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

IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

JOINT RESPONSE TO MOTIONS

The Big Wood and Little Wood Water Users Association (BWLWWU) and the Big Wood Canal Company (BWCC) file this summary response to the following Motions:

1. South Valley Ground Water District's Motion to Dismiss.

2. Sun Valley Company Motion to Dismiss.
3. South Valley Water District's Motion to Appoint Independent Hearing Officer.
4. South Valley Water District's Motion for Order Authorizing Discovery.
5. City of Bellevue's Motion for More Definite Statement, Motion for Clarification and Motion to Postpone Hearing.

MOTIONS TO CONTINUE

The City of Bellevue (Bellevue) and the South Valley Ground Water District (SVGWD) both seek to have the Director continue the hearing. In both Motions, the grounds cited for continuance are the short time to prepare for the hearing and conflicts with counsels' schedules. Neither Motion addresses the continuing out of priority diversion by junior water right holders that is reducing the supply of irrigation water to senior water right holders.

Correspondingly, motions for the continuance of the hearing by the opposing parties generally take issue with the compressed amount of time given to properly evaluate the factual issues, analysis the technical and scientific complexity of the information in the staff memorandum, and properly prepare for complex issues involved. However, given the 2021 irrigation season is upon us, any delay could catastrophically harm senior surface water users and is in direct contrast to the entire reason for the administrative proceeding initiated by the Director under Idaho Code § 42-237a.g. Additionally, this compressed amount of time to prepare for the June 7th date affects everyone equally and is equitable based on the Models projections. Senior water holders will have the same amount of time to evaluate, analyze, and prepare for the hearing whilst not solely bearing the burden of a continuance. Any extension of time is a detriment to senior surface water holders while a continuance and a delay of the proceedings only benefits the opposing parties.

Furthermore, the most compelling reason for not granting a delay will be evidenced and set forth in the affidavits which will be filed in the above-entitled matter at or prior to the pre-hearing by senior surface water users. These will include surface water rights that are either presently reduced, or soon to be reduced in flow, that will result in substantial injury to their crops and economic livelihoods. These individuals are just a very few examples of the numerous senior water rights and users who will be similarly injured if there are delays in these proceedings. Although the affidavits will speak for themselves, it should be noted that unlike other areas and valleys, the flows to these senior water right holders are dramatically increased with the discontinued pumping of wells located upstream of just a very few days.

MOTIONS TO DISMISS

Sun Valley Company (SVC) and SVGWD both filed Motions to dismiss. SVC's Motion is almost entirely predicated on the theory that a "call" by a senior water right holder is required to initiate an administrative hearing and is based upon a misinterpretation of the statute being utilized by the Director in this case. SVGWD argues that this administrative action must comply with the Conjunctive Management Rules (CM Rules) and misinterprets the express wording of the statute authorizing the alternative procedure utilized by the Director in this action.

SVC's argument is based upon the wording contained in Idaho Code § 42-237a.g. which states "water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would effect... the present or future use of any prior surface or ground water right." SVC then goes on to interpret this sentence to require a "call" by a senior water right holder. However, the wording of the statute is referencing the "amount called for by such right" which is the junior ground water right, not the senior water right. There is

nothing in the statute requiring the prior surface or ground water rights to make a call. In other words, if a junior is “calling” for its water by diverting water and it affects the present or future use of any prior surface or ground water right, the Director is statutorily authorized to administrator the rights. Anytime a junior user is diverting water, the junior user is calling on that junior’s right.

The parts of the statute that are not quoted are those portions that expressly give the Director the authority to administer in this circumstance:

42-237a. POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES. In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:

g. To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. (Emphasis added)

Idaho Code § 42-237a.g. goes on to state:

Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

There is nothing set forth in Idaho Code § 42-237(a) that requires the Director to proceed under the CMR in order to initiate the administrative proceeding referenced in Idaho Code § 42-237a.g., contrary to the arguments of SVC and SVGWD.

The issue of whether the Director must proceed under Idaho’s *Rules for Conjunctive Management of Surface Water Resources* (“CM Rules”) when administering ground water has already been addressed by Judge Wildman. In a *Memorandum Decision and Order* dated November 6, 2020, *Basin 33 Water Users v. Surface Water Coalition*, Ada County Case No. CV01-

20-8069, Judge Wildman ruled that the Director does not need to use the CM Rules when exercising his authority under the Ground Water Act. Judge Wildman further went on the state that the CM Rules are only implicated upon the filing of a delivery call under those Rules.

As in this case, the groundwater coalitions of Basin 33 and Upper Valley Water Users challenged the Director initiating administrative proceeding under Idaho Code § 42-237a.b. and not following the CM Rules. In that case, the groundwater users argued that CM Rules supersede and limit the Director's authority according to the *Final Unified Decree* in the Snake River Basin Adjudication ("SRBA"). However, the Court expressly disagreed with the Petitioner's assertion that the CM Rules somehow limit and supersede the Director's authority to act under the Ground Water Act.

The Court recognized that the Director correctly concluded in the *Basin 33* case that the CM Rules "do not subsume the separate need to manage ground water resources under the Ground Water Act, despite the completion of the SRBA and creation of water districts"¹. The Court distinctly retorted to the Petitioner's reasoning that;

"Absent the Ground Water Act, the Director's only option for addressing continuing ground water declines is to wait for the next delivery call...In theory, the pattern could continue until the ground water reaches critical levels or worse.

These examples demonstrate in practical terms the fallacy of the assumption and the shortcoming of relying exclusively on the CM Rules for ground water management. They further demonstrate that the Director's duty to manage ground water under the Act does not cease when an adjudication is completed or when a delivery call is resolved. They show that when a call is addressed through mitigation or some other monetary agreement, as opposed to curtailment, the continued depletion of the underlying water source is not addressed...leaving the Director's express duty under the Act...unfulfilled."

Basin 33 Water Users v. Surface Water Coalition Memorandum Decision and Order, CV01-2020-8069 pg. 12, Nov. 6th 2020.

¹ *Designation Order R.*, 19 & fn. 18.

As the Court concluded in the *Basin 33* case above, the Director has the ability to utilize the Ground Water Act “do all things reasonable and necessary”² to protect groundwater depletion by administering to the area pursuant to Idaho Code § 42-237a.g. The Court expressly affirmed and recognized CM Rule 3, which provides;

003. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 3).

Nothing in these rules limits the Director’s authority to take alternative or additional actions relating to the management of water resources as provided by Idaho Law.³

The Court further held that “Rule 3 makes clear the CM Rules do not limit the Director’s ability to exercise the authority granted to him under the Ground Water Act.”⁴ Exactly as in the *Basin 33* case, senior surface water users in the Big Wood River Valley cannot afford to wait until ground water levels reach critical levels to initiate a delivery call. The Courts have ruled that the Director has the ability to initiate administrative proceedings under the Ground Water Act outside of the CM Rules and specifically in Idaho Code § 42-237 a.g. when he determines it necessary, as he has done here. Any failure to respond to the information from the Model that withdrawal of water from ground water wells in the Wood River Valley south of Bellevue would impact the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season would leave the Director’s duty under the Act, likewise, unfulfilled.

The Motions to Dismiss should be denied.

MOTION FOR MORE DEFINITE STATEMENT AND CLARIFICATION

Bellevue requests that the Director clarify the Notice of Administrative Proceeding,

² Idaho Code § 42-231

³ IDAPA 37.03.11.003

⁴ *Basin 33 Water Users v. Surface Water Coalition* Memorandum Decision and Order, CV01-2020-8069 pg. 10, Nov. 6th 2020.

Prehearing Conference and Hearing (Notice). The primary argument made in support of that request is that the Director subsequently issued a Request for Staff Memorandum which asks for items that are broader than the issues set forth in the Notice.

The Notice sets forth the matters that will be addressed in the contested case. In the first paragraph, the Notice states “Therefore, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights... within the Wood River Valley south of Bellevue, as depicted on the attached map. If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.”

The Notice further states in the second paragraph “the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights... within the Wood River Valley south of Bellevue, as depicted in the attached map.” (Emphasis added)

Although many senior surface water right holders wish that the Notice would have included other ground water rights, the Notice restricts itself to the Wood River Valley south of Bellevue, as depicted on the map attached to the Notice.

At the prehearing conference, the Director will be in a position to address this issue further, but based upon the wording of the Notice, the issues to be addressed at the hearing are well defined.

MOTION TO APPOINT INDEPENDENT HEARING OFFICER

SVGWD has requested that the Director appoint an independent hearing officer pursuant to the provisions of Idaho Code § 42-1701A(2). The primary grounds for this request are that the Director participated in and made comments at committee meetings pertaining to ground water issues in the Big Wood Basin. SVGWD also argues that it doesn't agree with the actions being

taken by the Director and that is grounds for an independent hearing officer.

As expressly stated in the statute, the Director has the discretion to determine if he will act as the hearing officer. There is nothing in the statute or case law that requires the Director to disqualify himself as a hearing officer if he has knowledge of the proceedings or has engaged in discussions with the parties. Further, appointing an independent hearing officer would only lead to further delays in this matter. BWCC and BWLWWUA oppose the Motion to Appoint an Independent Hearing Officer.

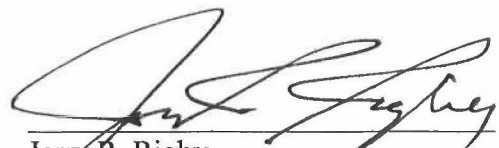
MOTION FOR ORDER AUTHORIZING DISCOVERY

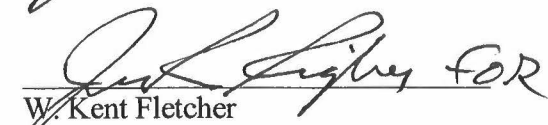
SVGWD has filed a Motion Seeking to Authorize Discovery. BWCC and BWLWWU do not oppose discovery so long as discovery is limited to those issues to be litigated at the hearing in this matter as described in the Notice of Administrative Proceeding. BWCC and BWLWWU object to the Motion to the extent that discovery is requested that exceeds the issues to be addressed at the time of the hearing.

CONCLUSION

BWCC and BWLWWU oppose the Motions to Continue, Motions to Dismiss, Motions for More Definition Statement and Clarification, and Motion to Appoint Independent Hearing Officer, and object to the Motion pertaining to discovery to the extent the Motion seeks to allow discovery that goes beyond the scope of the hearing to be held in this matter.

DATED this 21st day of May, 2021.


Jerry R. Rigby


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CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 21st day of May, 2021, a true and accurate copy of the foregoing was sent by U.S. Mail, postage prepaid to the following:

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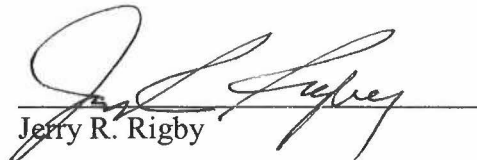
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