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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' BRIEF ON THE QUESTION OF IDAHO POWER'S STATUS IN THIS CASE

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" or "IGWA"), submits its brief in response to the June 16, 2005 *Order Regarding Status and Scheduling Conference of June 15, 2005* issued by the Director, Idaho Department of Water Resources

("Director" and "Department"). The issue on which the Director has requested briefing is whether Idaho Power is now to be recognized as a party to this case. The answer should be no, for the reasons set forth below.

Background

This matter began in mid-January 2005 with a letter from the Surface Water Coalition ("SWC") to the Director seeking curtailment of thousands of ground water wells in Water District ("WD") 120 (the "Delivery Call"). The Director granted requests for intervention filed by the Bureau of Reclamation ("Bureau"), the City of Pocatello, United Dairymen of Idaho, the State Agency Ground Water Users, and IGWA.

The Director denied Idaho Power Company's motion to intervene, noting that, "to the extent Idaho Power believes its water rights are being interfered with by the exercise of junior priority ground water rights, it has other adequate forms of relief available, such as the filing of a separate delivery call." *Order on Petitions to Intervene, etc.* (April 6, 2005). Idaho Power did not appeal or seek reconsideration of the order denying intervention, and that order is now final. Nor has Idaho Power filed its own delivery call and or described any injury to any of its water rights or entitlements.

Without conducting a hearing, the Director issued his May 2, 2005 *Amended Order* ("May 2 Order") requiring the ground water users to provide the Surface Water Coalition a specified amount of replacement water in 2005. The May 2 Order provided the parties the opportunity to seek reconsideration and to request a hearing, and all have done so. The matter is ongoing, and now will proceed to hearing.

Although it moved for, and was denied, intervenor status in April, Idaho Power nevertheless since has repeatedly filed papers in this matter as if it were a party. Idaho Power

also has filed a "protest" to IGWA's replacement water plans in which Idaho Power refers to unspecified and undocumented "harm" to what it claims to be its "water rights, contracts [sic] rights and entitlements to water at American Falls Reservoir." *Idaho Power Company's Protest to IGWA's Initial Plan for Providing Replacement Water* (May 4, 2005) at 4. Idaho Power filed a similar protest to the Water Resource Coalition's replacement water plans. After that, Idaho Power filed a petition asking the Director to rescind his approval of replacement water plans and requesting that he "[c]urtail junior water rights until mitigation plans are approved and implemented." *Idaho Power Company's Petition for Review of Orders Approving Replacement Water Plans* (May 20, 2005) at 4 (emphasis added).[1] As did the Surface Water Coalition, Idaho Power has filed a "disqualification" of the Director as hearing officer. Most recently, Idaho Power has sought to vest itself with party status by petitioning for reconsideration and requesting a hearing on the May 2 Order.

In other words, despite an unequivocal, unchallenged and now final order of the Director denying Idaho Power party status, Idaho Power has continued to participate fully in this case as if it were a party.

In this brief, IGWA points out that this is an ongoing matter in which Idaho Power's presence has been barred. If Idaho Power actually claims and can make out a case for "harm" of any kind given the binding obligations of the agreements, orders, Idaho Water Resource Board

[1] IGWA already has responded to these post-party filings, and requests that the Director refer to those responses in evaluating this matter. *See, e.g., Idaho Ground Water Appropriators' Response to Objections to Plan for Providing Replacement Water* (May 18, 2005), and *Idaho Ground Water Appropriators' Response to Protests Opposing Plan for Providing Replacement Water (May __, 2005)* (pointing out that there is no application, claim or appeal to which Idaho Power can protest).

plans, and statutes implementing the Swan Falls Agreement,[2] then Idaho Power should pursue its own delivery call.

Argument

1. This is an ongoing contested case in which Idaho Power has been denied intervention.

The essence of Idaho Power's theory is that this case, although not yet to the hearing stage, has resulted in final orders that allow essentially anyone to object and thus initiate a new action to which he or she is a party. This theory is based, most pointedly, on the statement in the May 2 Order that "any person aggrieved by the Order shall be entitled to a hearing before the Director." May 2 Order at 31. *See, e.g., Idaho Power Company's Petition for Hearing on May 2, 2005, Amended Order and Request for Independent Hearing Officer* (May 17, 2005) at 2-7. But the May 2 Order clearly applies only to the parties to that ongoing case. It might be different if the May 2 Order came at the end of the administrative process. However, in this situation, it comes at the beginning.

This case is unusual not just because it is a matter of first impression involving conjunctive administration of ground and surface water rights. More importantly, at least for purposes of the question at issue here, this is an ongoing matter in which there has not yet been a hearing, but that nonetheless has resulted in an emergency order on a limited record. The parties have sought reconsideration and the hearing now is about to be scheduled. Perhaps the "order first, hearing later" aspect of this proceeding has led Idaho Power to some of its erroneous conclusions. But the fact is that, despite the issuance of the May 2 Order, this is an ongoing proceeding to which Idaho Power has been denied entry.

[2] For shorthand purposes, these agreements, orders, plans, and statutes are referred to herein as the "Swan Falls Agreement."

The reason for the unique procedural posture of this case is that the Director has deemed this Delivery Call a contested case under the emergency procedures of the Idaho Administrative Procedure Act ("APA"), I.C. § 67-5247. May 2 Order at 47. This statute authorizes the agency to "act through an emergency proceeding" and to issue orders "to prevent or avoid immediate danger that justifies the use of emergency contested cases." It requires the agency to "give such notice as is reasonable to persons who are required to comply with the order." I.C. § 67-5247(3). Then, "[a]fter issuing an order pursuant to this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger." § 67-5247(4). Accordingly, the parties to the matter are entitled to have the agency "complete" the proceedings begun with the order.[3]

This is the case here. The parties are entitled to participate in this matter as the Department brings it to completion through hearing and final order. But those entities who have not become parties, or who have been affirmatively denied party status, do not have that entitlement. Idaho Power is one of these.

2. Idaho Power did not appeal the order denying its intervention, and that order now is final.

The Director issued a final order denying Idaho Power's motion to intervene. If there was an order here that rendered Idaho Power an "aggrieved person," that was it. But Idaho Power did not seek reconsideration or judicial review of that denial within the time constraints of Title 42 or the APA. It should not be allowed to evade that order or statutory, jurisdictional deadlines now by recasting itself as an "aggrieved person" with regard to the May 2 Order. Again, this case did not end and become reviewable with the May 2 Order. Now the parties will

[3] At issue in these proceedings will be the claims of the Surface Water Coalition and the defenses of the intervenors—including the replacement water plans provided in the same context in which the May 2 Order was issued: emergency circumstances. The parties now will have an opportunity to bring forward facts and legal arguments evaluating all of these questions, including the continued necessity of the replacement water plans.

proceed through the development of a full record through a hearing, and a final, reviewable order will result. If Idaho Power believes it might somehow be aggrieved by that eventual order, perhaps it can seek review of that decision. But for now, and as this case proceeds as specified in the APA, Idaho Power has been finally and conclusively denied intervention.

IGWA has been unable to locate any clear authority on this point. But the fact that this is an ongoing case that is moving toward hearing after the entry of an order issued by the Director under asserted emergency procedures strongly suggests that the denial of intervention should not be susceptible of an end-run by means of a petition from an alleged "aggrieved person" who actually is the same person who made the same arguments to enter the case and was denied. The Director surely has the discretion to deny intervention by an entity that does not even assert injury, that does not file a delivery call of its own, and that joins in the same arguments being made by the entities who did file the call. Granting Idaho Power party status now will suggest that the Director, in such proceedings, lacks the power to control the scope and nature of an emergency delivery call proceeding. IGWA believes the Director possesses such power, and properly exercised it in denying Idaho Power's gratuitous intervention in this case.

3. *Idaho Power's presence in this case is unjustified because it has no direct interest in the outcome, its position is represented by existing parties, and its involvement would significantly broaden the issues.*

The Director's denial of Idaho Power's motion to intervene in this case was fully consonant with the intervention rule, which urges the Director to exercise his discretion to disallow intervention where the petitioner has not demonstrated a direct and substantial interest, where intervention will unduly broaden the issues, or where the petitioner's interests are adequately represented by existing parties. IDAPA 37.01.01.353. Idaho Power fails on all three fronts. These considerations should remain uppermost as the Director determines whether he will allow Idaho Power to become a party as this case proceeds toward hearing. An additional

consideration—that the procedural orders in this case such as the order denying intervention are to be followed, not flaunted—will expedite these proceedings and avoid further needless expense to parties who are required to respond to pleadings filed by non-parties.

A. Idaho Power has made no showing of injury or grievance.

If Idaho Power asserts that it has a grievance with the May 2 Order, presumably it is that the order does not assure Idaho Power enough water. If that is the case, then Idaho Power should have instituted its own delivery call and demonstrated that it does not have enough water and which junior ground water rights it believes are responsible. The May 2 Order is not, and could not be, designed to provide Idaho Power with anything because Idaho Power did not file a delivery call. Rather, the May 2 Order is limited to describing the facts specifically related to, and the rights and obligations of, those parties holding legal or beneficial title to water rights alleged to be injured and those ground water users alleged to be causing the injury.

The May 2 Order mentions that the interests of "delivery organizations, such as the members of the Surface Water Coalition," have beneficial or equitable title to storage in water described in their contracts with the Bureau. But the May 2 Order does not address Idaho Power, or Idaho Power's contract or other water rights or entitlements it might hold in American Falls Reservoir or elsewhere. It does not mention Idaho Power at all. It does not attempt to establish or calculate reasonable carryover or other attributes of storage that might apply to Idaho Power, or otherwise describe or limit Idaho Power's rights or obligations. Idaho Power can identify no grievance with reference to the May 2 Order.

B. Idaho Power's presence will significantly broaden the scope of this proceeding and necessarily will bring in questions about the Swan Falls Agreement, such as whether Idaho Power is in breach of that agreement.

In its response to Idaho Power in the context of the separate proceeding on IGWA's proposed mitigation plan, IGWA set forth several points concerning Idaho Power's status as a subordinated water right holder in the upper Snake River Basin. *Ground Water Districts' Response to Motion to Dismiss* (April 4, 2005), including:

- In the 1984 Swan Falls Agreement, Idaho Power contracted to an absolute subordination of its water rights in the Snake River and associated springs to all water rights in place as of October 1, 1984, and also to all claims or applications bearing a priority of June 30, 1985 or earlier. Swan Falls Agreement at Section 7(D).
- The State Water Plan implementing the Swan Falls Agreement not only confirms this, but also provides that "Idaho Power's claimed water rights at facilities upstream from Swan Falls shall be considered satisfied when the company receives the minimum flow specified in Policy 5B at the Murphy gauging station." State Water Plan, Policy 5C at 20. These plainly would include any right or entitlement Idaho Power may have in American Falls storage.
- Because Idaho Power's Snake River and spring rights also have been subordinated to post-1985 water rights obtained under the "trust water" provisions of Idaho law, I.C. § 42-203C. In other words, there are no water rights on the Eastern Snake Plain that can be administered as junior to Idaho Power's rights.[4]

[4] These principles also were confirmed in the Consent Judgments entered in *Idaho Power Company v. State of Idaho, et al.*, District Court for the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Case No. 81375 (February 12, 1990) and *Idaho Power Company v. State of Idaho, et al.*, District Court for the

- Idaho Power also is bound by the *Contract to Implement Chapter 259, Session Laws, 1983*, which extends third party beneficiary status to ESPA ground water users and prohibits asserting claims against certain nonconsumptive domestic, commercial, industrial and municipal water rights above Swan Falls Dam. Idaho Power's presence as a party to this case essentially would make it party to a claim against those water rights represented by the Ground Water Districts constituting nonconsumptive commercial, industrial, or municipal uses.
- Idaho Power's claims also would violate Idaho's law prohibiting the consideration of above-Milner water rights in administration of those below Milner, I.C. § 42-203B(2), and the statute providing that "[a] subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law." I.C. § 42-0203B(6).[5]

In summary, if Idaho Power is allowed to participate as a party in this proceeding, the Swan Falls issues almost certainly will be raised.

C. Idaho Power's interests are adequately represented by the Surface Water Coalition and the Bureau.

Idaho Power asserts that it does not own water rights in American Falls Reservoir, but that the Bureau holds certain storage rights there as trustee for Idaho Power. *Idaho Power's*

Fourth Judicial District of the State of Idaho, in and for the County of Ada, Case No. 62237 (March 7, 1990) ("The Company's rights . . . are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract between the State and Company implementing the terms of Idaho Code §§61-539 and 61-540"). The "persons dismissed" included thousands of ground water right holders, most of whom are members of the Districts. Needless to say, these judgments are binding on Idaho Power, and are enforceable by the State and by the "persons dismissed."

[5] District members also are third party beneficiaries of the Swan Falls Agreement. *See, e.g.,* I.C. § 61-540 (codifying the 1983 act providing that "all consumptive water users who have beneficially used water . . . prior to November 19, 1982" and those water right applicants applications who have "made substantial investments" are "third party beneficiaries of [the Swan Falls Agreement]").

Protest to IGWA's Initial Plan for Replacement Water at 7 (May 4, 2005). The gist of its argument is that, since the Coalition members stand in a similar position with respect to Bureau storage water rights, Idaho Power also should be seen as having an interest. Idaho Power ignores this substantial distinction: the Coalition members have filed a delivery call concerning delivery of their contract storage, and Idaho Power has not. In any event, with its intervention motion, Idaho Power directly placed in issue the question of its interest, and the Director denied intervention. That question is final and no longer subject to challenge.

For the foregoing reasons, Idaho Power's attempts to become a party to this proceeding after already having been denied intervenor status should be denied.

RESPECTFULLY SUBMITTED this 22nd day of June 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June 2005, 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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