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DEPARTMENT OF
WATER RESOURCES

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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY AND 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-MP-2016-001
IN THE MATTER OF IGWA'S SETTLEMENT AGREEMENT MITIGATION PLAN	**IGWA's Objection to Notice of Intent to Take Official Notice of IGWA's 2021 Settlement Agreement Performance Report and Supporting Spreadsheet; and Request for Hearing**

Idaho Ground Water Appropriators, Inc. ("IGWA")[1] hereby objects to the *Notice of Intent to Take Official Notice of IGWA's 2021 Settlement Agreement Performance Report and Supporting Spreadsheet* ("Notice") issued August 18, 2022, in the above-captioned matter. As explained below, the Director cannot lawfully take official notice of IGWA's 2021 performance report[2] without granting a hearing and allowing IGWA to present evidence concerning the report and any action the Director may take in reliance thereon. For the Director to selectively take official notice of certain facts, while precluding the parties from presenting their own evidence to counter or rebut such facts, would violate the constitutional right to due process, the Idaho Administrative Procedures Act, and the rules of procedure of the Department, as explained below.

[1] IGWA is an umbrella organization that represents the common interests of the nine ground water districts who are parties to the IGWA-SWC Settlement Agreement: North Snake Ground Water District, Carey Valley Ground Water District, Magic Valley Ground Water District, American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Henry's Fork Ground Water District, and Madison Ground Water District.

[2] References to "IGWA's 2021 performance report" include the supporting spreadsheet.

Therefore, IGWA requests that the Director state the purpose for which he intends to take official notice of IGWA's 2021 performance report and hold an evidentiary hearing before taking any action in reliance thereon.

Introduction

The Notice states that it is issued in response to a request by the Surface Water Coalition ("SWC") to address an alleged breach of the IGWA-SWC Settlement Agreement. As explained in *IGWA's Supplemental Response to Surface Water Coalition's Notice of Steering Committee Impasse* ("IGWA's Supplemental Response") filed August 12, 2018, in this matter, the Director cannot lawfully take action on the SWC request unless and until the SWC files a motion that complies with the rules of procedure of the Department, and the parties are given an opportunity to submit evidence and file briefs in accordance with the rules. (IGWA's Response, p. 2-3.) IGWA's Supplemental Response also explains that if the Director intends to look outside the four corners of the Agreement to interpret its meaning, Idaho law requires the Director to consider parol evidence to determine the intent of the parties at the time the Agreement was entered. *Id*. at 7-8.

The Notice does not request a motion from the SWC, nor set a hearing, nor otherwise invite evidence from the parties. From this, IGWA infers that the Director intends to take action on the issues listed in the *SWC's Notice of Steering Committee Impasse / Request for Hearing* without first holding a hearing to develop an evidentiary record. Should the Director take action to interpret the Agreement and determine whether a breach occurred, without allowing IGWA to present evidence concerning the issues, it would be an egregious violation of due process, in utter disregard of the Idaho Administrative Procedures Act and Department rules of procedure of the. Such reckless disregard of the law would necessitate an immediate appeal and request for stay, and would entitle IGWA to bring a cause of action against the Director under 42 U.S. Code section 1983 for deprivation of the civil rights of IGWA and its member districts, and a claim for attorney fees and costs under Idaho Code § 12-117 for acting without a reasonable basis in law or fact.

Argument

A. Due Process entitles IGWA to a hearing and opportunity to present evidence.

A fundamental right afforded by the United Stated Constitution is that "No state … shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. Under Idaho law, "individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state." *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977). Due process applies to water right administration by the Department. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815-16 (2011).

Due process entitles property owners to "an opportunity for a hearing before he is deprived of any significant property interest." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). The United States Supreme Court has explained why a hearing is required:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession

> of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon application of and for the benefit of a private party.

Id. at 80-81. The hearing requirement "is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." *Id*. at 90, fn 22.

Importantly, the opportunity for a hearing must be granted "*before* he is deprived of any significant property interest, except for extraordinary situations when some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Id*. at 81 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (emphasis in original)). The bar is high for depriving a property interest before holding a hearing. It is allowed only in "extraordinary" situations, after taking into account

> the importance of the private interest at stake, the risk of an erroneous deprivation of rights given the processes at hand, the probable value, if any, of additional or substitute procedural safeguards and the government's interest and including the function involved and the fiscal and administrative burdens that the additional and substitute procedural requirements would entail.

LU Ranching Co. v. U.S. (In re Snake River Basin Adjudication Case No. 6), 138 Idaho 606, 608 (2003) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (internal quotations omitted). Even if extraordinary situations warrant an immediate deprivation of property, a hearing still "must be granted at a meaningful time and in a meaningful manner." *Id*. at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In *Nettleton v Higginson*, the owner of a surface water right (Nettleton) argued that he is entitled to a hearing before his water right is curtailed. 98 Idaho 87 (1977). The court rejected that argument on the basis that Nettleton had not been deprived of a "significant property interest" since his water right was merely a claimed "constitutional use" right which had not been proven or decreed. *Id*. The court stated in dicta that administration of surface water rights by a watermaster under Idaho Code § 42-607 may constitute "extraordinary situations when postponement of notice and a hearing is justified," but confined that reasoning to "the present case." *Id*. at 92.

The Idaho Supreme Court has acknowledged important differences between the administration of surface water rights and ground water rights. In *American Falls Reservoir Dist. No. 2 vs. Idaho Dept. of Water Resources* ("*AFRD2*"), the Court reversed the district court's conclusion that "when a junior diverts or withdraws water in times of water shortage, it is presumed there is injury to a senior," reasoning that the conclusion was based on precedent in *Moe v. Harger*, 10 Idaho 302 (1904), which was "a case dealing with competing surface water rights and this case involves interconnected ground and surface water rights." 143 Idaho 862, 877 (2007). "The issues presented," the Court explained, "are simply not the same." *Id*.

These differences compelled the Idaho legislature to adopt an entirely new section of code (the Ground Water Act) to address the special needs of groundwater administration. Unlike surface water administration under Idaho Code section 42-607, which involves rote regulation by a watermaster, administration under the Ground Water Act originally required that delivery calls be made in writing, under oath, stating "the facts upon which the claimant founds his belief that the use of his right is being adversely affected." Idaho Code § 42-237b (repealed). If the Director found that the call meets the minimum statutory requirements, he "shall issue a notice setting the matter for

hearing before a local ground water board." *Id*. Only after a hearing is held would a curtailment decision be made. Idaho Code § 42-237c (repealed). This process was followed in a delivery call by surface users against groundwater users in *Stevenson v. Steele*, 93 Idaho 4 (1969). The call was made at the beginning of the irrigation season, and the hearing was not completed until October. The decision was then appealed to the district court, followed by an appeal to the Idaho Supreme Court. The Supreme Court decision gives no indication that curtailment could have been warranted before the hearing was held.

The Court had much earlier emphasized the importance of fully examining all evidence before ordering curtailment of groundwater use. In *Jones v. Vanausdeln*, the Court refused to curtail groundwater pumping for lack of clear evidence that the senior was injured, explaining that "very convincing proof of the interference of one well with the flow of another should be adduced before a court of equity would be justified in restraining its proprietors from operating it on that ground." 28 Idaho 743, 749 (1916).

More recently, the Court reaffirmed that when it comes to curtailing groundwater rights, "It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts." *AFRD2* 143 Idaho at 875 (emphasis added).

More recently still, in Clear Springs Foods delivery call case the Court held that "the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for a hearing." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815 (2011). The Court explained that a hearing must be held prior to ordering curtailment because "groundwater pumping did not cause a sudden loss of water discharge from the springs," and "[c]urtailment would not quickly restore the spring flows." *Id*.

In this case, there is no "extraordinary circumstance" that requires the director to interpret the IGWA-SWC Settlement Agreement without first holding a hearing and taking evidence from the parties. This situation does not involve priority administration by a watermaster under Idaho Code section 42-607; it involves a dispute over interpretation of a contract. Even when a breach occurs under the Agreement, the parties have agreed that immediate curtailment is unnecessary; rather, the Agreement establishes a steering committee which is vested with responsibility to identify actions to cure the breach, after which the breaching party must be given 90 days' notice to implement the curative actions. Even after the Steering Committee reached an impasse, the SWC did not file a motion requesting curtailment; it asked only for a status conference, illustrating that the circumstances do require that the Director interpret the Agreement or take action to enforce the Agreement before holding a hearing.

The present circumstance illustrates why IGWA and the SWC formed a steering committee to identify curative actions, rather than simply turn a breaching party over to the Department for curtailment. First and foremost, the parties to the Agreement are ground water districts, yet curtailment would be imposed upon individual farmers within those districts, almost all of whom are in compliance with their district's mitigation program. If the Director orders blanket curtailment of all members of a particular district, the result would curtailment of water users who individually are in compliance with their responsibilities under the Agreement, resulting in a government taking of private property without due process or just compensation. This is a major reason why a steering committee was formed to determine appropriate actions that must be taken to cure a breach.

In addition, curtailment by the Department would be ineffective during years when there is no curtailment date under the Methodology Order, and curtailment would not be pragmatic at other times, including the present circumstance. If the Director were to order curtailment now, with only

a few weeks left in the irrigation season, the consequences would be drastic (killed crops, breached contracts, loan defaults, etc.). This would not only hurt IGWA members, it would also hurt members of the SWC whose dairies and other businesses rely on commodities grown by IGWA members. By contrast, curtailment would accrue only a small amount of additional water to SWC storage accounts for use next year, which could be negated by above-average winter snowfall.

There is no reason why a hearing cannot be held before the Director undertakes to interpret or enforce the Agreement. Even if evidence presented at a hearing demonstrated that curtailment was justified sooner, impacts from continued pumping for the remainder of the 2022 irrigation season could be remedied by requiring ground water districts to deliver rented storage to the SWC or suffer additional diversion restrictions during the 2023 irrigation season.

B. The Idaho Administrative Procedures Act also entitles IGWA to a hearing and opportunity to present evidence.

To ensure that Idaho agencies provide due process, the Idaho Administrative Procedures Act ("APA") states that any agency proceeding "which may result in the issuance of an order is a contested case" (Idaho Code § 67-5240), that a contested case may be disposed of informally only "by negotiation, stipulation, agreed settlement, or consent order" (Idaho Code § 67-5240); that formal disposition of a contested case requires a hearing "to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary" (Idaho Code § 67-5242(3)(a)); and that all parties shall have "the opportunity to respond and present evidence and argument on all issues involved" (Idaho Code § 67-5242(3)(b)).

The APA allows state agencies to take action without a hearing, but only "in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate government action." Idaho Code § 67-5247(1). Even then, the agency must "proceed as quickly as feasible to complete any proceedings that could be required." Idaho Code § 67-5247(4).

In this case, immediate curtailment is not necessary to avoid immediate danger to public health, safety, or welfare, as explained above. Therefore, the APA requires that a hearing be held, and that IGWA and the SWC be permitted to present evidence, before the Director can undertake to interpret or enforce the Agreement.

C. Department rules of procedure also entitle IGWA to a hearing and opportunity to present evidence.

In keeping with due process and the APA, the rules of procedure of the Department require the Department to "base its decision in a contested case on the official record in the case," and to "maintain an official record including the items described in section 67-5249, Idaho Code" (Rule 650.01), to hold a hearing (Rules 550-553) where testimony is received under oath (Rule 558), and to take evidence "to assist the parties' development of a record, not excluded to frustrate that development" (Rule 600).

Rule 602 allows the Director to take official notice of certain documents, but this must occur within the context of a contested case hearing. The rules neither contemplate nor allow the Director to selectively take judicial notice of hand-picked facts while depriving the parties of the opportunity to present evidence. Rule 602 specifically requires that "[p]arties must be given an opportunity to contest and rebut the facts or material officially noticed."

Moreover, Rule 602 does not authorize the Director to take official notice of just any fact, but "of generally recognized technical or scientific data or facts within the agency's specialized knowledge and records of the agency." Rule 602. IGWA's 2021 performance report was created by IGWA and is within the specialize knowledge of IGWA and its consultants. It was not created by Department staff and is not within the specialized knowledge of the Department. While IGWA or the SWC may be able to present it as evidence at a hearing, it does not fall within the category of facts for which the Department may take official notice.

D. If the Director disregards IGWA's constitutional due process rights, it will give rise to a cause of action under 42 U.S.C. § 1983.

Federal law provides that any government actor who deprives the constitutional rights of any citizen of the United States "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C.A. § 1983. If the Director takes action to interpret or enforce the Agreement without first holding a hearing, such action would entitle IGWA to bring a cause of action against the Director under 42 U.S.C. § 1983 for injunctive or declaratory relief for violation of groundwater users' procedural due process rights and attorney's fees and costs.

E. If the Director disregards IGWA's legal right to present evidence at a hearing before taking action, or disregards Idaho law governing contract interpretation, such action will likely entitle IGWA to recover attorney fees under Idaho Code § 42-117.

Idaho Code § 42-117 entitles the prevailing party in any proceeding involving a state agency as an adverse party to recover attorney's fees and costs if the non-prevailing party "acted without a reasonable basis in fact or law." The Director's legal duty to hold a hearing and take evidence before acting to interpret or enforce the Agreement is unequivocal. It is not a matter of discretion. If the Director ignores that duty, without a reasonable basis in fact or law, IGWA will be entitled to recover attorney fees and costs under Idaho Code § 42-117.

Request for Hearing.

For the reasons set forth above, IGWA hereby requests that the Director refrain from interpreting or enforcing the Agreement without first holding a hearing and allowing IGWA and the SWC to present evidence concerning the matter.

DATED August 23, 2022.

RACINE OLSON, PLLP

By: _____
Thomas J. Budge
Attorneys for IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2022, I served the foregoing document on the persons below via email or as otherwise indicated:

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