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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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

IDAHO GROUND WATER APPROPRIATORS' BRIEF IN RESPONSE TO DIRECTOR'S APRIL 6, 2005 ORDER

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP and on behalf of its ground water district members, Aberdeen-American Falls Ground Water District, Magic Valley Ground Water District, Bingham Ground Water District, North Snake Ground Water District, Bonneville-Jefferson Ground Water District, Southwest Irrigation District, and Madison Ground Water District ("Ground Water Users"), submits the following briefing as requested by the Director in the April 6, 2005 *Order on Petitions to Intervene and*

Denying Motion for Summary Judgment; Renewed Request for Information; and Request for Briefs ("April 6 Order").

I. ISSUE PRESENTED

The April 6 Order requests briefing on this question: "Whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party?" April 6 Order at 4.

The answer is no. Idaho law does not permit the Coalition members to pursue a delivery call against persons, including junior ground water right holders, who were not parties, or who are not in privity with parties, to an adjudication in which the Coalition members' water rights were decreed.

Under Idaho law, junior water right holders cannot be bound or affected by a prior decree to which they were not a party. Administration—that is, curtailment—based on the elements established in decrees represents the ultimate means of "affecting" a water right.

Idaho courts have precluded administration as between water rights whose elements are established in separate, unrelated decrees, even where the respective rights have been incorporated within their own water districts under their separate decrees. This is because the legal and hydrologic relationships among all of the respective water rights have not been judicially determined. Such is the case here. Therefore, the Coalition members may not pursue their delivery call against ground water users who were not parties to the decrees in which the Coalition members' water rights were decreed. Nor can they pursue delivery calls with respect to those of their water rights that have never been adjudicated.

Even assuming that the Coalition members' rights soon will be adjudicated in the SRBA, and that the Department thereafter will take appropriate steps to incorporate those water rights

and adjudicated ground water rights into water districts, conjunctive administration of the surface and ground water rights within, between or among water districts cannot be the rote, automatic, toggle-switch administration historically used for administering surface water rights on an adjudicated stream under Title 42, Chapter 6, Idaho Code. Conjunctive administration is more complex than the simple shutting and fastening of headgates. The Department's Conjunctive Management Rules set the framework for conjunctive administration as and when the Coalition members' water rights are decreed in the SRBA.

II. ARGUMENT

A. A private decree does not bind non-parties and cannot be the basis for curtailing their water rights.

The Idaho Supreme Court has ruled several times that a water rights decree "is not, and cannot be made, conclusive, as to parties who are strangers to it." *Mays v. District Court of Sixth Judicial Dist. in and for Butte County*, 34 Idaho 200, 200 P. 115, 116 (1921) (emphasis added). More importantly, it would be "repugnant to a fundamental principle of our jurisprudence" to conclude that "one's rights can be affected by a decree to which he was a stranger." *Id.* (emphasis added). The Court concluded that "[t]he operation of this principle cannot be defeated by the mere fact that it will put other parties to some added trouble or expense." *Id.*

In *Scott v. Nampa & Meridian Irr. Dist.*, 55 Idaho 672, 45 P. 2d 1062, 1064 (1934), the Court held that the decree establishing a shared curtailment arrangement for most Boise River water rights did not apply to an appropriator who was not a party to the decree. Again, the appropriator's rights could not be made subject to or affected by a decree to which he was a stranger.

The Idaho Supreme Court recently restated this rule, and quoted the above language from *Mays*, in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409, 415 (1997),

holding that "[a] decree entered in a private water adjudication binds only those parties to the decree." More importantly, the Idaho Court ruled that a non-party's water right cannot be "affected" by the rights in such a decree. *Id.*, quoting *Mays v. District Court*, 34 Idaho at 116.

In *Nettleton v. Higginson,* 98 Idaho 87, 558 P.2d 1048 (1977), the Idaho Supreme Court reversed the Department's instruction to have a watermaster deliver water from users in one water district to those in another. The Court ruled that such distribution could occur only after there is a hearing to determine "whether there are sufficient uncontested rights to develop a workable plan for water distribution. If not, then the [Department] should proceed with an adjudication pursuant to I.C. § 42-1406 before combining these two districts into one." *Id.* at 1055.[1] In other words, a non-party to an adjudication could not be curtailed under the distribution scheme established for the adjudicated rights' separate water district.

In the present case, the water rights of IGWA's members are in Water District 120, a district separate from that in which the Coalition members' rights lie. Moreover, those rights were decreed in separate, private adjudications, and have not yet been adjudicated in the SRBA. The Coalition asks the Director to summarily shut off the water rights of IGWA's members and other ground water users, based only on the Coalition members' private decrees and their claims of injury. The fact that many of the ground water users' water rights have been decreed in the SRBA and incorporated into their own separate water district does not entitle the Director to curtail them through an order to the District 120 Watermaster for the benefit of the Coalition's members. The Coalition members' surface water rights are in a separate water district

[1] As the Court noted in *Devil Creek Ranch v. Cedar Mesa Reservoir & Canal Co.*, 879 P.2d 1135,1139 (Idaho 1994), where rights were decreed in separate adjudications, their relationships need to be determined in a single adjudication (i.e, an adjudication such as the SRBA) before the rights can be administered together because, depending on the facts of the case, "priority-in-time might not necessarily result in priority of right."

established in an adjudication to which the ground water users were not parties, and none of these rights have yet been evaluated in the SRBA.

A primary purpose of the SRBA is to determine in one action the relative priorities of all water rights, and describe their legal and hydrologic relationship to facilitate administration, including conjunctive administration. These relationships are unique as among water rights in the various reporting basins. As the Idaho Supreme Court has observed:

> Conjunctive management combines legal and hydrologic aspects of the diversion and use of water under water rights arising both from surface and from ground water sources. Proper management of this system requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.

A & B Irrigation Dist. v. Idaho Conservation League, 958 P.2d 568, 579 (Idaho 1997). The Court also recognized that to the extent conjunctive management general provisions were found by the SRBA Court to be necessary to define or efficiently administer water rights, "[e]ach Basin's conjunctive management provision must be discretely considered in reaching the factual determination whether the respective general provision is necessary either to define or more efficiently administer water rights in that particular Basin." *Id.*, 958 P.2d at 580. The process of discretely considering those relationships has not been concluded in the SRBA; with respect to the Coalition members' surface water rights, it has not even been initiated. Until then, the Director is missing a necessary tool for "proper management."

Ground water users anticipate that the SRBA will, in the relatively near term, conclude its review of the Coalition members' water rights, and that they will be decreed alongside the ground water users rights in a unified, final decree under which all parties will be bound and

subject to administration. But it bears emphasis that in the conjunctive management context, being bound by, and subject to administration under, the same decree will not set up the automatic "call and curtail" process under Chapter 6 of Title 42 that historically has applied *within water districts* and *among surface water users on a stream.*

B. The Coalition's request to shut off ground water use in Water District 120 also contradicts the very water distribution scheme it attempts to invoke.

The Idaho court opinions discussed above are fully consistent with the water distribution statute itself. Idaho Code § 42-602, which obligates the Director to "distribute water in water districts," provides that "chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district." (Emphasis added.) Thus, as in *Nettleton,* any delivery call undertaken pursuant to Chapter 6 is limited to the boundaries of the water district. A request to curtail water rights outside a water district for the benefit of those inside must proceed under some separate authority, and after the rights are fully decreed in relation to one another.[2]

This point is buttressed by Section 42-604, which authorizes the Director to revise a water district's boundaries or combine two or more water districts, and by Section 42-607, which announces the watermaster's duty to "distribute the waters of the public stream, streams or water supply, comprising a water district among the several ditches taking water therefrom...." (Emphasis added). Section 42-604 describes how water districts are created, specifying that "this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts. . . ." (Emphasis added.) IGWA submits that the intent of this provision is to ensure that the authorities in Chapter 6 will be used to implement curtailment only

[2] The SRBA Court's January 8, 2002 Order Granting State of Idaho's Motion for Order of Interim Administration [in the then to-be-designated WD 120 and WD130] authorized "distribution of water pursuant to chapter 6, title 42, Idaho Code in accordance with the Director's Reports and the partial decrees that have superceded the Director's Reports, in those portions of Administrative Basins 35, 36, 41 and 43. . . ." It did not authorize distribution in those basins in accordance with any other decrees.

as between those rights that have been adjudicated in the same adjudication. The surface water users in the Coalition have not had their water rights adjudicated alongside those of the ground water users. As the Director well knows, that opportunity will soon arrive.

Perhaps most significantly for the present controversy, Chapter 6 does not address the conjunctive management situation. Nor does it make clear how, or even whether, the watermaster is supposed to function in such a setting, even where the ground water rights are part of an organized water district. This certainly is one reason why the Director promulgated, and the Legislature approved, the Conjunctive Management Rules ("Rules") in 1994.

The Rules state:

> These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights.

IDAPA 37.03.11.020.01 (emphasis added). Where organized water districts are involved, the Rules repeatedly refer to delivery calls occurring "within" them. Even Rule 40 applies where a delivery call challenges "holders of junior-priority ground water rights from areas having a common ground water supply in an organized water district." IDAPA 37.03.11.040 (emphasis added). This Rule concerns the "rights of the various surface or ground water users whose rights are included within the district." IDAPA 37.03.11.040.01.a. The Rules provide for the modification of a water district to include junior ground water rights, IDAPA 37.03.11.030.04, but they do not contemplate the situation where one water district is administered so as to deliver water to another.

The closest the Rules come to addressing the point is this reference in Rule 40, pertaining to regulation of water uses by the watermaster:

> Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated.

IDAPA 37.03.11.040.02.e.

In sum, the Rules do not authorize, much less include procedures for, delivery calls from one water district as against water rights in another. For example, the Rules describe Rule 40 as providing "procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created." IDAPA 37.03.11.020.07 (emphasis added).

Furthermore, even if the Rules contemplated intra-district administration such as the Coalition seeks here, the Chapter 6 approach still would not apply. This is so because, as noted above, Chapter 6 does not address the matter at all, while Rule 30 expressly applies when a delivery call has been made against ground water rights "within water districts where ground water regulation has not been included in the functions of such districts." IDAPA 37.03.11.030. Ground water-surface water regulation has not previously been a function of either the water district in which the Coalition's surface water rights are located or Water District 120.

While the Coalition presumably is free to pursue its Delivery Call once its members' rights are decreed (or perhaps recommended to the SRBA Court and under an order for interim administration), Rule 30 will govern that call. In considering any such delivery call, the Director must be mindful that

> The governmental function in enacting not only I.C. § 42-607, but the entire distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources.

Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048, 1052 (1977).

RESPECTFULLY SUBMITTED this 13th day of April 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April 2005, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

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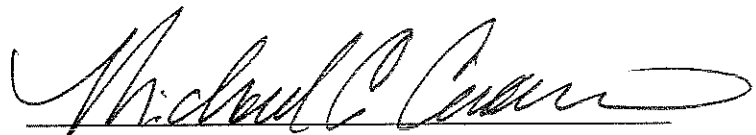

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