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

**IN THE MATTER OF BASIN 37
ADMINISTRATIVE PROCEEDING**

) Docket No. AA-WRA-2021-001
)
) **IDFG MOTION AND MEMORANDUM**
) **TO EXCLUDE WATER RIGHTS 37-**
) **7038, 37-8271, AND 37-8331 FROM**
) **CURTAILMENT**

The Idaho Department of Fish and Game ("IDFG"), by and through its undersigned counsel, and pursuant to IDAPA 37.01.01.260, 565, hereby moves the Idaho Department of Water Resources to exclude non-consumptive ground water rights 37-7038, 37-8271, and 37-8331 from consideration for curtailment in this proceeding. The grounds for this motion are set forth herein.

Standard of Review

IDAPA 37.01.01.565 provides for the filing of prehearing motions. “Unless otherwise provided by the presiding officer upon showing of good cause by a party . . . all parties joining in, answering to or responding to a prehearing motion have fourteen (14) days from the time of filing of the motion in which to respond.”

Argument

1. There is Good Cause for Shortening the Time to Respond to this Motion.

The *Prehearing Order; Scheduling Order* filed in this matter on May, 25, 2021, does not provide a deadline for the filing of prehearing motions. However, motions other than a motion to “dismiss, strike or limit an application or claim or appeal, complaint, petition, or protest” may be filed “at any time upon compliance with Rule 565.” IDAPA 37.01.01.260.03. Parties responding to a prehearing motion must be given fourteen days to respond unless good cause can be shown for shortening the time to respond. IDAPA 37.01.01.565.

The timeframes provided for in this procedure have been extremely tight. Notice of initiation of this administrative proceeding was provided on May 7, 2021. The Request for Staff Memorandum went out on May 11, 2021, and the staff memorandum was issued May 17, 2021. The prehearing conference was held May 24, 2021. The hearing is to begin June 7, 2021. Any prehearing motions would have needed to have been filed just after the Notice of Administrative Proceeding was served in order to provide 14 days for response by other parties. Under these circumstances it is not reasonable to expect any party to be prepared to file a prehearing motion in time to provide 14 days to respond. Therefore, the expedited timeframes of this proceeding provide good cause for waiving the 14-day response requirement of IDAPA 37.01.01.565.

2. IDFG's Water Rights are Non-Consumptive on Their Face.

IDFG-owned water rights 37-7038, 37-8271, 37-8331 (collectively “IDFG’s Ground Water Rights”) are three ground water rights for use at the Hayspur State Fish Hatchery. *Affidavit of Owen H. Moroney* (hereinafter “Moroney Aff.”), Exhibit A, B, and C. IDFG’s Ground Water Rights fall within the proposed area of curtailment outlined in the Notice of Administrative Proceeding, Pre-hearing Conference, and Hearing filed May 4, 2021. IDFG Water Rights 37-8331 and 37-8271 both contain the following condition “Use of water under this right shall be non-consumptive.” Moroney Aff., Exhibit A and B.¹

As explained by the Memorandum Re: Water Right 37-8352—Non-Consumptive Use Condition drafted by IDWR employee Shelley Keen, this condition is “standard approval condition 027. . .” Moroney Aff., Exhibit D at 1. The purpose of identifying rights with this non-consumptive use condition is because:

- It indicates why mitigation is not required for certain new water rights in moratorium areas.
- It indicates which water rights cannot result in the consumption of water now or after a change in nature of use.
- It indicates water rights that may not have to be regulated by priority in a curtailment scenario because they do not deplete the amount of water available to holders of senior water rights.
- It indicates which water rights are subject to special assessment and voting provisions in water districts pursuant to Idaho Code § 42-605A.

Id. IDWR includes this condition when it determines that a use is non-consumptive. IDWR “has usually considered non-consumptive water uses to be those that return all the diverted water to a

¹ Water Right 37-7038 does not contain this condition on the face of the right. *Id.* Exhibit C. However, as discussed below, the water from the point of diversion for water right 37-7038 is comingled with and used in the same manner as water rights 37-8271 and 37-8331. *Affidavit of Gregg Anderson* pg. 2–3, ¶ 9.

natural water body, either through direct flow to a surface water body or through seepage into the ground.” *Id.*

As noted by the memorandum:

Nearly every water use is consumptive to some extent. Some water uses are considered non-consumptive, however, because the fraction of water evaporated is so small as to be negligible. In other cases, the authorized water use is not more consumptive than the water in its natural state. For example, routing water through a canal or ditch and back into the source stream, often for aesthetic or wildlife purposes, could be considered non-consumptive if the amount of water continued to flow in the source stream.

Id. Thus, for standard condition 027 to appear on the face of a water right there must have been a determination by IDWR (or the SRBA Court) that use of water under the right met the criteria of being non-consumptive.

The appearance of this condition on the face of IDFG Water Rights 37-8331 and 37-8271 should be prima facie evidence that the right is non-consumptive. There should be no need for further review of use of the rights because IDWR (or the SRBA Court) has already made a determination that it is non-consumptive, meaning it should “not have to be regulated by priority in a curtailment scenario because they do not deplete the amount of water available to holders of senior water rights. does not deplete the amount of water available to holders of senior water rights.” *Id.*

3. IDFG’s Water Rights are Non-Consumptive in Fact.

Even if one were to discount standard condition 027 as providing prima facie evidence that IDFG’s water rights are non-consumptive, the plain facts of water use on the ground at the Hayspur State Fish Hatchery confirm that use of water under the rights does not deplete the amount of water available to senior surface water holders. Water diverted under IDFG’s Ground Water Rights are pumped and piped to a concrete headbox where they are commingled and

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distributed via pipe to the rest of the hatchery. *Affidavit of Gregg Anderson* (hereinafter “Anderson Aff.”) pg. 3, ¶ 11. Water within the hatchery is completely contained in pipes, concrete ponds, or raceways that are essentially seepage free. Buildings, drastically reducing any evaporative losses, cover most of the raceways and ponds. *Id.* Water is discharged from the hatchery via pipes a very short distance to the settling basin which is within a natural channel formed by Butte Spring. *Id.* at ¶ 12–13. The settling basin is a small flow-through basin that has very low retention time, (< 24 hours). *Id.* at ¶ 14. There are no other water rights on the portion of Butte Creek where discharge from the hatchery occurs. *Id.* at ¶ 16.

Thus, the facts of water use at the Hayspur State Fish Hatchery support the conclusion that IDFG’s Ground Water Rights are non-consumptive. The IDFG Ground Water Rights discharge into Butte Creek thereby “return[ing] all diverted water to a natural water body . . . through direct flow to a surface water body.” *See Moroney Aff.*, Exhibit D at 1. Water use in the hatchery is mostly enclosed in pipes, buildings, and concrete raceways/ponds, thus the “fraction of water evaporated is so small as to be negligible.” *See id.* In addition, the flow-through settling pond is within the natural channel formed by Butte Spring and does not slow the water “to the point of impoundment” but rather “allows water to pass through to a natural surface water body” and downstream to other users. *See id.* at 2.

Given these facts it is clear that use of IDFG’s Ground Water Rights is non-consumptive and should not be curtailed because it cannot “deplete the amount of water available to holders of senior water rights.” *See id.* at 1.

4. IDWR's Curtailment Scenario Analysis Excluded IDFG's Non-Consumptive Rights So No Technical Evidence Exists Supporting Curtailment of IDFG's Non-Consumptive Ground Water Rights

IDWR's analysis did not include curtailment of non-consumptive rights so no technical evidence supports curtailment of IDFG's non-consumptive rights. The curtailment scenario only considered the "cumulative impacts of the consumptive use of groundwater on streamflow" and did not consider IDFG's non-consumptive fish hatchery rights. Jennifer Sukow, Response to Request for Staff Memo - Basin 37 Admin Hearing, May 17, 2021 pg. 16. In an informal deposition on June 1, 2021, IDWR employee Jennifer Sukow readily admitted IDWR did not consider and analyze curtailment of non-consumptive water rights in its curtailment scenario. Ms. Sukow specifically mentioned that IDFG's fish hatchery water rights were not included in her curtailment analysis. She stated IDWR assumed such non-consumptive fish hatchery rights would have no impact on senior surface water holders. Without technical evidence and analysis, it would be inappropriate to curtail IDFG's non-consumptive groundwater rights.

5. It is IDWR's Policy to Exclude Non-Consumptive Water Rights in Situations Where There is a Water Shortage.

IDWR recognizes that non-consumptive water rights "do not deplete the amount of water available to senior water rights" Moroney Aff., Exhibit D. Even when water is scarce, IDWR has repeatedly allowed non-consumptive water use to continue. IDWR has excluded non-consumptive rights from previous curtailment orders, it has excluded non-consumptive rights when issuing moratorium orders, it has excluded non-consumptive water rights when creating Ground Water Management Areas ("GWMA") and Critical Ground Water Management Areas ("CGWMA"), and when administering the Murphy minimum stream flows under the Swan Falls Agreement. This pattern of policy and legal decisions demonstrates a recognition on the part of

IDWR that shutting off non-consumptive water users will have no effect on augmenting water supply when there are water shortages.

The Hayspur Hatchery is a corner stone for IDFG's statewide hatchery program. Rainbow Trout eggs from Hayspur Hatchery supply resident fish hatchery programs throughout Idaho that provide recreational fishing. Anderson Aff. pg. 4, ¶¶ 18, 19, 21. If IDFG was to lose its water due to curtailment, it would take four to six years to re-develop its hatchery Rainbow Trout program. *Id.* The Hayspur Hatchery has developed the YY Trojan Brook Trout, which is an all-male population of Brook Trout that is only capable of producing male off spring. *Id.* ¶ 20. Fish managers use these fish to control feral populations of Brook Trout. *Id.* The YY program is a research project and test platform to base the possible control of unwanted invasive species of fish into public waters. *Id.* Currently, Hayspur provides eggs to six other States to assist in further research in this application. *Id.* Loss of these fish due to water right curtailment would set IDFG back six to eight years. *Id.*

Given the devastating effects that curtailment of IDFG's Ground Water Rights would have on Hayspur State Fish Hatchery, the importance of the hatchery for the fisheries resources of Idaho and surrounding states, and the recognized inefficacy of curtailing non-consumptive rights during times of water shortage, it make sense to exclude IDFG's Ground Water Rights from curtailment in this matter.

a. Previously Issued Curtailment Orders Excluded Non-Consumptive Water Rights

Curtailment orders and notices issued by IDWR in other matters have excluded non-consumptive water rights. Only consumptive ground water rights were curtailed in the Rangen Delivery Call. Moroney Aff., Exhibit E at 3. The same is true of the Clear Springs Foods Delivery Call, and the Surface Water Coalition Delivery Call both of which explicitly stated non-IDFG MOTION AND MEMORANDUM TO EXCLUDE WATER RIGHTS 37-7038, 37-8271, AND 37-8331 FROM CURTAILMENT — 7

consumptive rights were not subject to curtailment. *Id.* at Exhibit F pg. 1, and Exhibit G pg. 1. Since non-consumptive water rights were excluded in other curtailment orders, they should be excluded in this matter too.

b. IDWR Allows New Applications for Non-Consumptive Water Rights to Proceed in Locations Subject to Moratoriums, That Have Been Designated as GWMA's and CGWMA's, or That are Part of the Trust Water Area.

Moratorium orders are issued when there is a determination made that issuance of new water rights should be suspended “to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of the minimum flow provision of the state water plan.” I.C. § 42-1805(7). Moratorium orders sometimes contain carve outs for those seeking water rights for certain purposes. For example, the Amended Moratorium Order for the ESPA and the Boise River Drainage recognized the declining water supplies in these basins and found that a moratorium on new water rights was necessary to protect existing water rights. Moroney Aff., Exhibit H at 1, 4. The order established a moratorium on “the processing and approval of new applications for permits to appropriate water from all surface and ground water sources” in the ESPA and Boise River Drainage. However, the order states “the moratorium does not apply to any application proposing a non-consumptive use of water” *Id.* at 5.

Similarly, IDWR has adopted a policy of allowing new non-consumptive water rights to be issued in locations designated as GWMA's. *Id.*, Exhibit I. And if a management plan does not exist for a CGWMA, IDWR “will issue a water right permit for non-consumptive uses.” *Id.* Finally, IDWR will process new water right applications for non-consumptive uses that are filed within the Trust Water Area. IDWR places the following condition on all new trust water right appropriations for non-consumptive uses:


Administration of this right to satisfy the minimum stream flow water rights in the Snake River at Murphy Gage shall not be required because use of water pursuant to this right is either non-consumptive or the right holder is required to provide ongoing mitigation to offset the depletion of water resulting from the use of this right.

Id. Exhibit J pg. 3.

Conclusion

Based on the foregoing, IDFG respectfully requests the hearing officer enter a final order excluding the IDFG Ground Water Rights from any curtailment order issued in this proceeding.

DATED this 2nd day of June 2021


OWEN H. MORONEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June 2021, I caused to be served a true and correct copy of the foregoing IDFG MOTION AND MEMORANDUM TO EXCLUDE WATER RIGHTS 37-7038, 37-8271, AND 37-8331 FROM CURTAILMENT by placing a copy thereof in the manner listed below:

1. Original to:

Idaho Department of Water Resources Director Spackman PO Box 83720 Boise ID 83720-0098	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: _____ <input checked="" type="checkbox"/> Email: megan.jenkins@idwr.idaho.gov
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1. Copies to:

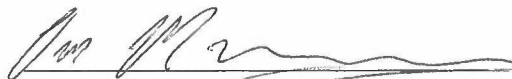
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