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JUN 25 2021

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

IGWA'S POST-HEARING BRIEF

Idaho Ground Water Appropriators, Inc. ("IGWA") submits this post-hearing brief pursuant to verbal instructions given by the hearing officer, Director Gary Spackman, at the conclusion of the hearing in this matter on June 12, 2021. As explained below, IGWA contends that this proceeding should be dismissed for non-compliance with the Rules for Conjunctive Management of Surface and Ground Water Resources set forth in IDAPA 37.03.11 ("CM Rules") and attendant principles of due process.

Introduction

The CM 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." CM Rule 20.01. This case involves a situation where junior diversions purportedly cause material injury to holders of senior water rights. However, the Department has not adhered to the CM Rules in this proceeding.

Under the CM Rules, a water user who believes they are suffering injury due to junior-priority groundwater diversions must file a delivery call containing information to support the claim of injury. CM Rules 30.01, 40.01; *In the Matter of the Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irr. Dist.* ("A&B"), 155 Idaho 640, 653 (2013). Notice must be provided and a hearing held to allow juniors who are risk of curtailment to scrutinize and defend against the call. *Clear Springs Foods, Inc. v. Spackman* ("Clear Springs"), 150 Idaho 790, 815 (2011). The Department must evaluate material injury and reasonable use of water based on criteria set forth in CM Rule 42, and consider mitigation plans under CM Rule 43. CM Rules 40.03, 40.01.b. If curtailment is necessary, it may be phased-in over a five-year period, CM Rule 40.01.a,

and a pre-season management plan may be developed to enable farmers to make informed planting decisions, *A&B*, 155 Idaho at 653.

In this case, the Department initiated a proceeding to curtail juniors without requiring seniors to file a delivery call alleging injury. The Department published a notice stating that “pursuant to Idaho Code § 42-237a.g and IDAPA 37.01.01.104, the Director is initiating an administrative proceeding to determine whether water is available to fill ground water rights ... within the Wood River Valley south of Bellevue, as depicted in the attached map.” The notice does not cite the CM Rules, and Department staff member Tim Luke reportedly testified that the right to provide mitigation under the CM Rules is not available in this proceeding. The Department appears to be acting on the premise that it has independent authority under Idaho Code § 42-237a.g to perform conjunctive management and curtail junior groundwater diversions without regard to the CM Rules.

As explained below, the Department cannot disregard the CM Rules when undertaking conjunctive management. While Idaho Code § 42-237a.g empowers the Department to “supervise and control the exercise and administration of all rights to the use of ground waters” and to “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,” the CM Rules define the procedures the Department must follow when exercising that power.

Equally concerning is the Department’s initiation of this proceeding in May, after farmers had already planted crops, followed by a hurried and truncated hearing process. Given the complexities of conjunctive management, due process requires a more deliberate procedure that gives juniors a fair opportunity to understand and scrutinize the call and prepare for curtailment.

Analysis

Idahoans have a constitutional right to divert and use water: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied.” Idaho Const., Art. 15, § 3. Of course, this right is subject to the availability of water, which depends upon Mother Nature. When the demand for water outstrips supply, “priority of appropriation shall give the better right as between those using the water.” Idaho Const., Art. 15, § 3.

Responsibility for distributing water under the prior appropriation doctrine is vested with the Department, but the Department does not have blanket authority to act as it sees fit. Rather, it must operate within specific statutory authorities granted by the Idaho Legislature. The Legislature has authorized the Department to curtail beneficial use of water (i) within water districts pursuant to Chapter 6, Title 42, Idaho Code, and (ii) pursuant to the Ground Water Act, Idaho Code §§ 42-226 to 42-238b.

Water districts were historically used to distribute surface water. In surface water systems the water supply resets annually and runoff follows a familiar pattern established over many years of practice. Farmers typically have a good idea of how much water will be available to them when they make planting decisions in the spring. As water supplies dwindle during summer, the water-master channels water from juniors to seniors in a matter of hours or days by opening and closing headgates and shepherding water through streams, rivers, and canals. Application of the priority system in this manner maximizes beneficial use of Idaho’s surface water resources.

By contrast, groundwater supplies change slowly over extended periods, and hydraulic connectivity between senior and junior rights is often complex and tenuous. In addition, groundwater cannot be channeled from juniors to seniors through canals and ditches. When a groundwater pump is shut off, the hydraulic effect emanates outward through the aquifer in 360 degrees. Only a

fraction of the curtailed water may accrue to senior users, it may take months or years to arrive, and it may arrive at a time the senior doesn't need it.

Blind application of priority curtailment within aquifers would enable the owner of a shallow well to block all future development of the aquifer, thereby minimizing beneficial use of the resource. Therefore, the Legislature enacted the Ground Water Act in 1951 to provide a different method of priority administration within aquifers based on maintenance of reasonable pumping levels. Idaho Code § 42-226. Given the delayed effects of pumping and curtailment, the Act required, until recently, that curtailment orders be issued by September 1 prior to the irrigation season in which curtailment takes effect. 2016 Idaho Sess. Laws., ch. 297, sec. 1, p. 848; 2018 Idaho Sess. Laws, ch. 41, sec. 1, p. 103. These adjustments to priority administration aim to achieve “full economic development of underground water resources.” Idaho Code § 42-226.

While the two different approaches to priority administration work well in their separate spheres (as between surface users and as between groundwater users), they do not play well together. Consequently, until the Legislature provided for conjunctive management, the Department administered surface water and groundwater separately, even where hydraulic connectivity was obvious.

In 1992 the Legislature opened the door to conjunctive management by amending Chapter 6, Title 42, Idaho Code, to authorize water districts to regulate the distribution of groundwater as well as surface water. 1992 Idaho Sess. Laws, ch. 339, §§ 2 & 4, p. 1015. The first conjunctive management delivery call was filed soon thereafter, and in 1994 the Idaho Supreme Court affirmed the Department's responsibility to conjunctively manage hydraulically connected surface water and groundwater sources. *Musser v. Higginson*, 125 Idaho 392 (1994).

In an effort to reconcile the incongruencies between priority administration within surface water systems versus aquifers, the Department adopted special rules to govern conjunctive management. The CM Rules were promulgated in 1994 under Idaho Code § 42-603 which authorizes the Department “to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.” The Rules “prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.” CM Rule 1. They reference and implement various provisions of the Ground Water Act, and are intended to “acknowledge all elements of the prior appropriation doctrine as established by Idaho law,” CM Rule 20.02, including “the traditional policy of reasonable use of both surface and ground water,” “optimum development of water resources in the public interest,” and “full economic development as defined by Idaho law,” CM Rule 20.03.

Conjunctive management is exceedingly complex. It requires “a great deal of prior analysis and planning toward determining the proper apportionment of water to and among the various water right holders according to their priority.” *A&B*, 155 Idaho at 651. The Director must “make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development.” *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 876 (2007). The CM Rules “give the Director the tools by which to determine ‘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 [others],’” *Id.* at 878 (quoting *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422 (1997)).

Given the complexities of conjunctive management and the severe economic repercussions of curtailment—not only for individual farmers but for local and state economies—due process

requires notice and a hearing before the Department makes curtailment decisions under the CM Rules. *Clear Springs*, 50 Idaho at 815. Conjunctive management does not normally present “a special need for very prompt action without notice and an opportunity for a hearing” since “groundwater pumping [does] not cause a sudden loss of water discharge from the springs” and “curtailment would not quickly restore the spring flows.” *Id.* Rather, due process affords a deliberate hearing process where all parties are “fully advised of the claims of the opposition and of the facts which may be weighed against [them],” and are “given full opportunity to test and refute such claims and such facts, and present his side of the issues in relation thereto, is essential to due process.” *Application of Citizens Utilities Co.*, 82 Idaho 208, 215 (1960). A fair hearing “is not a mere formality—it is an integral component of due process because it provides a claimant with an opportunity to be heard in a meaningful time and in a meaningful manner.” *Ayala v. Robert J. Meyers Farms*, 165 Idaho 355, 362 (2019). Thus, application of the CM Rules must follow a deliberate process that carefully examines claims of material injury and reasonable use of water and enables junior users to make informed planting decisions based on pre-season management plans that are thoroughly vetted. *A&B*, 155 Idaho at 653.

Compliance with the CM Rules is not optional. They expressly 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.” CM Rule 20.01. “Courts generally hold that an administrative agency is bound by and must follow its own regulations, including procedural regulations, even if the adoption of the regulations was discretionary.” 2 Am. Jur. 2d Administrative Law § 234. Under Idaho law, “IDAPA rules and regulations are traditionally afforded the same effect of law as statutes.” *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908-909 (2004). Therefore, the Department cannot disregard the CM Rules in any conjunctive management proceeding.

The Department has not adhered to the CM Rules in this case. First, there has been no delivery call by holders of senior rights. The Department cannot assume that the diversion of water under a junior right automatically injures the holder of a senior right. Farmers regularly raise crops with less than the maximum amount of water authorized by their water rights. Injury occurs only if the senior does not receive enough water to accomplish their beneficial use. *See, e.g. A&B*, 155 at 650 (“beneficial use acts as a measure and limit upon the extent of a water right”), *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 328-324 (1924) (“it is against the public policy of the state, as well as against express enactments, for a water user to take from an irrigation canal more water, of that to which he is entitled, than is necessary for the irrigation of his land”), Idaho Code § 42-104 (“The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases”). The filing of a delivery call, including a description of the alleged injury and supporting information, is essential to put the Department on notice of the alleged injury and to give juniors a fair opportunity to understand and scrutinize the claim.

Second, the CM Rules prescribe the standards for evaluating material injury and reasonableness of water diversions. CM Rule 42. The Rules also grant authority to file mitigation plans and prescribe the factors that will be considered in evaluating mitigation plans. CM Rule 43. The Department does not appear to be applying these standards, but instead acting independently under Idaho Code § 42-237a.g which contains no procedural guidelines, no standards for evaluating injury and reasonable use, and no right to submit mitigation plans. After all the years of litigation that IGWA has endured to understand, define, and refine the Department’s authorities under the

CM Rules, the notion that the Rules can now be jettisoned and replaced with an undefined and untested process under Idaho Code § 42-237a.g is extremely troubling to IGWA and its members.

Third, the timeframe within which the Department initiated and prosecuted this proceeding is alarming and anathema to what due process requires. Commencing in May would not be problematic if the proceeding were designed to have a pre-season management plan in place for 2022. But rushing to hearing in a matter of weeks indicates the Department is considering curtailment in 2021. The truncated hearing schedule provided woefully insufficient time for juniors to fully understand and fairly scrutinize the seniors' claims of injury, the reasonableness of the seniors' diversion and use of water, and other complexities of conjunctive management. And it places juniors in the untenable position of not having curtailment threatened until after crops had been planted. Instead of a pre-season management plan that enables farmers to make informed planting decisions, it has been shock and awe for the juniors. There will be excessive and unnecessary destruction to Idaho's agricultural economy if conjunctive management decisions are sprung helter-skelter in this manner.

Conclusion

For the reasons set forth above, IGWA respectfully requests that the Department dismiss this proceeding on the basis that it has not complied with the CM Rules, and allow any senior user who claims material injury to file a delivery call under the CM Rules as required by law.

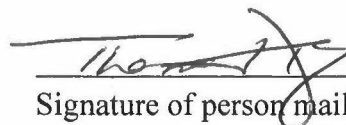
DATED this 21st day of June, 2021.

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CERTIFICATE OF MAILING

I certify that on this 21st day of June, 2021, the foregoing document was served on the following persons in the manner indicated.



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