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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-07210, 36-07427, AND 36-02356A **Blue Lakes Delivery Call**	**SPRING USERS' JOINT RESPONSE TO IGWA'S MOTION FOR PARTIAL RECONSIDERATION AND OFFER OF PROOF**
IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B, AND 36-07148 (SNAKE RIVER FARM) **Clear Springs, Snake River Farm Delivery Call**	

COME NOW, Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs") (collectively referred to as "Spring Users"), by and through counsel of record, and hereby respond to the Idaho Ground Water Appropriators, Inc.'s ("IGWA") *Motion for Partial Reconsideration & Offer of Proof*, filed in this matter on November 20, 2007. For the following reasons, IGWA's Motion should be denied.

INTRODUCTION

In an obvious change of position, IGWA filed a *Motion for Reconsideration* of the Hearing Officer's November 14, 2007 *Order Granting in part & Denying in Part Join Motion for Summary Judgment & Motion for Partial Summary Judgment* ("November 14 Order"). Just a month ago IGWA claimed there were no "genuine issues of material fact" with respect to the issues decided and that summary judgment was appropriate. Now, in its present motion, IGWA confusingly argues that the same issues raised in its October 19, 2007, *Motion for Partial Summary Judgment*, actually need "a complete record of relevant testimony and evidence" implying summary judgment is not warranted. Despite the obvious contradiction in its pleadings, IGWA has failed to provide a supporting basis to justify reconsideration of the matters already decided in the November 14 Order.

Notably, IGWA's Motion fails to raise any new facts or arguments that have not already been addressed in the November 14 Order. Indeed, the Hearing Officer has already considered and addressed the arguments contained in IGWA's Motion. The issues were fully briefed, a hearing was held, and the Hearing Officer issued a written order.

Accordingly, for the reasons stated below, as well as the reasons provided in the Spring Users' *Joint Motion for Summary Judgment*, *Joint Response to IGWA's Motion for Partial Summary Judgment*, and *Joint Reply to Motion for Summary Judgment*, the Hearing Officer should deny IGWA's *Motion for Partial Reconsideration & Offer of Proof.*

STANDARD OF REVIEW

Civil Rules 11(a)(2)(B) provides that a "motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment." "The decision to grant or deny a request for reconsideration generally rests in the sound discretion of

the trial court." *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). Furthermore, while the Rules do not require the submission of new evidence, the moving party bears the burden to show that the original decision was in error. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (App. Ct. 2006). In *Jordan*, , the Court of Appeals affirmed a district court's decision to deny a motion for reconsideration, recognizing that "the district court was provided with no new facts to create an issue for trial, and thus there was no basis upon which to reconsider its summary judgment order." 135 Idaho at 592, 21 P.3d at 914. In that case, former clients sued their attorney for malpractice. Shortly after filing suit, the former clients filed a motion for summary judgment. The district court ruled in favor of the attorney. Thereafter, the former clients filed a motion for reconsideration, which was denied by the district court. On appeal, the Court of Appeals recognized that the former clients provided no new facts which would place any doubt on the district court's decision. Similar to the facts in *Jordan*, here IGWA has failed toprovide any new facts, law or arguments that would warrant reconsideration of the Hearing Officer's decision. Rather, IGWA rehashes the same arguments it made in its summary judgment motion – this time, however, arguing that there are issues of fact that require a "complete record" before any decision. As explained below, IGWA's motion fails and should be denied.

ARGUMENT

I. The Hearing Officer Correctly Determined that the Spring Users' Means of Diversion are Reasonable

In the November 14 Order, the Hearing Officer stated:

> IGWA has asserted deficient means of diversion by the Spring Users. However, there is no evidence that the diversion works are out of date or function inefficiently as they exist, following correction of a defect observed by the Director. IGWA's position in this regard is premised on the claim that the Spring Users should be required to pursue additional water by drilling, as

> noted, a belief expressed by persons of considerable authority. However, the partial decrees that were entered did not condition the rights to water upon pursuing it in a different manner, and ***there is no basis in the record to add this condition to the partial decrees***. There is ***conjecture*** that the Spring Users could drill, ***but there are not facts establishing that they could fulfill their water rights in this manner without interfering with other rights. There is no genuine issue of material fact to dispute the Director's finding that the Spring Users' means of diversion are reasonable***.

November 14 Order at 14 (Emphasis added).

IGWA has failed to present any new facts or argument that would warrant reconsideration of the Hearing Officer's decision on this issue. The Spring Users' diversion facilities are functioning and adequate, and the partial decrees confirm their right to divert surface water from the decreed sources. There is no dispute that the SRBA Court decreed surface water rights to the Spring Users as well (i.e. Alpheus Creek and Springs).IGWA also argues, once again, that the court's decision in *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), allows the Director to eviscerate the Spring Users' decrees by limiting their diversions based on notions of "optimum development" and "full economic development of the ESPA." *IGWA Motion* at 5. IGWA further alleges, again, that the Ground Water Act applies to the Spring Users' water rights and for those reasons a different decision should be reached. These are the same legal arguments IGWA made on the summary judgment motions. Without new facts or new law to apply, there is no reason to reconsider the November 14 Order on these matters, and the Hearing Officer should deny IGWA's motion.

II. Season Variation Limitations were Improperly Applied to the Spring Users' Water Rights

As the Hearing Officer correctly recognized in the November 14 Order, at 9, the Spring Users' decreed water rights authorize a year-round use of water with no "differences season to season." IGWA provides no new facts or argument, other than to suggest the Hearing Officer's

decision on this issue is at odds with the decision on the "guaranteed minimum water supply" issue. *IGWA Motion* at 6. Contrary to IGWA's renewed legal arguments, there are no "seasonal variations" limitations on the Spring Users' partial decrees and the Director has no authority to reduce the diversion rates to limit those decreed rights. Although variables such as "the weather and rights of prior appropriators" affect water supplies, that does not justify an administrative attempt to reduce a water right holders' decreed diversion rate. The Hearing Officer's decisions on these issues are consistent and proper. As such, IGWA's motion should be denied.

A. The Director Imputed "Seasonal Variation" to the Spring Users' Rights

Former Director, Karl Dreher was deposed on October 31 and November 1, 2007. In his deposition Mr. Dreher confirmed that he imported a seasonal variation condition on the Springs Users' water rights, and that his consideration of seasonal flows had nothing to do with the Spring Users' water needs.[1] Mr. Dreher's testimony establishes that there is no basis to infer that seasonal water flows at the time of appropriation were inadequate to supply the Spring Users' second priority water rights.

In addition, the North Snake Ground Water District's (NSGWD) pleadings and SRBA District Court decision in the consolidated "facility volume" case, *see Third Affidavit of Daniel V. Steenson Re. IGWA's Motions in Limine and For Partial Reconsideration*, Exs. C-H, show that the ground water users tried, and failed, to limit the Spring Users' water rights based on alleged "seasonal variations."

In the Spring Users' 2005 Orders, the Director inferred that "seasonal" or "intra-year" variations "existed when appropriations for these rights were initiated." *BL Order*, p. 11, ¶ 49; *CS Order*, p. 12, ¶54. Based on this, the Director concluded that Blue Lakes' 1971 priority water

[1] This testimony, notwithstanding the arguments made during summary judgment, answers the question the Hearing Officer raised regarding the Director's intent and provides a sufficient basis for summary judgment on this issue in

right and Clear Springs' 1955 priority water right are satisfied by "seasonal high" flows, despite the fact that the water supplies are insufficient to deliver the decreed quantities the majority of the year. On this basis, the Director denied administration for these water rights.

In the November 14 Order, the Hearing Officer concluded that the Director may consider historical information to determine "whether the water will be put to a beneficial use or whether there will be a waste of water." In his deposition, Mr. Dreher testified that his analysis of the authorized diversion rates of the Spring Users' water rights, including his consideration of seasonal variations in water flows, did not pertain to the Spring Users' water needs or whether they will put the water to beneficial use without waste if it is delivered. Mr. Dreher explained that he was "doing an analysis of what the quantity element means" and "interpreting a quantity for purposes of administering junior-priority ground water rights."

> Q. Okay. Then under the next section heading in this order, at page 10, the section heading entitled, "Authorized Diversion Rate For Water Rights Nos. 36-02356A, 36-07210, and 36-07427," and it lists the water rights there. The discussion that you give there under that heading, is it based on one or more of the Conjunctive Management Rules?
> A. I can't say it's based on a specific rule. But I can say that it's not outside of the provisions of the Conjunctive Management Rules.
> Q. Okay. Could you turn to, I think, it's Deposition Exhibit No. 37, a copy of the Conjunctive Management Rules. And identify for me which, if any, portions of the rules pertain to this discussion, beginning at page 10 of Exhibit No. 11?
> A. Again, I'm not saying that there is a specific rule that I followed in doing that analysis. But the analysis is not outside of the rules.
> Q. Do you mean, it's within the rules?
> A. Well, the rules provide -- they provide a number of specific factors that are looked at. But, you know, they also, in general, frame out how ground water is going to be administered. And this investigation is not outside of the constraints provided by the rules.
> Q. Which factor of constraint provided by the rules pertains to this analysis?
> A. Well, **this analysis goes to -- was done trying to describe what the quantity element of the decreed right -- what that meant.** It was, in fact, a maximum authorized rate of diversion. And the difference -- the

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favor of the Spring Users.

reason for the analysis is that the difference is that these, the sources of supply for these rights, does vary significantly seasonally. And that was a factor that existed at the time that the rights were established. **So it's simply doing an analysis of what the quantity element means.**

Q. Okay. So I take it then that under this heading, none of the discussion pertains to a consideration of the quantity of water that Blue Lakes needs, or would put to beneficial use; is that correct? In other words, **this isn't an analysis of need for water under this section**?

A. And the section that you are referring to is Findings 45 through 51?

Q. Correct.

A. Yeah, **this does not relate necessarily to how much water is needed by Blue Lakes, or how much they would put to beneficial use**. This analysis goes to under what conditions can they call for the distribution of water to their rights.

Steenson Third Aff., Ex. B, p.181, l.12 - p.183, l.17; *see also Id.* at p.185, l.25 - p.186, l.15 (same); p.188, l.22 - p.189, l.17. (indicating that this is the first time such analysis had been performed); p.190, ll.7-15 (indicating that the Director's analysis is "not just interpreting the quantity. It's interpreting a quantity for the purposes of administering junior-priority ground water rights that you are diverting from a different source."); p.393, l.24 – p.394, l.8 (indicating that diversion rates on decrees are "further defined" by "the seasonal variation of flow that existed at the time of appropriations").[2]

The 2005 Orders state that there is insufficient data to determine the seasonal variations in the Spring Users' water supplies that existed at the time of appropriation. *BL Order* at 11, ¶ 49; *CS Order* at 12, ¶ 54. As such, there is no rational basis to infer seasonal water flows at the time of appropriation that were inadequate to fill Blue Lakes' 1971 and Clear Springs' 1955 water rights.

It is not disputed that spring discharges follow a predictable seasonal ("intra-year") pattern of highs in the late fall, and lows during the spring or summer. According to Mr. Dreher,

[2] Mr. Dreher further acknowledged that it is not possible to enhance conditions beyond those that existed at the time of appropriation, by curtailing junior ground water diversions that did not exist at that time, particularly when spring flows have declined since that time. *Id.*, p. 391, lns. 12-17.

the pattern and magnitude of such variations relative to the Spring Users' water rights at the time of appropriation was "probably not too much unlike what exists today." *Steenson Third Aff.*, Ex. B, p.245, l.5 – p.246, l.9; p.394, ll.13-16. Accordingly, the logical inference is that there were sufficient, year-round water supplies for Blue Lakes' 1971 priority water right and Clear Springs' 1955 priority water right at the times of appropriation.

In any case, as acknowledged by IGWA's expert Ronald Carlson, by Tim Luke, and by Mr. Dreher, seasonal variations in flows do not alter the requirement that water be administered in accordance with priority at all times during the annual, seasonal pattern of flow. *Steenson Second Aff.*, Ex. A, Luke Depo., p.168, ll.9-18; Carlson Depo. p.168, ll.9-18; *Id.*, Ex. B, Dreher Depo. p.50, l.20 - p.352, l.7.

B. The "Facility Volume" Subcases in the SRBA

NSGWD, a party to this proceeding and represented by IGWA, has already attempted to raise this issue in an effort to limit the quantity element of the Spring Users' water rights. NSGWD's efforts in the Facility Volume Subcases were denied by the SRBA District on substantive and procedural grounds. The Spring Users *Joint Response to IGWA's Motion in Limine*, at 7-10, provides a brief overview of these proceedings.

During those proceedings, NSGWD filed a *Motion to Alter & Amend* and supporting briefing. *Steenson Third Aff.,* Ex. D. In that brief, NSGWD made a "seasonal variation" argument that is strikingly similar to the Director's 2005 Orders and IGWA's briefing and proposed findings of fact and conclusions of law in this case:

> **The Diversion Rates and Diverted Volumes Designated in the Special Master's Recommendations Are Not Adequate to Fully Define Quantity**
>
> The diversion rates for these four rights which were included in the water right licenses and then adopted in the Director's Report and Special Master's Recommendations represent **maximum allowable diversion rates**. It is well

known that the Hagerman springs typically are subject to **seasonal variations** and that the fish propagation facilities actually may utilize average rates of diversion that are less than the licensed cap. Nevertheless, the diverted volume amounts in the licenses and the Director's Report and Special Master's Recommendations are calculated based on a continuous year-round flow of the maximum allowable diversion rate. Thus, the diverted volume amounts for these rights do not add any additional limitation. The diverted volume figures provide of continuous year-round diversion at a maximum allowed diversion rate even if the maximum rate of diversion is not an accurate measure of the actual amount of water used at the facility.

The license diversion rate which is then incorporated in the Special Master's Recommendations does not reflect **seasonal variations** or actual diversion practices. In other words, Blue Lakes may be able to increase its production by expanding its facility volume and its average diversion rate without exceeding either the rate of diversion or diverted volume of its water rights as described in its licenses or in the Special Master's Recommendations. Thus the rate of diversion and the diverted volumes as currently specified are not adequate to describe current actual beneficial uses for these fish propagation rights. Facility volumes are necessary to describe the size of the facilities an to define the parameters of the current actual beneficial uses.

Id., p. 3-4 (emphasis added).

After NSGWD's motion was denied, the subcases were consolidated for purposes of resolving NSGWD's subsequent *Notice of Challenge*. In denying the *Notice of Challenge*, *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue & "Additional Evidence" Issue*. *Id.*, Ex. H, Presiding Judge Wood found:

[The] proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water. Additionally, this illustrates that trying to regulate fish propagators with facility volume is analogous to IDWR trying to regulate an irrigator to the type or quantity of a crop that can be grown, i.e., regulation of production, not quantity of water. Finally, it bears repeating that production of fish is primarily related to the rate of flow, not the size of the facility.

...

The court cannot limit 'the extent of beneficial use of the water right' in the

> sense of limiting how much (of a crop) can be produced from the use of that right, so long as there is not an enlargement of use of the water right . . .[B]ecause the use is a non-consumptive, continuous flow use, the highest and greatest duty of the water would seem to encourage the grower to use his or her best efforts to maximize the crop obtained from using the water. And if this means the grower under these circumstances can economically produce 200 pounds of fish versus 100, there is no legitimate policy in water law for not allowing this to occur.

Id., at 9 & 17.

NSGWD then complained that the inability to present evidence regarding the quantity of the Spring Users' water rights, including evidence of "seasonal variations," would forever preclude them from raising these issues. Id., Ex. H, p. 23. This argument as addressed by Judge Wood:

> Simply put, NSGWD could have become timely involved in these subcases and properly raised any related issues before the matter went to trial before the respective Special Masters. NSGWD readily admits, however, that its practice has been to not get involved in the subcase until the special master has issued his or her recommendation ... In the event NSGWD disagrees with the recommendation, NSGWD then becomes engaged in the subcase via a motion to alter or amend pursuant to AO1 § 13 and then seeks to introduce new or additional evidence and/or raise new legal theories.
> ...
>
> Thus it is clear from the record NSGWD made a conscious determination not to become involved in the various subcases ... To place the matter in proper perspective, **NSGWD contends that the evidence sought to be introduced in the consolidated cases was probative of the claimant's 'extent of beneficial use.' However, as noted in the preceding sections of his opinion 'extent of beneficial use' is not an element of a water right. Furthermore, the respective Special Masters already conducted hearings on the quantity element**. In this Court's view, although being couched in the phrase 'extent of beneficial use,' NSGWD is really attempting to raise a cause of action for partial forfeiture or abandonmnt, or in the alternative to relitigate the quantity issue. By way of explanation, any evidence that a claimant is using less water than the quantity for which the claimant was previously licensed or decreed, by definition must be in support of an action for partial forfeiture (or abandonment). Partial forfeiture, abandonment or adverse possession are the only cognizable legal theories by which a diminishment could be obtained.

Id., p. 24-25.

These repeated attempts to modify the quantity element through various theories, including seasonal variation, demonstrate a collective commitment on the part of the Director and IGWA to reduce spring rights in anticipation of administration. While those efforts failed in the SRBA, the commitment to the agenda continues in the Director's 2005 Orders and in IGWA's motion for reconsideration. The Hearing Officer should grant the Spring Users' motion for summary judgment on this issue.

III. All Connected Ground Water is Subject to Priority Administration

IGWA, once again, argues that the Director should distinguish between "natural" and "artificial" groundwater for purposes of conjunctive administration. However, IGWA fails to provide any new facts or legal argument that would justify reconsideration of the Hearing Officer's decision. Indeed, in the same argument IGWA admits the Hearing Officer's finding that "the *Summary Judgment Order* discusses the applicability of the Conjunctive Management Rules and administration by priority to all sources of supply that are hydraulically connected." *IGWA Motion* at 7. For this reason alone IGWA's motion on this issue should be denied.

However, in an effort to cast doubt on the decision, IGWA relies on the claim that "the Hearing Officer does not appear to fully understand IGWA's waste water arguments." *IGWA Motion* at 7. The Spring Users have never argued, and the November 14 Order did not state, that the Director must curtail junior groundwater users to compensate for reductions in spring flows due to improved irrigation methods by other appropriators. Rather, as the Hearing Officer correctly determined in the November 14 Order, at 10, "once water enters the aquifer ... from whatever source it is subject to administration by priority." As recognized above, IGWA apparently agrees with this premise. Since IGWA has provided no new facts or law, but instead

accepts the fact that "administration by priority" applies to "all sources of supply that are hydraulically connected", its motion should be denied.

IV. The Swan Falls Agreement Does not Prevent Administration

IGWA attempts, once again, to convince the Hearing Officer that the Swan Falls Agreement somehow prevents non-party water right holders in the ESPA from seeking priority administration based on flows at the Murphy Gage. In doing so, however, IGWA once again shows a lack of understanding of the Swan Falls Agreement. IGWA attempts to disregard the fatal fact that the Spring Users were not parties to the Swan Falls Agreement and are therefore not bound by that Agreement, by arguing that (without any supporting factual information), since the Spring Users were "named defendants" to litigation involving the Idaho Power Company that initiated the Swan Falls Agreement, they are somehow bound by the Agreement. Even assuming for argument's sake that the Spring Users were defendants in the Idaho Power litigation, then it is clear that Idaho Power's water rights are subordinated to the Spring Users' water rights. It does not mean that a subordination was created as between any defendants.

Indeed, IGWA has failed, apparently, to read the subordination provisions of the Agreement. Article 7 of the Agreement addresses subordination. Paragraphs A and B, of Article 7 address the general subordination provisions of the Agreement. Paragraph C addresses the very argument IGWA raises in its motion: "The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the use of those persons dismissed from Ada County Case No. 81375." In other words, Idaho Power's water right rights were subordinated to those rights identified in Case No. 81375. The Hearing Officer put it best: "Regardless of historical belief and understandings of many concerned interests, the Spring Users were not parties to the Swan Falls Agreement, and nothing in this record indicates that they agreed to that understanding."

November 14 Order at 11. Those facts remain undisputed. Since IGWA has failed to provide any new facts or law on this issue, the Hearing Officer should deny its motion.

V. Local Ground Water Boards are not Required

IGWA's argument regarding the local groundwater board, much like the others listed above, was already considered and rejected by the Hearing Officer's November 14 Order, at 12-13. IGWA provides no new facts, law or argument to support any change in the Hearing Officer's determination on this issue. The local groundwater board process is not mandatory and has been superseded for purposes of this action. *See* November 14 Order at 13. IGWA's own proposed expert with experience in water rights administration recognizes this fact. *Second Steenson Aff.*, Ex. B, Carlson Depo., p.96, l.1 – p.97, l.8.

OFFER OF PROOF

The Spring Users' object to IGWA's attempt to delay the hearing in this case and address matters already decided by the Hearing Officer's November 14 Order. There is no basis to consider testimony and evidence on issues that have been decided as a matter of law.

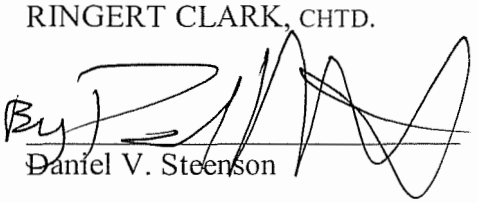
The Spring Users' further object to IGWA's efforts to fill the record with irrelevant information and evidence, with the apparent hope of using it on judicial review, by proffering testimony and other evidence and arguing that summary judgment is not appropriate without a "complete record." While IGWA has affirmatively alleged that there were no "genuine issue of material fact" regarding the matters identified in its summary judgment motion, it has changed course for purposes of the present motion for its own advantage. To the extent, however, that the Hearing Officer determines that he will permit additional evidence on matters resolved by the Summary Judgment, the Spring Users' reserve the right to cross-examine witnesses and submit additional evidence as necessary to counter IGWA's "offers of proof."

CONCLUSION

Rather that raise lawful defenses to administration, IGWA continues to argue the same legal theories it advanced on summary judgment with no new facts. Since IGWA has failed to provide any new facts, law or arguments to call into question any of the rulings of the Hearing Officer in his November 14 Order, IGWA's Motion should be denied.

Dated this 27th day of November, 2007.

RINGERT CLARK, CHTD.

By 

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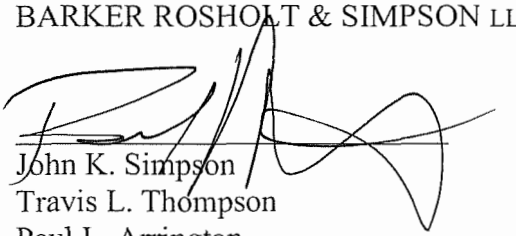

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2007, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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