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

)	Docket No. AA-WRA-2021-001
IN THE MATTER OF BASIN 37)	
ADMINISTRATIVE PROCEEDING)	IDFG POST-HEARING BRIEF
)	
)	
)	

The Idaho Department of Fish and Game (“IDFG”), by and through its counsel of record, hereby files its post-hearing brief in the above-captioned matter.

Introduction

On May 4, 2021, the *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (“Notice”) provided notice that the Director of the Idaho Department of Water Resources (“IDWR”) was initiating an administrative proceeding

because the Director “believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season.” *Notice* at 1. The Director initiated the proceeding:

[T]o determine whether water is available to fill the ground water rights, excluding water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-1401A(11), within the Wood River Valley south of Bellevue, as depicted in 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.

Id.

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.¹ IDFG’s Ground Water Rights fall within the proposed area of curtailment outlined in the *Notice*.² The purpose of use of IDFG’s water rights are “fish propagation.” IDFG Exhibit 2, 4, 6. Therefore, IDFG’s water rights do not fall under the “domestic” or “stockwater” exclusions outlined in the *Notice*. However, as demonstrated by the evidence presented at hearing, IDFG’s Ground Water Rights are non-consumptive and should be excluded from potential curtailment in this matter because they cannot and will not “affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season.” *Notice* at 1.

¹ IDFG also owns fish propagation water right 37-2695 from Loving Creek and fish propagation water right 37-2489 from Butte Spring. These rights are also used in the Hayspur Fish Hatchery but are surface water rights that are outside the scope of potential curtailment outlined in the *Notice*.

² Throughout this proceeding there was discussion regarding the difference between the boundaries of the potential curtailment area drawn on the map attached to the *Notice* and the boundaries of the potential curtailment area used by Jennifer Sukow in her Staff Memo. IDFG’s water rights fall within the area of potential curtailment under either boundary.

Argument

Some water rights in Idaho contain the following condition: “Use of water under this right shall be non-consumptive.” As explained by the Memorandum Re: Water Right 37-8352—Non-Consumptive Use Condition drafted by IDWR employee Shelley Keen, this condition is known as “standard approval condition 027. . .” IDFG Exhibit 16. 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. emphasis added. IDWR includes this condition when it determines that a use is non-consumptive. *Id.* IDWR “has usually considered non-consumptive water uses to be those that return all the diverted water to a natural water body, either through direct flow to a surface water body or through seepage into the ground.” *Id.* IDWR recognizes that “[n]early 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.” *Id.*

IDWR “usually considers storage water rights to be consumptive” because “[i]mpounding water slows its velocity, exposes it to the atmosphere, and causes a significant portion of the water to evaporate.” *Id.* The memo notes, however, that

determining when the velocity of water in a canal, ditch, or natural water body has been slowed enough to be considered a consumptive use is difficult. *Id.* at 2. To “answer this question, IDWR employs the rule-of-thumb that an off-stream basin is not storage if it can fill in less than 24 hours and it allows water to pass through to a natural surface water body thereafter.” *Id.*

1. Two of IDFG’s Water Rights are Non-Consumptive on their Face

IDFG Water Rights 37-8331 and 37-8271 both contain standard condition 027: “Use of water under this right shall be non-consumptive.” IDFG Exhibits 4 and 6.³ For standard condition 027 to appear on the face of a water right there was 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.” IDFG Exhibit 16 at IDFG0380.

2. IDFG’s Ground Water Right are Non-Consumptive in Fact.

In his testimony IDWR employee Tim Luke stated that IDWR normally considers fish propagation rights to be non-consumptive. *Testimony of Tim Luke*, IDWR Audio

³ Water Right 37-7038 does not contain this condition on the face of the right. IDFG Exhibit 2. However, as discussed below, and as outlined in the testimony of Gregg Anderson, the water from the point of diversion for water right 37-7038 is commingled with and used in the same manner as water rights 37-8271 and 37-8331. *Testimony of Gregg Anderson*, IDWR Audio Recording Basin 37 June 10, 2021 PM Session at 2:31:00–2:31:07. In addition, Ms. Sukow confirmed in her testimony that she assumed water right 37-7038 was non-consumptive and did not include it in her modeled curtailment scenario. *Testimony of Jennifer Sukow*, IDWR Audio Recording Basin 37 June, 7, 2021 PM Session at 1:33:15–1:34:37.

Recording Basin 37 June 8, 2021 AM Session at 2:15:15–2:18:00. He also stated that he was not aware of any fish propagation rights that IDWR has considered to be consumptive in the past and he confirmed that the reason non-consumptive rights are generally not included in curtailments is because it is recognized they cannot deplete the amount of water available to senior users. *Id.* However, Tim Luke also suggested that further fact-specific inquiry was needed to determine if water rights containing the standard non-consumptive use condition 027 were in actual fact non-consumptive. *Id.* at 2:20:15–2:24:00.

The fact-specific evidence presented at the hearing of water use at the Hayspur State Fish Hatchery confirms that use of water under the rights is non-consumptive and does not deplete the amount of water available to senior surface water holders. The testimony of IDFG employee Gregg Anderson provided a detailed description of water use at the Hayspur Fish Hatchery. *Testimony of Gregg Anderson* IDWR Audio Recording Basin 37 June 10, 2021 PM Session at 2:30:26, *see also* IDFG Exhibit 20 and 21. IDFG’s Ground Water Rights are pumped from three separate wells. *Id.* at 2:25:45-2:29:39. The rights are authorized on their face to divert a total of 6 cfs. IDFG Exhibits 2, 4, 6. However, testimony at the hearing demonstrated that these wells actually produce much less water than authorized, closer to 2–3 cfs. *Id.* at 2:25:45-2:29:39; *see also* IDFG Exhibit 24 at IDFG0418.

Water pumped under IDFG’s Ground Water Rights is piped to a concrete headbox where it is commingled with IDFG’s Butte Spring water right 37-2695. *Id.* at 20:30:26. Water within the hatchery complex is completely contained either in pipes or concrete ponds and raceways. *Id.* at 20:30:26–20:38:50. The water used in the hatchery building

and incubation building is contained in plastic trays and concrete vats. *Id.* at 20:31:34–20:33:19, *see also* IDFG Exhibit 20 at IDFG0394. The round ponds are concrete and are also covered by grain silos which protect the fish from predators and also help reduce evaporative losses. *Id.* at 2:34:00, 2:37:45; *see also* IDFG Exhibit 20 at IDFG0394. The large and small concrete raceways are open to the air but they flow continuously reducing the possibility for evaporation to occur. *Id.* at 2:36:40, 2:41:57; IDFG Exhibit 24 at IDFG 0415–0418.

The total inflow of water into the hatchery is variable, but evidence presented at the hearing for flow measurements taken on May 19, 2021 demonstrated an inflow of 7.06 cfs into the hatchery. *Id.* at 2:48:37, *see also* IDFG Exhibit 23. It should be noted that the measured inflow of 7.06 cfs includes water from IDFG’s Butte Spring water right 37-2489, which is a surface water source and not subject to potential curtailment under this proceeding. Direct measurement data for water coming from Butte Spring alone is not available because water right 37-2489 is commingled with IDFG’s Ground Water Rights in the headbox prior to measurement. *Id.* at 20:31:00–20:31:17. However, it is estimated the Butte Spring currently flows at 5.0–5.5 cfs. *Id.* at 2:25:08 ; *see also* IDFG Exhibit 21 at IDFG0403, IDFG Exhibit 20 at IDFG0393, IDFG Exhibit 24 at IDFG0417. Thus, the inflow into the hatchery attributable to IDFG’s Ground Water Rights is about 1.56 cfs.

Water is discharged from the hatchery via pipes a very short distance to the natural channel of Butte Spring Creek. *Id.* at 2:39:20-2:41:22. A culvert with dam board divides the natural channel and creates a settling basin. *Id.* at 2:40:16; *see also* IDFG Exhibit 25 at IDFG046. Water from the hatchery is discharged either into the settling basin or directly into the creek below the settling basin. *Id.* at 2:39:20-2:41:22. The settling basin

is a “full flow” basin approximately 1 acre in size. *Id.* at 3:07:47, *see also* IDFG Exhibit 20 at IDFG0396, IDFG Exhibit 24 (discharge type from settling basin listed as “constant.”). The full-flow settling basin has very low water retention time and turns over approximately 4 times per day. *Id.* at 20:40:40–20:41:12.

The total discharge of water from the hatchery is variable, but evidence presented at the hearing for flow measurements taken on May 19, 2021 demonstrated an outflow of between 7.43 to 8.10 cfs.⁴ *Id.* at 2:50:09–2:55:21, *see also* IDFG Exhibit 26. The outflow from the hatchery exceeds the inflow into the hatchery. *Id.* at 2:55:21-2:55:37. It is likely that springs visible around the settling basin and Butte Spring Creek account for this increase in flow. *Id.* at 2:55:37, 3:08:09. Nonetheless, the measured 7.06 cfs inflow and 7.43 cfs outflow from the hatchery demonstrate that IDFG’s Ground Water Rights “return all the diverted water to a natural body, either through a direct flow to a surface water body or through seepage into the ground.” IDFG Exhibit 16 at IDFG0380.

IDWR recognizes that “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.” IDFG Exhibit 16 at IDFG0380. The evidence presented in the testimony of Gregg Anderson outlining the construction of the hatchery complex demonstrates any evaporative or seepages losses from the hatchery itself are “so small as to be negligible.” *Id.* No parties presented any affirmative evidence demonstrating what evaporative losses were from the hatchery or that they were significant.

⁴ It should be also be noted that the measured outflow of 7.43 cfs includes water from IDFG’s Butte Spring water right 37-2489, which is a surface water source and not subject to potential curtailment under this proceeding.

In addition, the evidence presented in the testimony of Gregg Anderson demonstrates any evaporative losses from the settling basin are “not more consumptive than the water in its natural state.” IDFG Exhibit 16 at IDFG 0380. The basin is small (less than 1 acre) and has a continuous flow of approximately 7.43 cfs running through it. *Id.* 7.43 cfs of water would equal 14.7 acre feet per day, more than enough water to turn the small settling basin over once in 24 hours. IDWR employs the rule that a “basin is not storage if it can fill in less than 24 hours and it allows water to pass through to a natural surface water body thereafter.” IDFG Exhibit 16 at IDFG0381. Thus, the settling basin does not “store” water. In addition, because the water in the settling basin turns over at least once every 24 hours, there is no need to calculate evaporative losses associated with the basin. *See* IDWR Administrator’s Memorandum Application Processing No. 73, Re: Utilization of the 24-Hour Fill Allowance for Impoundments, April 18, 2013 at 3 (stating: “When calculating the 24-hour fill allowance volume, no consideration should be given to gains and losses to the pond volume associated with precipitation, evaporation, or seepage.”). Any evaporative losses occurring from the settling basin are likely equivalent to what would occur naturally in Butte Creek. None of the parties presented any affirmative evidence showing what the evaporative or seepage losses from the settling basin might be or demonstrating they are in any way a significant factor that cause harm to senior surface water users. Therefore, the evidence in the record demonstrates that the evaporative losses from the settling basin are negligible and do not deplete the amount of water available for senior surface water users.

Evidence presented at the hearing demonstrated that there are no other points of diversion for any other water rights on the portion of Butte Creek where discharge from

the hatchery occurs. *Testimony of Gregg Anderson* at 2:39:34. It also demonstrated that water discharged from the hatchery flows from Butte Creek into Loving Creek and into Silver Creek. *Id.* at 2:42:53–2:43:09. Thus, water discharged from IDFG’s hatchery flows directly to the surface water sources from which the senior surface water users divert. If IDFG were to be ordered to curtail its ground water rights, there would be approximately 1.56 cfs less water in Silver Creek for senior surface water users to divert.

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.” IDFG Exhibit 16 at IDFG0380. 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.” *Id.*

3. There is No Technical Evidence in the Record Supporting Curtailment of IDFG’s Ground Water Rights

In her testimony at the hearing, Jennifer Sukow readily admitted that the curtailment scenario she conducted in her Staff Memo considered only consumptive ground water rights and did not include non-consumptive ground water rights. *Testimony of Jennifer Sukow*, IDWR Audio Recording Basin 37 June, 7, 2021 PM Session at 1:26:13–1:27:25, IDWR Exhibit 2 at 16, 17, 29. She testified that she was generally familiar with IDFG’s Ground Water Rights and that, when she ran the baseline scenario of the model, she included them as pumped from the aquifer but offset that pumping with reach gains to the surface water system. *Id.* at 1:26:59–1:28:00. She testified her model run assumed that whatever was pumped under the IDFG Ground Water Rights was

returned to the creek and that under this assumption they would have no impact in the curtailment scenario. *Id.* 1:34:00. As noted above, Ms. Sukow’s assumption that all the water pumped into the hatchery was returned to the surface water system was confirmed by the testimony of Gregg Anderson.

Ms. Sukow’s testimony demonstrates that IDFG’s Ground Water Rights were not considered in IDWR’s modeled curtailment scenario because IDWR recognized that they could not have an impact on senior surface water users. No other parties offered any evidence demonstrating or even suggesting that IDFG’s Ground Water Rights should be included in any potential curtailment. Therefore, there is no technical evidence in the record supporting curtailment of IDFG’s Ground Water Rights.

4. 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” IDFG Exhibit 16 at IDFG0380. Even when water is scarce, IDWR has repeatedly allowed non-consumptive water use to continue. Evidence presented at the hearing demonstrated that IDWR has excluded non-consumptive rights from previous curtailment 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. These policy and legal decisions demonstrate 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.

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. *Testimony of Tim Luke* IDWR Audio Recording Basin 37 June, 8, 2021 AM Session at 2:13:53–2:15:15. Only consumptive ground water rights were curtailed in the Rangen Delivery Call. IDFG Exhibit 11 at IDFG0333; *Testimony of Tim Luke* at 2:27:07–2:28:49. The same is true of the Clear Springs Foods Call, and the Surface Water Coalition Delivery Call both of which explicitly stated non-consumptive rights were not subject to curtailment. IDFG Exhibit 8 at IDFG0322 and *Testimony of Tim Luke* at 2:23:50–2:24:49; IDFG Exhibit 9 at IDFG0325 and *Testimony of Tim Luke* at 2:25:46–2:26:33. Because 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 that Have Been Designated as GWMA's and CGWMA's or that are Part of the Trust Water Area.**

IDWR has previously allowed new non-consumptive water rights to be issued in locations designated as GWMA's. IDFG Exhibit 13 at IDFG0367–0368, *Testimony of Tim Luke* at 2:29:03–2:32:00. And if a management plan does not exist for a CGWMA, IDWR “will issue a water right permit for non-consumptive uses” in CGWMA's too. IDFG Exhibit 13 at IDFG0368. In addition, 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.

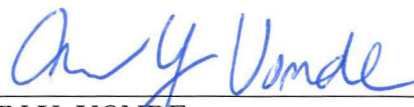
IDFG Exhibit 15 at IDFG0377, *Testimony of Tim Luke* at 2:32:50–2:34:45.

Testimony and evidence provided at the hearing demonstrates the devastating effects that curtailment of IDFG’s Ground Water Rights will have on Hayspur State Fish Hatchery, the importance of the hatchery for the fisheries resources of Idaho and surrounding states. IDFG Exhibit 21, *Testimony of Gregg Anderson* at 3:02:55–3:03:12. Given the inefficacy of curtailing non-consumptive water rights during times of water shortage and it makes sense to exclude IDFG’s Ground Water Rights from curtailment in this matter, just as has been done in multiple decision made by IDWR in the past.

Conclusion

Evidence presented at the hearing demonstrated that IDFG’s Ground Water Rights are non-consumptive both on their face and in fact. The record lacks any technical evidence demonstrating that non-consumptive rights were considered in modeled curtailment scenarios or that non-consumptive rights can in any way deplete the amount of water available to senior surface water users. The evidence demonstrated that IDWR has a settled policy of allowing non-consumptive water use to continue even during times of water shortage. Finally the evidence demonstrated the catastrophic effects curtailment would have on the fishery resources of the state of Idaho. Thus, IDFG’s Ground Water Rights are non-consumptive and should be excluded from curtailment in this matter because they cannot and will not “affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season.”

DATED June 18, 2021



ANN Y. VONDE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of June 2021, I caused to be served a true and correct copy of the foregoing IDFG'S POST-HEARING BRIEF by placing a copy thereof in the manner listed below:

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ANN Y. VONDE
Deputy Attorney General