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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 REQUIRING
MEASURING DEVICES FOR GROUND
WATER DIVERSIONS IN THE PORTIONS
OF WATER DISTRICT NOS. 31, 34, 110,
110, 120, 130 AND 140 OVERLYING THE
EASTERN SNAKE PLAIN AQUIFER

**SURFACE WATER COALITION'S
PETITION FOR RECONSIDERATION
AND REQUEST FOR HEARING**

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 (collectively, the "Surface Water Coalition" or
"Coalition"), and hereby request reconsideration and a hearing on the Director's *Final Order* in
the above-captioned matter, issued June 15, 2016. The petition is filed pursuant to Idaho Code
§§ 67-5246 and 42-1701A(3), and the Department's Rule of Procedure 740.02 (IDAPA
37.01.740.02).

BACKGROUND

On June 15, 2016, the Director issued an order requiring the installation and use of measuring devices on groundwater diversions within the Eastern Snake Plain Aquifer ("ESPA"). The Director relied upon Rule 50 of the Department's Conjunctive Management Rules (IDAPA 37.03.011.50) for purposes of defining the geographic area that would be subject to the measuring device requirement. That rule defines the ESPA as an "area of common groundwater supply" as follows:

[T]he aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian.

Final Order at 1, n.3.

In addition, the Final Order provides for variances, exemptions, and extensions from the measurement device requirement, including under certain circumstances allowing for the use of a Power Consumption Coefficient ("PCC"). *See* Final Order at 11-12.

PETITION FOR RECONSIDERATION

The Coalition appreciates and is supportive of the Director's decision to require measuring devices. Having accurate water use information is essential to proper management of the aquifer and administration of all ground water rights. However, the Coalition requests reconsideration of two aspects of the Final Order to avoid confusion and any misunderstanding moving forward with implementation of the Settlement Agreement.

First, it the Coalition's position that the Director should not attempt to insert a definition of the ESPA into the Settlement Agreement and limit its application to only those groundwater rights diverting within the aquifer as defined by CM Rule 50. As the Department's current

groundwater model – Enhanced Snake Plain Aquifer Model v. 2.1 (“ESPAM 2.1”) – evidences, the aquifer actually extends beyond the area covered by Rule 50. Moreover, the boundaries of the signatory Ground Water Districts also extend beyond the Rule 50 area. Consequently, the obligation to install measurement devices should apply to: 1) all members of the signatory Ground Water Districts; and 2) all water users that divert from the aquifer defined by ESPAM 2.1.

Second, the Final Order should clarify that it does not alter the obligations of the parties to the Settlement Agreement. For example, although the Final Order speaks to certain exemptions and variances from the measurement device obligation – particularly for PCC usage – the Settlement Agreement expressly prohibits the use of PCC and calls for the installation of “closed conduit flow meters on all remaining unmeasured and [PCC] measured groundwater diversions.” The parties have a right to decide whether an exemption, extension, or variance is authorized for any member of a signatory party to the Settlement Agreement. As such, the Director’s Final Order should be clarified to ensure the parties retain their rights and avoid confusing any members of the signatory Ground Water Districts.

The Coalition requests the Director to reconsider the Final Order and address these points accordingly.

I. The Obligation to Install Measurement Devices Should Not be Limited to Groundwater Users Located Within the Conjunctive Management Rule 50 “Area of Common Groundwater Supply.”

The Director cites to and relies upon Rule 50 to define the geographic area of water users subject to the measuring device requirement. The Director further limits the measuring device obligation to rights located within existing water districts covering the ESPA. However, Rule 50, which relies on a 1992 USGS professional paper (nearly 25 years old), does not reflect the

most current information describing the extent of the Eastern Snake Plain Aquifer. In fact, it understates the boundaries of the aquifer compared to what it used under ESPAM 2.1, which the Department acknowledges is the best scientific information available for evaluating hydraulically connected ground and surface water resources on the Snake River Plain.¹ According to the Department's own information, the Rule 50 boundary understates actual irrigation within the ESPA by at least 255,383 acres.²

There is no legal or factual basis for limiting the measurement device obligation to water users located within the Rule 50 boundary, or those within the boundaries of existing water districts. Legally, the Director's authority to order a measuring device is not constrained by the CM Rules or a water right's inclusion within a water district. The measuring device statute plainly states, "*all appropriators or users of any public waters*" are required to maintain "suitable headgates and controlling works" and, "when required by the director," all water users "shall construct and maintain ... a rating flume or other measuring devise." (emphasis added). Neither the statute nor any regulation limits the Director's authority to require measuring devices in certain areas. Instead, the statute is unambiguous and states the requirement applies to all appropriators or users of any public waters.

In addition, the statute does not limit the Director's authority to require a measuring device for only those rights located within the 25-year old Rule 50 boundary of the ESPA – particularly when that boundary has been proven inaccurate with current information available to the Department. *Supra*. Most recently the Idaho Supreme Court affirmed the Director's finding that ESPAM 2.1 represents the best available scientific information for analyzing hydraulically

¹ http://www.idwr.idaho.gov/WaterInformation/GroundWaterManagement/Petition/PDF/ESPA_base_tribs1.pdf (viewed June 29, 2016).

² http://www.idwr.idaho.gov/WaterInformation/GroundWaterManagement/Petition/PDF/ESPA_gw_pous_master.pdf (viewed June 29, 2016).

connected groundwater use and its impacts on springs and river reaches in the Snake River Plain. *See Rangen, Inc. v. IDWR*, 160 Idaho 199, 369 P.3d 897, 914 (2016).

Further, there is no dispute that groundwater pumping within the ESPA, as defined by the groundwater model, is predicted to impact aquifer levels and connected river reaches. *See* ESPAM 2.1 Final Report at 11-15.³ As such those groundwater users that pump from the aquifer but are located outside of the Rule 50 boundary will affect water supplies located throughout the Eastern Snake Plain. There is no reason why those diversions should not be measured just like any other groundwater diversion located within the Rule 50 boundary or an established water district.

The Final Order acknowledges the “decades-long declining trend in ground water levels of the” ESPA. Final Order at 1. These declining trends have resulted in numerous water calls throughout the ESPA over the last decade. *See* <http://www.idwr.idaho.gov/legal-actions/delivery-call-actions/> (IDWR List of water calls). The SWC Call has been litigated since 2005. Last year, the SWC and several groundwater districts in southern Idaho entered into a Settlement Agreement to resolve the SWC Call. *See* Settlement Agreement entered Into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc. (the “Settlement Agreement”).⁴

Notably, the Settlement Agreement does not define the ESPA as the limited aquifer described in Rule 50. Therefore, the Director’s Final Order mistakenly interprets the Agreement and imports the Rule 50 definition into it. *See* Final Order at 1. At a minimum, the Director

³ http://www.idwr.idaho.gov/Browse/WaterInfo/ESPAM/ESPAM_2_Final_Report/ESPAM21FinalReport.pdf (Viewed June 29, 2016).

⁴ An addendum to the Settlement Agreement was entered by the parties on August 1, 2015. Copies of all of the settlement agreements were previously provided to the Director as attachments to the *Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order*, filed March 9, 2016 (Docket No. CM-MP-2016-001). In addition, on October 7, 2015, A&B Irrigation District and the participating ground water districts entered into an Agreement (the “A&B Agreement”).

should reconsider the definition identified in the order on this basis and clarify that Rule 50 is not the parties' definition of the ESPA.

Moreover, among other things, the Agreement calls for the installation of measurement devices on all groundwater diversions within the participating Ground Water Districts' boundaries. Importantly, the boundaries of several of the participating Ground Water Districts extend beyond the Rule 50 boundary in the CM Rules.⁵ Compare maps at *supra* n.1 and n.5 and <https://idwr.maps.arcgis.com/home/webmap/viewer.html?webmap=142033118a85430dad6e1dfb6fb38ecf&find=100> (viewed June 29, 2016).

Accordingly, the Final Order should be reconsidered and amended to require measurement devices on all groundwater diversions within the current, recognized boundary of the ESPA as provided under ESPAM 2.1, and at a minimum for all groundwater diversions within the boundaries of the groundwater districts signatory to the Settlement Agreement. By making this clarification the Director will avoid creating confusion among those groundwater users who are party to the Agreement but that may be located outside the Rule 50 boundary.

II. The Director Should Clarify that the Final Order does Not Alter the Obligations of the Parties to the Settlement Agreement.

The Final Order provides certain exemptions, extensions, and variances from the measurement device obligation – including the use of PCC in certain circumstances. Final Order at 11, ¶ 4. This is based on Section 42-701(2), authoring the Director to accept such information in limited circumstances.

However, the example of the variance authorizing the use of PCC instead of a measuring device should not apply to groundwater users subject to the Settlement Agreement, unless agreed to by parties. Through the Agreement, at page 3, the signatory Ground Water Districts

⁵ <https://www.arcgis.com/home/webmap/viewer.html?webmap=b7b4803d4cf242fdae2c62f8b86320db> (viewed June 29, 2016).

specifically agreed to have all members install "closed conduit flow meter(s) *on all remaining unmeasured and power consumption coefficient (PCC) measured ground water diversions.*"

(Emphasis added).

The Final Order creates confusion in that it both recognizes the Agreement's prohibition of the use of PCC, at page 2, and then authorizes water users to seek a PCC variance, at page 11. To avoid confusion over the use of PCC, the Final Order should be clarified to confirm that it does not alter or amend any of the obligations of the parties to the settlement agreement – including the mandate that all diversions install a "closed conduit flow meter." Whether a particular exemption, extension, or variance is allowed for any groundwater users subject to the Agreement is a matter to be determined by the parties.

REQUEST FOR HEARING

To the extent the Director denies the above request for reconsideration, the Coalition requests a hearing on the same pursuant to Idaho Code § 42-170A(3).

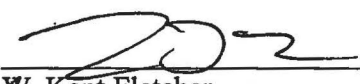
DATED this 1st day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2016, I served a true and correct copy of the foregoing *Petition for Reconsideration and Request for Hearing* on the following by the method indicated:

Director Gary Spackman c/o Deborah Gibson State of Idaho Dept of Water Resources 322 E Front St Boise, ID 83720-0098 *** service by electronic mail facsimile – 208-287-6700 gary.spackman@idwr.idaho.gov deborah.gibson@idwr.idaho.gov		
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