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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF MODIFYING THE
BOUNDARIES OF THE AMERICAN FALLS
GROUND WATER MANAGEMENT AREA

**PETITION TO SCHEDULE HEARING
IN CONTESTED CASE**

COME NOW, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY (the “Companies”), by and through their attorneys of record, Barker, Rosholt & Simpson, LLP, and petition the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) for an order resuming action and scheduling a hearing in the above-captioned matter.

INTRODUCTION

On August 29, 2003, the Director issued a *Final Order Modifying the Boundaries of the American Falls Ground Water Management Area* (“2003 Order”). In that order, the Director found the following:

- Severe drought conditions that “caused the Director to designate the ground water management area” continued to exist across the Snake River Basin.
- Since “Water District Nos. 120 and 130 have been established for the purpose of administration of water rights”, the need for the Ground Water Management Area (“GWMA”) “no longer exists in those portions of the GWMA overlain by Water District Nos. 120 and 130.”

- The continuation of the GWMA in areas overlapping Water District Nos. 120 and 130 “may cause confusion in the administration of water rights.”

Based on the Director’s determination that the newly created water districts would negate the need for the Ground Water Management Area (GWMA), the 2003 Order amended the boundary of the American Falls GWMA.

On October 2, 2003, the Companies timely filed a *Petition to Initiate Contested Case*. That petition challenged the 2003 Order, requested that the Director initiate a contested case to address the matter and asked for a hearing. To date, the Director has not taken any action on the Companies’ petition. Through this petition, the Companies move the Director for an order resuming action on the above matter and setting a hearing on the Companies’ petition.

DISCUSSION

The Companies’ petition thoroughly discussed the factual inadequacies of the Director’s decision to amend the boundaries of the GWMA. This includes the fact that water supplies remained stressed and that drought conditions plagued the entire Snake River Basin. These conditions continue today – and, in many cases, have worsened.

The 2003 Order stated that amendment of the GWMA boundaries was warranted because of the creation of Water District Nos. 120 and 130. According to the 2003 Order, the new water districts would provide the same protection as the GWMA. In particular, on page 2 of the 2003 Order, the Director held that the ground water districts provide “the Director with the more comprehensive water administration authorities available under chapter 6, title 42, Idaho Code” and, together with the Conjunctive Management Rules, “make it unnecessary to retain the current boundaries of the American Falls GWMA.” The 2003 Order improperly conflates the administrative authorities of a water district with the water supply protection goals and authorities of a GWMA.

Over the last 8 years water users throughout the Snake River Basin have participated in administrative water delivery calls resulting from the depletion of ground water supplies in the Eastern Snake Plain Aquifer (“ESPA”). In the case of the Coalition, Blue Lakes Trout, and Clear Springs Foods’ water delivery calls, the Director found that junior groundwater pumping caused material injury to their senior priority surface water rights. Yet, notwithstanding these administrative actions, the health of the aquifer continues to decline.

The Director’s focus on the *administrative* duties of water districts has not improved the health of the aquifer or water supply conditions for existing water right holders. This is undoubtedly because a water district is not the same as a GWMA – it does not provide the same protection. While a GWMA set up under Idaho Code § 42-233b is specifically aimed at protecting Idaho’s ground water resource, a water district is “created ... [as] an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of *distribution of water among appropriators*.” I.C. § 42-604 (emphasis added). In a water district, the watermaster and the Director have a clear legal duty to distribute water “in accordance with the prior appropriation doctrine.” I.C. §§ 42-602 & 42-607. A water district is not created for the purpose of protecting the water supply in an aquifer – it is created to perform the “essential governmental function” of water right administration regardless of the available supply.

During the proceedings on the A&B Irrigation District call, Tim Luke, IDWR’s Section Manager for the Water Distribution section, testified that there are limitations on a water district’s ability to protect ground water:

Q. [BY MR. THOMPSON]: But the watermaster doesn’t have the authority to go out and create a water management plan for an aquifer within a water district, does he?

A. I don’t think so, no.

Q. He's just concerning with administering the rights?

A. Right.

Q. Not concerned with the source?

A. The source?

Q. Like an aquifer, he doesn't have any responsibility –

A. Right.

Q. – to prohibit new appropriations as the statute provides under ground water management/ correct?

A. Right. Other than – right – not new – he can't authorize new appropriations, but he needs to be responsible for taking care or addressing unauthorized appropriations or diversions.

Q. There's some fundamental differences between those two statutes?

A. Oh, yeah. Yeah.

Tr. Vol. VI, p. 1339, ln. 24 – p. 1340, ln. 22.

Unlike a water district, a GWMA is designated when a ground water basin, or part thereof, “may be approaching the conditions of a critical ground water area.” I.C. § 42-233b. When a GWMA is created, the Director may approve a “ground water management plan” which shall “provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.” *Id.*

Unlike a water district, a GWMA designation is specifically designed to protect the groundwater resource and manage the effects of ground water withdrawals. For example, under the GWMA statute, the Director must review all applications for permit within the GWMA and “determine on an *individual basis* that sufficient water is available and that other prior water rights will not be injured.” I.C. § 42-233b (emphasis added). In other words, whereas a water district is concerned with the administration of existing water rights, the GWMA is concerned

with the health of the aquifer and is set up to address new proposed diversions with additional criteria.

Furthermore, whereas the water district's administrative responsibilities are primarily preceded by a water user's call for administration, a GWMA requires that the Director analyze the health of the aquifer and order curtailment of ground water diversions where there "the ground water supply is insufficient to meet the demands of water rights within all or portions of" the GWMA:

The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given.

Id. (emphasis added).

CONCLUSION

The need for the American Falls GWMA – as originally created – is evident. As discussed above, the health of the aquifer is continuing its downward trend. Conditions are not improving. Accordingly, the Director should schedule a hearing in the above contested case.

DATED this 15^E day of August, 2013.

BARKER ROSHOLT & SIMPSON LLP



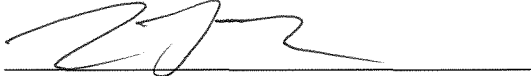
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2013, I served a copy of the foregoing **PETITION TO SCHEDULE HEARING IN CONTESTED CASE**, by electronic and U.S. Mail to the following:

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Travis L. Thompson

Gibson, Deborah

From: Jessica Forbis [jf@idahowaters.com]
Sent: Thursday, August 15, 2013 2:48 PM
To: John Simpson; Travis Thompson; Paul Arrington; 'Kent Fletcher'; Spackman, Gary; Gibson, Deborah
Subject: In the Matter of Modifying the Boundaries of the American Falls Ground Water Management Area
Attachments: 20130815 Petition to Intervene.pdf; 20130815 Petition to Schedule Hearing.pdf

Attached please find a copy of the *Petition to Intervene & Memorandum in Support* and *Petition to Schedule Hearing on Contested Case* in regards to the above referenced matter.

The originals will be mailed to the Department today.

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