment in the right to use the water defeats the very purpose of the right. Further, any action which undermines the priority of the water right undermines the core value of the right – the right to the water before all those acquired their rights subsequent to the senior user.” *Id.* (emphasis added).

Finally, Judge Wood cited the Idaho Supreme Court’s decision in *Roark v. Caldwell*, 87 Idaho, 557, 566 (1964) wherein the Court stated:

Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. **The substantial value of property lies in its use. If the right to use be denied, the value of the property is annihilated and ownership is rendered a barren right.**

Order at 122 (emphasis in original).

In this case, IDWR has no authority to deny a senior appropriator the right to use “water” under a senior right, particularly in favor of allowing a junior to use the water instead. *See Lockwood, supra*. Such an action would “annihilate” the value of a senior water right and render it a “barren” right. *See Montpelier Milling Co.*, 19 Idaho at 220 (“In this dry and arid region a right to the use of water appropriated for beneficial purposes is of great value because of the many enterprises carried on which are dependent upon its use. In many instances such enterprises would be rendered valueless if the right to the use of water necessary to carry them on was taken away;”). Idaho law forbids such a result and protects a senior’s prior right to use the water in times of shortage.

Moreover, IDWR has no authority to simply take a senior’s private property in the context of an action before the agency. Idaho Code § 7-701 *et seq.* is the only “manner prescribed by law” in which property rights, including water rights, can be taken for a public, not

private, purpose. Accordingly, if the State of Idaho (through IDWR or otherwise) chooses to exercise its eminent domain powers to take a water right for a necessary public purpose it must follow the statutory procedures, which requires filing a civil action in district court. *See* I.C. §7-706. In other words, the law prohibits any type of condemnation proceeding before an administrative agency.

On the other hand, Idaho law, as amended in 2006, expressly forbids “private parties”, such as the Ground Water Districts (and or their members), from using eminent domain to “acquire private property”, in this case senior water rights owned by Clear Springs. *See* Idaho Code § 7-701A. Accordingly, the Ground Water Districts have no authority to take a senior’s water right. In this case, they cannot use IDWR as their surrogate to take Clear Springs’ rights either. *See id.* (“This section limits and restricts the use of eminent domain under the laws of this state . . . by the state of Idaho . . . public agencies . . . to condemn any interest in property in order to convey the condemned interest to a private interest or person as provided herein.”).

Therefore, IDWR has no authority to condemn a senior right (or take water away from a senior water right) and convey it to a host of private junior ground water right holders (the Ground Water Districts). Stated another way, IDWR cannot step into the role of a district court in an administrative proceeding and allow a junior water right holder to take a senior’s property right and then order a payment of “money” or “compensation” to substitute for that senior right. IDWR has no such jurisdiction.

In the event IDWR attempted to take on such a prohibited role, it’s clear that action would violate the constitution’s separation of powers doctrine in addition to effecting an unlawful taking. The constitution vests the judicial power in the State’s district courts. IDAHO CONST. art. V, § 2 (“The judicial power of the state shall be vested in . . . district courts . . .”); art.

V, § 20 (“The district court shall have original jurisdiction in all cases, both at law and in equity . . .”).

Article 2, § 1 of the Idaho Constitution is this state’s expression of the separation of powers doctrine:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of power properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as this constitution expressly directed or permitted.

IDAHO CONST. art. II, § 1.

Under this constitutional provision administrative agencies, like IDWR, may not exercise any powers properly belonging to the state’s judiciary, such as hearing and deciding a condemnation case. *See* Idaho Code § 7-706; *State v. Finch*, 79 Idaho 275, 281 (1957) (“Judicial power cannot be conferred upon any agency of the executive department, in the absence of constitutional authority, where the constitution has specifically provided for the creation of a judicial system.”); *see also, Estep v. Commissioners of Boundary County*, 122 Idaho 345, 346 (1992).

Therefore, since Idaho law prohibits taking a water right for another “private interest”, and IDWR has no authority to take water from a senior and give it to a junior (through the payment of “money”, i.e. a de-facto condemnation proceeding), the Coalition opposes the Ground Water Districts’ mitigation plan and it should be dismissed with prejudice accordingly.

III. The CM Rules Do Not Allow the Director to Exchange Delivering “Money” Instead of “Water” to an Injured Senior Water Right.

The Ground Water Districts base their entire mitigation plan on the lone undefined phrase “or other appropriate compensation” found in Rule 43.03.c. (emphasis added). Contrary to the Ground Water Districts’ view, the CM Rules do not state that “money” is appropriate

compensation, they do not authorize IDWR or the Director to order “money” as “compensation” to be paid instead of distributing “water” to an injured senior water right, and they do not set out a procedure to determine how damages for the taking of the senior’s water right would be calculated.

Notably, Rule 20.01 plainly states both in its heading and text that the rules only concern: **“Distribution of Water Among the Holders of Senior and Junior-Priority Rights. . . .** The rules govern the distribution of water from ground water sources and areas having common ground water supply”. Rule 20.01 (emphasis in original). As explained above, IDWR, the Director, and the watermasters are limited by statute, and nothing in Idaho law allows them to unilaterally decide to distribute “money” instead of “water” to an injured senior water right. Whereas IDWR has no authority to even force an “exchange” of water upon a senior water right holder, there is no question it cannot order “money” to be paid instead. *See Daniels v. Adair*, 38 Idaho 130, 135 (1923). In *Daniels* the Idaho Supreme Court struck down a compelled exchange of water upon a senior water right holder:

To require them to surrender such property right and take in lieu thereof undecreed waters of Lemhi River would be in violation of their constitutional right to the possession and enjoyment of their property. . . . In so far as the injunction affects the petitioner Daniels it is mandatory and directly in violation of the decree whereby the waters of Agency Creek are to be distributed. Daniels, as water-master, is limited in the matter of the distribution of the waters of Agency Creek by the decree and must follow its provisions.

38 Idaho at 135-36.

Accordingly, whereas Idaho law forbids a compelled “exchange” that would take water away from a senior’s prior right, nothing in the CM Rules can be approved to the contrary. In the event the CM Rules, or their application, conflict with Idaho’s constitution and statutes, those

provisions must be set aside. *Roeder Holdings LLC v. Board of Equalization of Ada County*, 136 Idaho 809, 813-814 (2001).

Although the CM Rules use the term “compensation” in selected provisions, the term must be read in context with all of the Rules and their intent which expressly concern the distribution of water to water rights. See *Mason v. Donnelly Club*, 135 Idaho 581, 586 (2001) (“The language of the rule, like the language of a statute, should be given its plain, obvious and rational meaning. . . . In addition, this language should be construed in the context of the rule and statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement.”). Therefore, actions that are taken to provide “compensation” to water rights must provide water. Moreover, the Rules state the Director may consider whether the parties have entered into “an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions”. Rule 43.03.o. Although a senior water right holder and a junior water right holder may enter into an “agreement” on a mitigation plan that could include terms other than water, the senior must agree to accept “compensation” other than water. See e.g. Idaho Code § 42-240 (proposed exchange of water requires an “agreement in writing” with the affected water right holder). In that case, the Director and watermaster would review the plan and maintain records to ensure that junior ground water right holders were operating in conformance with the plan and its agreed upon terms.

While senior surface water right holders and junior ground water right holders have a history of such “agreements” (i.e. the Interim Stipulated Agreements 2001-2004), the law does not force a senior to accept “money” instead of “water”. IDWR and the Director have no authority, under any law, including the CM Rules, to administer water rights any other way.

CONCLUSION

Should IDWR attempt to embark on this new path, it's clear that no senior water right would be safe. If a junior is permitted to take "water" and pay a senior "money", then any junior water right holder with the ability to pay a monetary amount determined by the Director receives the water and takes priority over the senior. Effectively, the Ground Water Districts are arguing that the junior should always have the right to the water so long as the junior pays the amount of an alleged "lost profit" determined by the Director. To make matters worse, the Ground Water Districts are not offering to pay for the value of the water right. Based upon their argument, the junior only has to pay the "profit" that is lost by the senior resulting from the diversion out of priority by the junior.

Carrying this new theory forward, if the junior wants to grow a high value crop, then the junior can take water from a senior growing pasture or a lower value crop, pay the lost "profit" and end up with priority over the water. How this plays out in years in which the fish industry or a senior's crop is not "profitable" is problematic – using the Ground Water Districts' theory, no money would be owed if the senior was not going to use the water for a "profitable" purpose. Even more problematic will be the response to this procedure, if it is authorized, by the industrial, commercial and power generating users. It will be fairly simple for those with resources to target low or no profit agricultural uses of water, take the senior rights for their uses and pay the Director's determination of "lost profit".

If this process is approved by IDWR, what is the recourse of the senior water right holder – does it have to "bid" against a junior user for the use of its own water right, and if so, who would the senior pay in order to have the right to use its senior right? Other than accepting the amount of "lost profit" determined by the Director, the process advocated by the Ground Water

Districts leaves the senior water right holder without recourse and without the water that should be delivered under the law based upon its senior water right.

Fortunately Idaho law precludes such a result and requires water rights to be administered “first in time, first in right”. IDWR, the Director, and the watermaster have a mandatory obligation to distribute water and protect senior water rights from injury by out-of-priority diversions. The Ground Water Districts’ mitigation plan which offers “money” instead of “water” overtly contradicts Idaho’s constitution and water distribution statutes. In a mitigation setting, money is not appropriate compensation unless the senior water right holder agrees to a monetary payment. The Director should dismiss the plan with prejudice.

DATED this 2nd day of March 2009.

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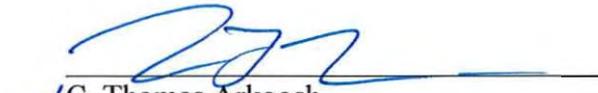


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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2009, I served a true and correct copy of the foregoing *Surface Water Coalition's Memorandum Regarding IDWR's Lack of Authority to Order a Junior Water Right Holder to Pay "Money" Instead of Delivering "Water" to an Injured Senior Water Right* by depositing same in the United States mail, postage prepaid, addressed to the following:

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