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Attorneys for Respondents Idaho Ground Water Appropriators, Inc., Jerome Cheese Company, a division of Davisco Foods International, Inc., Milk Producers of Idaho, Inc., Unit Three Water Users Association, Aberdeen-American Falls Ground Water District, and Bingham Ground Water District

BEFORE THE DIRECTOR OF THE
IDAHO DEPARTMENT OF WATER RESOURCES

In Re: Canal Companies' and Clear Springs' Petitions for Establishment of Ground Water Management Areas in Water Basins 35 and 36	**RESPONDENTS' MOTION TO VACATE HEARING AND FOR RECONSIDERATION OF DEPARTMENT'S ORDER AUTHORIZING DISCOVERY**

MOTION

Respondents Idaho Ground Water Appropriators, Inc., Jerome Cheese Company, a division of Davisco Foods International, Inc., Milk Producers of Idaho, Inc., Unit Three Water Users Association, Aberdeen-American Falls Ground Water District, and Bingham Ground Water District, through their attorneys, Givens Pursley LLP, hereby move that the hearing currently scheduled in the above-captioned matter be vacated, and that the discovery period be extended for an appropriate period commensurate with the importance and complexity of the issues raised by the above-captioned matters. The reasons for Respondents' Motion are stated below.

PROCEDURAL BACKGROUND

On July 16, 2001, the Director of the Idaho Department of Water Resources ("Department") received two separate letters from the Twin Falls and North Side Canal Companies ("Canal Companies") and Clear Spring Foods ("Clear Springs") requesting that the Department designate all of Basins 35 and 36 as ground water management areas ("GWMA"). The Respondents never were served with these letters by the Canal Companies or Clear Springs. However, the Respondents obtained copies of the letters on July 26, 2001, after their counsel learned of their existence and requested copies from the Department.

At a public meeting held in Boise, Idaho on August 2, 2001, the Director announced his intention to treat the letters as petitions to designate GWMAs ("Petitions"), and stated his intention to hold a hearing on the Petitions on August 28, 2001. On August 3, 2001, the Department issued two orders: one designated the Thousand Springs GWMA, and the other designated the American Falls GWMA ("Orders"). These Orders also formally determined the Canal Companies' and Clear Springs' letters as Petitions, and directed that the Petitions would be considered pursuant to the Idaho Administrative Procedure Act, Idaho Code § 67-5201 et seq., and the Department's procedural rules. The Department's designation of the Thousand Springs and American Falls GWMAs was first published on or about August 9th in local newspapers. In the public notice, the Department appended notice that a public hearing on the Petitions would be held at 10:00 a.m. in Boise, Idaho on August 28, 2001.

The Respondents filed their response ("Response") to the Petitions on August 10, 2001. In their Response, the Respondents stated their request for, and expectation of, a full hearing on the merits of the Petitions, pursuant to the Department's Conjunctive Management Rules and contested case procedures. Respondents simultaneously filed a Motion for Discovery Order.

On August 12, 2001, the Department issued its Order Authorizing Discovery ("Discovery Order"). The Discovery Order stated that "because the hearing in this matter presently is set for August 28, 2001, any discovery must be conducted by the parties on an expedited schedule." The Discovery Order directed that the Respondents serve any discovery requests on the Petitioners by August 17th, and that all discovery, including Petitioners' answers to Respondents' discovery requests be completed by August 24th.

ARGUMENT

1. The Scheduled August 28th Hearing Must be Vacated.

A. There is no mandate for the Department's headlong rush to hold a hearing.

The Department's decision to conclude its consideration of the Petitions by August 28th is inexplicable. The only "deadline" imposed by the Ground Water Management Area statute, Idaho Code § 42-233b, is a September 1 deadline to issue any order directing the curtailment or reduction of ground water pumping within a Ground Water Management Area. This statute does not require a hearing on, and determination of, a request to designate a Ground Water Management Area to be concluded by any specific date. The Petitions, which are most notable for their brevity and lack of specificity, do not request a curtailment order. Indeed, they do not even request a hearing, let alone the immediate, summary hearing the Department now has ordered. Based on the relief requested in the Petitions, and the applicable statute, there is no basis to conclude that a hearing on the Petitions must be expedited.

B. Forcing discovery to meet an unreasonable and unnecessary hearing schedule prejudices the Respondents.

Although the Department may have some discretion under its rules of procedure to direct the timing and course of discovery, that discretion must be exercised within reason. Here it has been abused. The Department's discovery schedule is improperly premised on meeting an August 28

hearing date – a hearing date that was not requested by the Petitioners or required by statute. The Department's current schedule gives the Respondents only two weeks to initiate and conclude discovery, and prepare for a hearing on Petitions that implicate the potential curtailment of hundreds, if not thousands, of water rights within an area that encompasses thousands of square miles, and that is situated over a highly complex, and as yet poorly understood, aquifer system. Under the Department's discovery schedule, the Respondents cannot even expect to receive discovery responses until close of business on Friday, August 24th, which leaves one business day before the hearing for Respondents and their potential witnesses and experts to review and analyze whatever information might be provided and to prepare testimony and exhibits. This is patently unreasonable.

By way of example, on August 2nd, Respondents requested information concerning the factual basis, scope and effect of the Department's GWMA designation from the Department.[1] Although the Department agreed to produce this critical information, it still has failed to do so. If the Department is unwilling or unable to provide necessary factual information to affected ground water users in the two weeks that have elapsed, it is naive to expect that the Petitioners will be any more forthcoming in the two weeks that remain before the scheduled hearing.

C. The Respondents cannot be forced to expedite discovery and their preparation for hearing to make up for the Petitioners' and the Department's procrastination.

The Department's apparent compulsion to furnish the Petitioners with an immediate hearing (while denying affected ground water users any reasonable opportunity to obtain needed information from the Department or the Petitioners to meet their allegations), is especially misplaced given the abundance of legal process and information that has long been available to the Petitioners and the

[1]This information also is critical to Respondents' ability to prepare for hearing on the Petitions.

Department. The Department's Conjunctive Management Rules, IDAPA 37.03.11, et seq., have been in place since 1995, and have provided a specific procedure for the Petitioners to obtain the kind of conjunctive administration they now seek (and the Department is attempting to force) by way of truncated process through the Ground Water Management Act. In the seven years that the Conjunctive Management Rules have been in place the Petitioners have never availed themselves of them and made a delivery call asserting that their water rights were materially injured by ground water pumping.

Nor can the Petitioners or the Department reasonably assert that any exigency has been generated by the instant drought. All Idaho water users are on notice that drought is a natural, cyclical event (*see* Idaho Drought Plan, Idaho Department of Water Resources, May 2001), and have been on notice that the instant drought was imminent since as early as February, 2001 when precipitation and snow pack figures were below normal, and the Surface Water Supply Index ("SWSI")[2] for the Snake River Basins forecast significant water shortages for 2001. By March 1, 2001 the Idaho Basin Outlook Report and SWSI unambiguously warned water users, managers and administrators that: 1) surface water supplies for 2001 would be far below normal; 2) reservoirs in the Upper and South Side Snake River Basins would not fill; and 3) these reservoirs would be depleted by the end of the 2001 irrigation season.

Significantly, Idaho Power Company took heed of these forecasts. Idaho Power Company initiated proceedings before the Idaho Public Utilities Commission to allow it to increase rates and purchase power from irrigation pumpers in anticipation of the impact of low water supplies in the Snake River Basin on its hydropower production capacity. If the Petitioners had been as diligent,

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[2]Published by the USDA, Natural Resources Conservation Service in cooperation with the Idaho Department of Water Resources.

presumably their Petitions could have been given fair consideration well before now, without prejudicing the Respondents.

D. The Department's scheduled hearing on the Petitions conflicts with a long-scheduled SRBA hearing on Basinwide Issue 5.

Aside from the significant due process defects of the Department's hearing and discovery schedule for the Petitions, as the Department is well aware, several of the Respondents also are parties in the Snake River Basin Adjudication litigation concerning Basinwide Issue 5 (Conjunctive Management General Provision). Basinwide Issue 5 has been set by the Court for trial on September 24, 2001[3], and a pre-trial conference for all parties to Basinwide Issue 5 is scheduled for 1:30 p.m. August 28, 2001, in Twin Falls, Idaho–the same day as the Department's scheduled hearing on the Petitions. Respondents are required to appear at the pre-trial conference (as are the Petitioners' attorneys, and presumably the Department). The Respondents cannot reasonably be expected to simultaneously present their case at a hearing in Boise and appear at a pre-trial conference 130 miles away in Twin Falls.

CONCLUSION

The Respondents have been severely prejudiced by the untimeliness of the notice and Petitions, and the limited process that has been afforded them. Although the Respondents have acted diligently and as quickly as possible under the circumstances to respond to the Petitions and to request critical information from the Department, it cannot reasonably be expected to complete discovery in the time frames set out by the Department, or reasonably to prepare for a hearing involving the complex issues and facts raised by the Petitions and the requested agency action. The

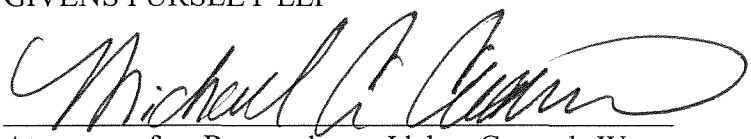
[3]Coincidentally, in a separate order, the Department has set the hearing on its Orders designating the Thousand Springs and American Falls Ground Water Management Areas to precisely coincide with the scheduled trial dates for Basinwide Issue 5.

Department's Discovery Order and the Orders setting the hearings on the Petitions for August 28 are arbitrary and capricious and deny the Respondents' their constitutional right to due process.

For the foregoing reasons, Respondents move for an order vacating the scheduled hearing on the Basin 35 and 36 Petitions, and rescinding the Discovery Order. Any rescheduled hearing on the Basin 35 and 36 Petitions should be set only after the Department has held a pre-hearing conference, and in consultation with counsel for the Petitioners and the Respondents, established an appropriate schedule for discovery, pre-hearing motion practice and hearing that affords the Respondents their due process.

Dated this 16th day of August 2001.

GIVENS PURSLEY LLP



Attorneys for Respondents Idaho Ground Water Appropriators, Inc., Jerome Cheese Company, Inc., Milk Producers of Idaho, Inc., Unit Three Water Users Association, Aberdeen-American Falls Ground Water District, and Bingham Ground Water District

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August, 2001, I caused to be served a true and correct copy of the foregoing to each of the following persons by the method indicated below:

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