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BEFORE THE DEPARTMENT OF WATER RESOURCES  
 OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF	)	<b>SIXTH REQUEST</b>
WATER TO WATER RIGHT NOS. 36-02356A,	)	<b>FOR HEARING, REQUEST</b>
36-07210, AND 36-07427	)	<b>FOR EXPEDITED HEARING,</b>
(Blue Lakes Delivery Call)	)	<b>REQUEST FOR STAY, AND</b>
	)	<b>REQUEST FOR</b>
	)	<b>CONSOLIDATION</b>
	)	
_____	)	
IN THE MATTER OF DISTRIBUTION OF	)	
WATER TO WATER RIGHT NOS. 36-04013A,	)	
36-04013B, AND 36-07148 (SNAKE RIVER	)	
FARM); AND TO WATER RIGHT NOS.	)	
36-07083 AND 36-07568 (CRYSTAL SPRINGS	)	
FARMS)	)	
(Clear Springs Delivery Call)	)	
_____	)	

COME NOW the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District and Magic Valley Ground Water District (collectively “Ground Water Districts”), for an on behalf of their members (collectively “Ground Water Users”), through counsel, and hereby submit the following requests to the Director of the Idaho Department of Water Resources (“IDWR” or “Department”):

## **I. REQUEST FOR HEARING AND SCHEDULING CONFERENCE**

This Sixth Request for Administrative Hearing is made pursuant to Idaho Code §42-1701A(3) on the Director's May 19, 2005 Order in the Matter of Distribution of Water to Water Rights Nos. 36-02356A, 36-7210, and 36-07427 in response to the Blue Lakes Trout Farm, Inc. delivery call, and the July 8, 2005 Order in the Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04138, and 36-07148 (Snake River Farm); and to Water Rights Nos. 36-07083 and 36-07568 (Crystal Springs Farm) on the Clear Springs Food, Inc., delivery calls and any subsequent Orders relating thereto. These orders will be referred to herein as the "2005 Orders." The spring users who own the water rights that are the subject of the 2005 Orders are referred to herein collectively as the "Spring Users." The Ground Water Districts' five previous requests for hearing are as follows:

1. **June 2, 2005 Petition for Reconsideration.** "Idaho Ground Water Appropriators, Inc. ("IGWA") . . . hereby petitions the Director, Idaho Department of Water Resources ("Director") for reconsideration of the Director's May 19, 2005 Order ("May 19 Order") in this matter. IGWA also requests that the Director convene a hearing on the Blue Lakes Trout Farm, Inc. ("Blue Lakes") delivery call."
2. **July 19, 2005 Petition for Reconsideration.** "Idaho Ground Water appropriators, Inc. ("IGWA") . . . hereby petitions for reconsideration, and requests a hearing on, the Director's July 8, 2005 *Order* ("July 8 Order") issued in response to the Clear Springs Foods, Inc. ("Clear Springs") delivery call."
3. **August 7, 2006, IGWA's Brief in Response to Order Concerning Nature of Further Proceedings (Blue Lake Delivery Call, Clear Springs Delivery Call, Snake River Farm).** IGWA will "exercise all available legal means to resist a curtailment order, unless they first have had full evidentiary hearings on the Spring Users' delivery calls." . . . IGWA respectfully requests that the Director schedule a hearing, either before the Director under applicable rules or before a ground water board, to occur in February 2007."

4. **April 9, 2007, 2007 Joint Water Replacement Plan.** “Finally, the Ground Water Districts reiterate their request for a hearing on the Director’s Orders.”
5. **June 8, 2007 Status Conference.** At the June 8, 2007 status conference conducted by the Director, the Ground Water Districts, through their undersigned counsel, renewed their previous requests for hearing on the Director’s July 2005 Orders in this matter and requested an immediate hearing to commence July 9, 2007, or as soon thereafter as practicable. This request was made as a result of the Order issued by Judge Melanson at the conclusion of the hearing on June 6, 2007, in Jerome County Case No. CV-2007-0000526 denying the Plaintiff Ground Water Districts’ Motion for Preliminary Injunction and granting the Defendants’ Motions to Dismiss.

At the June 8, 2007, scheduling conference, the Director did not overtly rule on the Ground Water Districts’ fifth request for an immediate and expedited hearing to commence on July 9, 2007, or as soon thereafter as possible, yet, because the Director made comments that a quick hearing did not seem possible, it appears that the Ground Water Districts’ request of an expedited hearing to commence July 9, 2007, was denied. The Director did represent, however, that a hearing would be scheduled on all objections and petitions for rehearing of the 2005 Orders in due course. A schedule has not yet been set. The Spring Users indicated that they want full and extensive discovery and preparation before any hearing date. To the extent that their request is a request to open discovery in this matter, the Ground Water Districts’ object to that request because it would be more prudent and cost effective for all parties involved to proceed with an expedited hearing on the Ground Water Districts’ legal defenses before resolving the myriad of complex factual questions. The request for an expedited hearing and the reasons therefore are set forth below.

## **II. REQUEST FOR EXPEDITED HEARING**

Pursuant to Amendment 14 §1 of the United States Constitution, which provides that no state “shall deprive any person of life, liberty, or property without due process of law” and Article I, § 13 of the Constitution of the State of Idaho which states, no person shall be “deprived of life, liberty or property without due process of law” and Idaho Code § 42-1701A(3), the Ground Water Districts are requesting an expedited hearing be set the week of July 9, 2007, or as soon thereafter as possible to set forth their legal defenses prior the physical curtailment and deprivation of their property rights. This request is made on the following grounds:

The Ground Water Districts have requested on many occasions an opportunity to be heard on their legal defenses and in good faith have provided costly replacement water plans, under protest, to forestall physical curtailment of their water rights with the understanding that they would be provided a hearing. No hearing has been held or scheduled that would allow the Ground Water Districts to set forth their affirmative defenses to the Department’s 2005 Orders. On the other hand, the Spring Users have been provided with all the presumptions that their water rights are valid and senior to the ground water rights. The Spring Users have been provided due process by the Department acting expeditiously on issuing the 2005 Orders, making findings of fact and conclusions of law as to the nature and extent of material injury to the Spring Users’ water rights because of alleged ground water withdrawal from the Eastern Snake Plain Aquifer. However, actual physical curtailment has not been warranted because the Spring Users have been provided adequate replacement water in 2005 and 2006 because of the Magic Valley Ground Water District and North Snake Ground Water District’s Replacement Water Plans filed for those years. Yet, the necessity of providing that replacement water at great cost to the Ground Water Districts has not

been answered because the Ground Water Districts have been denied a hearing to assert their defenses.

Because of the complex nature of the administration of the Spring Users' water rights and the potential permanency of curtailment ordered, it is reasonable to allow the junior water users an opportunity to assert affirmative defenses before being physically curtailed. The Spring Users' water rights, as noted above, have already been afforded the appropriate presumption of validity and the Department issued curtailment orders accordingly. Yet, no hearing has been granted to allow the Ground Water Districts to prove their defenses. These affirmative defenses should be allowed to be raised in an expedited manner before the junior users are subject to economic devastation. Without a hearing on these defenses to determine among other things whether or not the delivery calls are in themselves valid, the juniors face irreparable harm and the inability to protect their water rights if they are curtailed.

This case presents very different issues than a normal water delivery call that occurs between surface water users and even in the parallel case involving the Surface Water Coalition. The Spring Users' water rights are 1) for year-round fish propagation purposes, 2) require a certain quality of water in addition to quantity, 3) are specifically referenced and restricted by the State of Idaho State Water Plan since 1977, and the Swan Falls Agreement, 4) depend on spring flows that will likely never be fully restored. Furthermore, the hydraulic relationship between junior ground water wells and senior springs is complex and cannot be predicted with current tools. Unlike in normal water delivery call situations where the watermaster has a century's worth of knowledge about which water users are junior and which ones are senior, the issues raised in this matter are not tested. Certainly the junior water users should not bear the unreasonable weight of having their property rights destroyed and the economic devastation to the

region occur when there are very real and unresolved legal questions concerning the severity of the calling water rights. Prudent, deliberate and judicious action is warranted and this includes the opportunity for the junior water users to assert their affirmative, legal defenses prior to suffering complete, physical curtailment.

Constitutional due process requires a pre-deprivation hearing except in very limited circumstances. In this case, a pre-physical curtailment or pre-deprivation of the juniors' water rights should warrant an expedited hearing.

If the alleged junior ground water users are unable to prevail on their affirmative defenses, and it is determined that the Spring Users' water delivery calls are valid, then a hearing on the complex factual questions involving the water supply, the need for water and extent of material injury can occur in due course.

To actually physically curtail and devastate the ground water users without allowing them a hearing and opportunity to present affirmative defenses rises to an abuse of discretion of extraordinary proportions and a clear and unlawful denial of the process of law.

### **III. REQUEST FOR STAY**

Given the gravity of this situation and the questions of the validity of the Spring Users' Delivery Calls, it is appropriate that the Department exercise its discretion pursuant to the Idaho Administrative Procedures Act 37.01.01.780 and stay physical curtailment under the 2005 Orders and subsequent orders until such time as the Ground Water Districts have been afforded an opportunity to present their legal defenses and get final answers to these important questions. Furthermore, the Idaho Supreme Court in its recent decision in *American Falls Reservoir District No. 2* affirmed that as to the timing of curtailment, it is "vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the

available facts” than to impose a hasty timeframe for curtailment. *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources*, \_\_\_ Idaho \_\_\_, \_\_\_, 154 P.3d 433, 446 (2007). The same logic must apply here, where there are colorable, untested affirmative defenses that have been repeatedly asserted by the Ground Water Districts.

A stay of the Department’s orders will allow not only the Department to make some preliminary legal findings on the defenses raised, but will also provide for the efficient and timely determinations of all issues raised in this case. The expense of a full evidentiary hearing including the taking of various depositions of all expert witnesses, fact witnesses, and issues surrounding the model on which the 2005 Orders are based, will be expensive and time consuming for all parties involved. However, if any of the Ground Water Districts’ legal defenses are valid and affirmed, that expense can be avoided. Furthermore, the ground water users and the Spring Users will both benefit from rulings on these legal issues and depending on the outcome thereof, can prepare for a full evidentiary hearing on the factual matters or can pursue settlement discussions once these legal issues are resolved. Thus, Ground Water Districts request that the Department stay its 2005 Orders and the physical curtailment occurring therefrom until the legal issues have been concluded.

#### **IV. REQUEST FOR CONSOLIDATION**

The legal issues and defenses raised are common to all Spring User water delivery calls filed in 2005, thus the Ground Water Districts would request that all 2005 Spring Delivery Calls be consolidated for purposes of determination of the threshold legal issues. These include the March 16, 2005 Billingsley Creek Ranch letter sent to IDWR, the March 22, 2005 Blue Lakes Trout letter to IDWR requesting delivery of water, the May 2, 2005 letter sent by Clear Springs Foods on behalf of Snake River Farms and Crystal Springs Farms facilities submitted to IDWR,

and the April 12, 2005 letter sent from John W. Jones to IDWR on May 10, 2005 requesting delivery of water. Furthermore, the consolidation should also include the Rim View Trout Company letter dated January 19, 2007 as well as the Rangen, Inc. letter submitted to IDWR on January 17, 2007, requesting water delivery.

**REQUEST FOR EXPEDITED ORDERS**

In light of the important issues raised by the Ground Water Districts and the certainty that both the Ground Water Districts and the Spring Users desire, the Ground Water Districts ask for expedited orders on the above requests which include:

- 1) Request for Hearing and Scheduling Conference for a full evidentiary hearing;
- 2) Request for Expedited Hearing on the Ground Water Districts' Legal Defenses;
- 3) Request for Stay; and
- 4) Request for Consolidation.

DATED this 18<sup>th</sup> day of June, 2007.

RACINE, OLSON, NYE, BUDGE  
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By   
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