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

IN THE MATTER OF DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS
HELD BY OR FOR THE BENEFIT OF
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

Docket No. CM-DC-2010-001

**SURFACE WATER COALITION'S
OPPOSITION TO GROUNDWATER
USERS' MOTION TO RE-SET
HEARING DATES**

COME NOW, 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 ("Surface Water Coalition," "Coalition," or "SWC"), by and
through counsel of record, and pursuant to the Department's Rules of Procedure (IDAPA
37.01.01.220) hereby file the following response in opposition to the *Motion to Re-set Hearing*

Dates (“*Motion*”) filed jointly by the Coalition of Cities, Cities of Idaho Falls and Pocatello, the Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Ground Water District, and Bingham Ground Water District (hereinafter collectively referred to as “Groundwater Users”) on May 22, 2023. This response is supported by the attached exhibits and the *Declaration of David Colvin* filed together herewith. For the reasons set forth below, the Director should deny the Groundwater Users’ motion, again.

BACKGROUND / APPLICABLE RULE

The Groundwater Users identify no basis or applicable rule for their present “motion.” Presumably it is a second motion for reconsideration of the Director’s denial of their original motion for continuance. As indicated in the *Order Denying Motion for Reconsideration of Denial of Continuance* (“*Reconsideration Order*”), the Director has discretion to “rescind, alter or amend any interlocutory order” pursuant to Rules 710 and 711. *See* IDAPA 37.01.01.560. For the reasons contained in that *Order* and as set forth below, the Director should again deny the present effort to delay the hearing in this case.

The Surface Water Coalition submits the Director properly exercised his discretion in denying the Groundwater Users’ repeated requests and that there is nothing in the present *Motion* that would warrant reconsidering the prior reasoning or decisions.

ARGUMENT

I. The Groundwater Users Offer No New Facts or Argument Warranting a Delay in this Hearing and Ultimately Conjunctive Administration of Junior Priority Ground Water Rights During the 2023 Irrigation Season.

The Groundwater Users offer no new facts that would justify any further delay in this case. Instead, they repeat the same claims the Director fully considered and addressed in the *Reconsideration Order*. *See generally, Motion* at 2-3. While the Director provided for remote

participation for consultants that cannot travel to Idaho or will be voluntarily out-of-state at that time, that accommodation is overlooked.¹ *See Order* at 7. The Groundwater Users are familiar with remote participation as evidenced by their counsel’s participation in the depositions of IDWR staff last week as well as their consultants full participation in the Technical Work Group meetings hosted by the Department over a six-week period beginning in November of 2022. In fact, it was at those meetings where information was presented that ultimately resulted in the modifications to the Methodology in the *Fifth Order*.

The Groundwater Users ask the Director to move the hearing presently set for June 6-10 to June 19-23.² *Motion* at 2. However, even with this delay they “do not believe that moving the hearing dates back comport with necessary due process this case requires and do not hereby waive any arguments relative to the process.” *Id.* In other words, the Groundwater Users admittedly really don’t believe moving the hearing two weeks matters or addresses the concerns alleged. Perhaps if the requested “re-set” acknowledged satisfaction of alleged due process concerns, the motion and its basis would look differently. However, they make no such claim. The reality is as pointed out in the Groundwater Users’ briefing is that they want the delay, not to prepare for hearing, but to primarily provide more time for the processing of their district court filings.

¹ The Groundwater Users’ request to move the hearing to June 19th would still require Ms. Sigstedt to participate remotely as she indicated she could not travel out-of-state until mid-July. *See Sigstedt Dec.* Accordingly, that is not a reason to reconsider the Director’s order. Moreover, IGWA admits that “Jaxon Higgs will be available for hearing.” *Motion* at 2. Even though Mr. Higgs “will be out of the country,” the Director’s remote accommodation addresses that concern. *See Order* at 7. Mr. Higgs does not indicate where he will be in Mexico but presumably he would be located in either the Mountain or Central time zone, i.e. a one hour difference from Boise, Idaho.

² The Coalition disputes the Groundwater Users’ characterization of their discussions concerning moving the hearing date. *See Motion* at 2, n. 1. Each time the Groundwater Users’ counsel requested moving the hearing, counsel for the Coalition advised of the problems with delaying administration to their clients’ senior water rights and the fact that IGWA’s *Notice of Mitigation* did not cover all affected junior ground water rights. As acknowledged by the Director, senior water right holders are entitled to timely administration and the schedules of counsel and consultants do not trump that statutory duty.

Since the denial of their original motion for reconsideration the Groundwater Users have filed three separate lawsuits against the Director and the Department in Ada County District Court. *See generally, IGWA et al. v. IDWR*, Case No. CV01-23-8187; *City of Pocatello et al. v. IDWR*, Case No. CV01-23-8258; *City of Pocatello et al. v. IDWR*, Case No. CV01-23-8306. In those actions the Groundwater Users seek among other relief, a stay, injunctive relief, and writs of mandamus and prohibition. Despite exercising their statutory rights and requesting an administrative hearing on the Director’s *Fifth Order* pursuant to Idaho law, the Groundwater Users now ask the Director to delay that hearing in order to accommodate their lawsuits against the State of Idaho. *Motion* at 3 (“[r]esetting the hearing to June 19 will allow due consideration of the pending Complaint and Writ Action”). Stated another way, the Groundwater Users are not declaring the two-week delay would satisfy their due process claims, but instead are effectively asking the Director to voluntarily delay the administrative case proceeding so that the district court might enjoin it altogether. Whereas the State of Idaho and all parties involved will likely spend significant time and resources on these cases and the multitude of motions, it is likely such matters will be dismissed as a matter of law. *See e.g. Order Denying Application for Temporary Restraining Order (SVGWD v. IDWR*, Blaine County Dist. Ct., Fifth Jud. Dist., Case No. CV07-21-243, May 27, 2021); *Order Granting Motion to Dismiss (IGWA v. IDWR*, Jerome County Dist. Ct., Fifth Jud. Dist., Case No. CV27-22-945, Dec. 8, 2022) (“Since IGWA has an adequate administrative remedy available to it which has not been exhausted under Idaho Code § 42-1701A(3), its *Petition* must be dismissed”). The Director should see through the Groundwater Users’ requested “re-set” for what it is, a delay tactic that will cost all parties substantial resources and attorneys fees, and deny it accordingly.

Most importantly, as noted before, any delay in the hearing would effectively delay conjunctive administration during the 2023 irrigation season. *See generally, SWC Opposition to Groundwater Users' Motion for Reconsideration* (May 8, 2023). Whereas the Ground Water Districts' breach of the 2021 Stipulated Mitigation Plan took several months to address, it created great concern for potential curtailment at the end of the growing season. Any additional delay in this hearing has the potential to re-create that same situation, including for groundwater users that do not have an approved mitigation plan.

Indeed, the Director has stated that he “will not be issuing a curtailment order until after a hearing in this matter so that junior ground water users have the opportunity for a hearing before being curtailed.” *Order* at 6. This may include addressing the Ground Water Districts' 2022 breach of the Stipulated Mitigation Plan. Although over-pumping by certain Districts last year will have continuing impacts on the Snake River into this irrigation season, any delay in administration could reduce the effectiveness of any curtailment remedy if necessary.

For example, even if the Director issued a final order within a week of the close of the scheduled hearing, any actual curtailment could be delayed beyond that timeframe. For example, in 2022, after issuing the Steps 1-3 As Applied Order on April 20, 2022 forecasting a projected injury of 162,000 acre-feet, the Director stated that junior ground water users who did not establish their ability to mitigate by May 1, 2022 would be curtailed effective at 12:01 a.m. on May 20, 2022. *See Final Order Curtailing Ground Water Rights Junior to December 25, 1979* (CM-DC-2010-001; May 5, 2022). In other words, the actual curtailment was ordered to occur approximately two (2) weeks after the order was issued.³ If a similar schedule were to apply here, delaying the hearing to June 19-23 could foreseeably forestall any required curtailment to

³ The Director has ordered curtailment to occur sooner within the issuance of an order following hearing as evidenced in the Basin 37 administration case. *See Final Order* (Docket No. AA-WRA-2021-001, June 28, 2021).

the middle of July. This sort of delay in administration is unacceptable to the Coalition and their landowners and shareholders, particularly for entities like TFCC that typically rely solely on reach gains from ESPA aquifer discharges for the source of their natural flow water rights. Given the trends over the last several years, it is likely that natural flow declines will continue and would not satisfy increasing irrigation demands throughout the summer.

Further, the Director aptly highlighted the problems and issues with IGWA's *Notice of Mitigation*. See *Order* at 6. Again, IGWA's representative districts do not represent and have no authority to mitigate for any junior groundwater right holders who are not members of a groundwater district. See I.C. § 42-5224(6). This is also confirmed in IGWA's filing wherein the districts represent they are only proposing to mitigate for their members. See *Notice* at 2-3 ("These districts' proportionate shares of the 63,645 acre-feet demand shortfall predicted in the April 2023 As-Applied Order are as follows . . ."). Stated another way, the *Notice* does not indicate that the districts will mitigate for the entire predicted demand shortfall of 75,200 acre-feet.

Any delay in the schedule would inevitably delay administration of any affected junior ground water rights not covered through an approved any effectively operating mitigation plan. Every day that passes furthers the potential that unmitigated pumping will continue to injure the Coalition's senior surface water rights without adequate mitigation as the irrigation season has already commenced throughout the various administrative basins across the ESPA.

Further exacerbating potential injury this year is the deteriorating water supply evidenced by the U.S. Bureau of Reclamation's revised May 1st streamflow forecast and the recently released 2023 aquifer sentinel well index. See Ex. A; see also, Ex. A to *Dec. of David Colvin*. The reduced surface water supply forecast due to increased temperatures and lack of spring

precipitation, as well as declining groundwater levels are likely reducing hydraulically connected reach gains in the Near Blackfoot to Minidoka reach of the Snake River this year. Moreover, it is still uncertain at this time whether storage water supplies will completely fill. *See* Ex. B. Delaying administration under such worsening conditions is not warranted and is contrary to Idaho law.

The Coalition submits the Director properly found that after “considering the need of the senior water user to have timely administration versus the ground water users desire to have more time to prepare for hearing, the Director will adhere to the current schedule.” *Order* at 5 (emphasis added). The Coalition requests the Director to deny the Groundwater Users’ motion to re-set the hearing accordingly and confirm that the hearing is still scheduled for June 6-10, 2023 as previously ordered.

II. Coalition Consultant Conflict.

In addition to the reasons explained above, delaying the hearing until June 19th would create a conflict for one of the Coalition’s primary consultants, David Colvin, who will be out of the country and unavailable from June 8-21, 2023. *See Dec. of David Colvin.* Mr. Colvin has been assisting the Coalition for several years, including through the Technical Working Group process last fall and winter. Mr. Colvin is traveling to Vietnam, which would have an extreme time difference (13 hours ahead) making remote participation problematic. *See id.* Mr. Colvin has made travel arraignments and is planning on attending the hearing June 6-7. *See id.*

Whereas moving the hearing would conflict with this schedule which has been set for weeks, the Coalition opposes the Groundwater Users’ *Motion* on this basis as well.

CONCLUSION

In conclusion, the Coalition submits the Director properly exercised his discretion in denying the Groundwater Users’ motion for continuance the first two times. The administrative hearing requested by the Groundwater Users and the Coalition was set over four weeks ago on April 21st and is set to begin two weeks from today. Since the parties have already been preparing for the current schedule, including deadlines set for May 30th and the June 6-10 hearing, there is no new reason to delay that schedule, particularly when the Groundwater Users are seeking that delay to accommodate their lawsuits against the State.

Time is still of the essence for conjunctive administration this irrigation season and given present aquifer levels and likely decreased reach gains this summer, any delay in the process stands to further harm the Coalition’s senior surface water rights. The Coalition therefore submits the Groundwater Users’ motion to re-set the hearing should be denied.

DATED this 23rd day of May, 2023.

MARTEN LAW LLP

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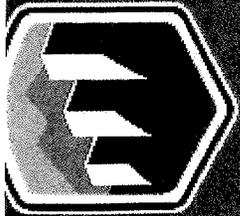
CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2023, I served a true and correct copy of the foregoing on the following by the method indicated:

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Exhibit

A



— BUREAU OF —
RECLAMATION

Snake River Agency Meeting/Public Information Meeting

May 18, 2023

Upper Snake Reservoir Operations

May 2023 Volume Runoff Forecasts

CURRENT MONTHLY FORECAST SUMMARY
MAY 1, 2023

FORECAST POINT	FORECAST PERIOD	1991-2020 AVERAGE (KAF)	FORECAST (KAF)	PERCENT NORMAL
*** HEISE	MAY~JUL	2898	3200	110%
JACKSON LAKE	MAY~JUL	701	734	105%
ISLAND PARK	MAY~JUL	158	180	114%
TETON	MAY~JUL	303	345	114%
*** RIRIE	MAY~JUN	35	100	289%
*** LITTLE WOOD	MAY~JUL	52	95	184%

* Coordinated with USACE

Mid-May Heise Forecast Reduced to 105% of Normal
due to dry conditions



Exhibit B

WATER REPORT – May 16, 2023

Total system natural flow continues to be sufficient to fill irrigation rights currently diverting water that are senior to the American Falls Reservoir 1921 priority storage right while continuing to accrue new storage into the 1917-priority Henrys Lake and 1913-priority Jackson Lake storage rights. It appears the American Falls storage right will reach 100% accrual near the end of this week, at which time the 1935-priority Island Park, 1936-priority Grassy Lake, 1939-priority Palisades, and perhaps the 1969-priority Ririe Reservoir space will begin accruing additional storage under their priorities.

All system natural flow is expected to be delivered to senior canal rights or stored to reservoir storage rights without spilling past Milner for at least the next few weeks. Whether the natural flow will be sufficient to fill the entire reservoir system and spill excess water past Milner probably won't be known for certain until mid-June.

CALENDAR

May 17th – Henrys Fork Watershed Council Meeting beginning at 9 AM at Fremont County Annex Building in St. Anthony or via Zoom link <https://us02web.zoom.us/j/88172196681>.

May 18th – Jackson Lake Operations Public Information Meeting beginning 3pm at Teton County Library in Jackson, Wyoming.