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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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

IDAHO GROUND WATER APPROPRIATORS' RESPONSE TO OBJECTIONS TO PLAN FOR PROVIDING REPLACEMENT WATER

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP and on behalf of its ground water district members, Aberdeen-American Falls Ground Water District, Magic Valley Ground Water District, Bingham Ground Water District, North Snake Ground Water District, Bonneville-Jefferson Ground Water District, Southwest Irrigation District, and Madison Ground Water District (the "Ground Water Districts"), hereby responds to the Objections to IGWA's Initial Plan for Providing Replacement Water ("Replacement Water Plan" or "Plan") filed by the United States Bureau of Reclamation ("Bureau") and the Surface

Water Coalition ("SWC"), both of which are parties to this action. IGWA also responds to the filing of Idaho Power Company ("Idaho Power"), a non-party who previously was denied intervenor status in this matter.

BACKGROUND

On April 29, 2005, IGWA timely filed its Initial Replacement Water Plan as required by the Director's April 19, 2004 Order (subsequently amended on May 2, 2005)(the "May 2 Order"). The Plan describes how IGWA, on behalf of its members, including five affected Ground Water Districts, will: 1) provide a minimum of 27,700 acre-feet ("af") of replacement water to certain members of the SWC during the 2005 irrigation season as required by the Order; 2) deliver up to an additional 45,500 acre-feet of water through the North Side Canal in 2005 for replacement supplies and aquifer recharge; and 3) claim credit, against any replacement water obligation over and above the 27,700 acre-foot minimum required for 2005, for all reach gains resulting from IGWA's current and past mitigation actions to provide replacement water, as demonstrated by the Department's ESPA model to accrue to the American Falls reach of the Snake River ("AFR") in 2005 and subsequent years. SWC and the Bureau have objected to the Plan. Idaho Power, evidently of short memory (or simply choosing to defy the Director's express order denying its intervention in this case), also files papers seeking to object.

RESPONSE TO PROTESTS

1. A Protest in Not an Appropriate Pleading in this Proceeding.

Before addressing the arguments raised by the SWC, the Bureau and Idaho Power filings, it should be noted that they are each improperly styled as "protests." Under the Department's Rules, a protest is a pleading that is properly filed by someone who has a statutory right to oppose an application or claim. IDAPA 37.01.01.250.01. No application or claim by IGWA or

the Ground Water Districts is involved in this proceeding. Moreover, as discussed below, Idaho Power is not a party to this case or otherwise entitled to file a pleading. Furthermore, the objections and arguments that SWC, the Bureau and Idaho Power make in their filings essentially challenge the Director's authority to order submission of a replacement water plan rather than requiring submission of a full mitigation plan. As such, they are challenging the Director's application or interpretation of the Conjunctive Management Rules in the May 2 Order—something only a party can do by requesting reconsideration within fourteen days of the date of the order. Idaho Code § 67-5246(4). Of course, any person aggrieved by a final order has the right to petition for judicial review under Idaho Code § 67-5273(2). However, the SWC, Bureau and Idaho Power filings cannot be characterized as petitions for judicial review.

2. The Bureau's Pleading.

The Bureau says it is willing to accept the Plan's 27,700 af of replacement water "for the 2005 season only." But the agency "objects to the rest of the submitted plan" because it believes "the proper procedure to consider a replacement plan and mitigation credits is under the Conjunctive Management Rules through a submitted mitigation plan." Bureau Pleading at 1-2.[1]

The Bureau's point essentially is that the Director should shoot first and ask questions later: Simply shut off thousands of irrigation wells and cancel a large portion of Idaho's agricultural economy for the year so that the affected water users can put on evidence concerning a formal mitigation plan. Indeed, IGWA continues to question, and reserves the right to challenge, the Director's ability to carry out a delivery call of this nature in the first place without

[1] The Conjunctive Management Rules ("Rules") state that "[n]othing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law." IDAPA 37.03.11.005. If the Director is statutorily empowered to act, and so long as he is proceeding pursuant to law, he does not always have to act under the Rules.

first convening a ground water board and conducting hearings as specified in Idaho Code § 42-237b.

The Director obviously is taking a different course in this matter. The section of the Conjunctive Management Rules ("Rules") applicable to delivery calls in organized water districts authorizes the Director to issue "orders" specifying how regulation of junior water rights will be carried out. IDAPA 37.03.11.40. Such orders can specify such things as phased-in curtailment or the acceptance of "a mitigation plan approved by the director." But the rule does not limit the Director to proceeding, or issuing orders concerning, only those mitigation plans that have been formally proposed under separate Rule 43.

Here, IGWA did not propose the replacement water plan; it was mandated by the Order. IGWA does not assert that complying with that Order is an exercise in proposing or approving a mitigation plan submitted under Rule 43. Indeed, IGWA already has initiated that procedure separately. And separately, the opponents have protested and sought discovery concerning the mitigation plan. That process is pending as a different contested case that may well take months to complete.

The Bureau's challenge to the Plan is simply an objection to the replacement water provisions of the Order. All parties, including IGWA, have taken the opportunity to petition for reconsideration of the Order. But in the meantime, IGWA intends to comply with it.

In any event, it hardly would maximize the use of Idaho's water for the Director to order a shut-off in excess of a hundred thousand acres of ground water uses while he waits for the outcome of what must be assumed will be a lengthy hearing and appeal process undertaken to evaluate a mitigation plan that has not yet been fashioned to respond specifically to his Order. This is especially so where, as here, the Director already has made a determination and issued an

order—and IGWA's members have demonstrated they have replacement water on hand to satisfy it.

It is at least encouraging that the Bureau (unlike SWC) indicates that it will not stand in the way of steps to provide the 27,700 af in 2005. It would seem self-defeating to do otherwise.

3. SWC's Pleading.

The gist of SWC's pleading also is that IGWA must proceed under Rule 43 of the Conjunctive Management Rules and propose, then go through a lengthy hearing on, a mitigation plan; presumably while IGWA's members are subject to ongoing curtailment in the meantime. The above points address this issue and will not be repeated here.

In its Replacement Water Plan, IGWA stated that, to the extent the Director might deem the Replacement Water Plan to be a mitigation plan contemplated by the Rules, IGWA incorporates by reference its February 8, 2005 Mitigation Plan as support. However, the Director clearly has not deemed the Plan to require processing under Rule 43. He has required specific actions of the Ground Water Districts by order and an expedited statement from the Ground Water Districts how they intended to implement those actions. The Replacement Water Plan can and does stand on its own in that regard by presenting the specific information required by the Director's Order.[2]

The Director's Order states that it is issued in the context of the administration of water rights in an organized water district pursuant to Chapter 6, Idaho Code. The Director takes the position that, in this context, no hearing is required before such an order can be issued. And that

[2] The Ground Water Districts are not proposing at this time to withdraw or amend the February 2005 Mitigation Plan.

is how this matter is proceeding.[3] Likewise, the obligations the Order imposes on ground water users are immediate: shut off wells or state in writing by April 29, 2005 how replacement water will be provided. This is not a proceeding where a mitigation plan is being proposed or heard. The objecting parties, (indeed, perhaps all of the parties) may disagree with the Director's approach. But that disagreement goes to the merits of his Order, not the Plan submitted to comply with it.

In essence, SWC argues that the Director, having ordered the Ground Water Users to take certain actions, should now declare that they should be prohibited from doing so. For the Director to agree with that argument would place him in the position of ordering an action and simultaneously declaring that, under the law, it must not be carried out. That position should be rejected. It is more than a little curious that SWC protests an order directing that they immediately be supplied with the very water they claim is owed them.[4]

4. Idaho Power's Filing.

Give Idaho Power credit for audacity. Idaho Power previously moved to intervene in this delivery call, but that motion was denied in the Director's Order of April 6, 2005 (the "April 6 Order"). Idaho Power did not appeal the denial of its intervention, or even seek reconsideration. Now, without so much as a mention of the fact that a few weeks ago the Director denied it the right to file pleadings in this case, Idaho Power enters with a flourish and files a "Protest" wherein it argues for the due process rights owed *to parties*. In its filing, Idaho Power refers to

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[3] Interestingly, these same objectors previously have argued that their delivery call is an informal proceeding under Chapter 6 of the Water Code wherein summary orders by the Director, including summary curtailment orders without a hearing, are proper.

[4] On May 6, 2005, the Director entered an additional order in this case (the "May 6 Order") directing IGWA to provide, by May 23, additional information about the Replacement Water Plan. Perhaps these objectors also will challenge that order, and ask that IGWA not provide the information. That would be consistent with their apparent belief that, instead of responding to an order and providing replacement water under Rule 40, IGWA's members should be shut off under Rule 40 (or Ch. 6 of Title 42) while they face the objectors' objections, under Rule 43, to their separate mitigation plan.

the Director's April 6 Order, and the fact that the Director granted the Bureau's intervention motion. Idaho Power Protest at 5. But not a word about the April 6 Order's denial of Idaho Power's intervention. Idaho Power essentially asks the Director to pretend that the April 6 Order does not exist.[5]

If Idaho Power continues to believe that the Department should shut off ground water use on the Eastern Snake River Plain, then, as the Director pointedly noted in the April 6 Order, it should pursue that end by filing its own delivery call. Then it can pursue its own litigation as an applicant or a petitioner or a claimant against the southern Idaho agricultural economy. To the extent Idaho Power continues to object to the Ground Water Districts' Mitigation Plan, it is a party to that proceeding and is free to advance its arguments there. As to the present matter, Idaho Power is not entitled to file pleadings or otherwise challenge the Replacement Water Plan. The Director should reject Idaho Power's Protest.[6]

For the foregoing reasons, the "protests" filed by the SWC, Bureau of Reclamation and Idaho Power Company should be dismissed.

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[5] Idaho Power hints at the huge, elephant-in-the-room obstacle to its presence here by suggesting that the May 2 Order somehow rendered it an "aggrieved party" and vested it with "standing." Idaho Power Protest at 4-5. However, the May 2 Order is interlocutory, and it affects only those who are parties. Only parties can seek reconsideration. Further, the deadline has passed for Idaho Power to appeal the April 6 Order denying it party status.

[6] At best, Idaho Power is an "interested person," i.e., a non-party who has an interest in a proceeding. IDAPA 37.01.01.158. As such, Idaho Power may appear as 'public witnesses' at any hearing on the Coalition's delivery call in accordance with Rule 355. IDAPA 37.01.01.355.

RESPECTFULLY SUBMITTED this 18th day of May 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May 2005, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as stated. I also served a courtesy copy on counsel for Idaho Power Company.

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