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DEPARTMENT OF
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE CITY OF)
POCATELLO APPLICATION FOR)
LEASING OF WATER FOR)
HYDROELECTRIC GENERATION)
_____)

**POST-HEARING BRIEF OF IDAHO GROUND
WATER APPROPRIATORS, INC.**

COME NOW Idaho Ground Water Appropriators, Inc., for and on behalf of its member ground water users (collectively "IGWA") through counsel, and submit this Post-Hearing Brief as requested by the Director at the conclusion of the hearing on July 31, 2008.

BACKGROUND

On June 19, 2008, the City of Pocatello ("City") filed an Application for Leasing of Water for Hydroelectric Generation ("Application") with the Idaho Department of Water Resources ("IDWR" or "the Department"). Pursuant to the Application and attached Water Lease, the City seeks authorization from the Department to lease up to 20,000 AF of water available under its Palisades storage contract to Idaho Power Company ("Idaho Power") at a price of \$35 per AF for delivery below Milner Dam for hydroelectric generation purposes. The City asserts a right to do so pursuant to I.C. §§ 42-108A and

108B without the consent of the Committee of Nine of Water District 01, and to circumvent the Water District 01 Rental Pool Procedures ("Rental Pool Procedures").

Following the filing of the Application, the Department issued a notice and set a hearing held on July 31, 2008, in Jerome. The Application and proposed Lease was protested by IGWA, the Committee of Nine, Idaho Irrigation District, New Sweden Irrigation District and Palisades Water Users, Inc. (collectively "Protestants"). In sum, Protestants assert that I.C. §§ 42-108A 108B are inapplicable. If those code sections apply, and the Rental Pool Procedures can in fact be circumvented, Protestants assert that the Application should be denied because the delivery of storage water below Milner for power production purposes would adversely affect storage, carry-over storage and Rental Pool prices, causing material injury to their water rights and thus be in conflict with the local public interest and adversely affect the local economy. Testimony and evidence was presented to the Director at an evidentiary hearing conducted on July 31, 2008.

ISSUES

IGWA submits that the following issues are properly before the Director for decision based upon the applicable law and evidence presented, to-wit:

1. Are the provisions of I.C. §§ 42-108A and 108B applicable to the Application and Lease enabling the City and Idaho Power to circumvent the Water District 01 Rental Pool Procedures established pursuant to I.C. §§ 42-1763 and 1765?
2. Does the City's Palisades Storage Contract with Reclamation allow the proposed Lease and delivery of water below Milner for hydroelectric generation purposes without first complying with the Water District 01 Rental Pool Procedures?
3. If Issues 1 and 2 are answered in the affirmative, will the proposed Lease and delivery of water below Milner for hydroelectric purposes cause injury to other water rights, adversely affect the local economy or conflict with the local public interests contrary to I.C. § 42-1763?

STATEMENT OF POSITION

At the outset, IGWA wishes to make it clear that it highly values its working relationship with the City which has been an important partner in providing generous amounts of storage water under IDAHO GROUND WATER APPROPRIATOR'S, INC. MEMORANDUM REGARDING THE APPLICABILITY OF IDAHO CODE § 42-108B

annual leases at reasonable prices. This has been and will continue to be critically important to enable IGWA to meet its mitigation plan obligations in Water Districts 120 and 130 to avoid curtailment of ground water users, particularly in extremely dry years when water supplies are limited such as 2005 and 2007. Further, IGWA acknowledges and does not challenge in any way the City's storage water rights available under its Palisades Contract with Reclamation, nor the right to lease its storage water pursuant to the Water District 01 Rental Pool Procedures.

As a matter of policy, however, in order to protect their water rights of its members, maintain water in the upper basin for the primary purpose of irrigation and to protect the integrity of the Water District 01 Rental Pool, IGWA and Protestants adamantly oppose any water leasing. IGWA submits that because a Rental Pool has been established and operates in Water District 01 pursuant to I.C. §§ 42-1763 and 1765 and under authority of the Director and the Idaho Water Resource Board ("Board"), the Rental Pool Procedures must be followed. As a result, the consent of Committee of Nine, the Director and Board must first be obtained. These long-established processes and procedures have historically worked well and properly functioned to protect storage water for irrigation purposes above Milner and cannot be circumvented under I.C. §§ 42-108A and 108B, which are inapplicable. To do so would render entirely meaningless the Water District 01 Rental Pool and its long-established and followed procedures.

Approving the Lease under I.C. §§ 42-108A and 108B would essentially render storage water a "commodity" and open the door for open market trading to the highest bidder. Mayor Chase testified that it would then be the City's intention to lease as much water as possible every year to Idaho Power; and, further, based upon his discussions with several Idaho Power officials, that Idaho Power would in fact seek to lease as much water as possible from storage contract holders in the Upper Snake. Unquestionably, this would undermine and contradict the very purpose for which the Upper Snake

storage reservoir systems were constructed as well as the purpose of the Rental Pool Procedures of providing irrigation water for water users. *See Rental Pool Procedures.*

The Rental Pool Procedures specifically provide that the purpose is to provide “a process . . . by which storage water supplies will be made available by space holders for rental through the Water District 01 Rental Pool” (Rule 1.2B); to provide “expanded opportunities for all space holders to participate in and benefit from the proceeds of the Rental Pool” (Rule 1.2D); provide “controls, priorities and safeguards to ensure that existing water rights are not injured and that an adequate supply of stored water may be obtained on a voluntary basis from available supplies for the stated needs set forth in these procedures.” (Rule 1.2G). Furthermore, the “general procedures” set forth in Rule 3 specifically state that “the primary purpose in the operation of the Rental Pool will be to provide irrigation water to space holders within Water District 01.” (Rule 3.2) “Two party leases are not allowed for power generation or flow augmentation.” (Rule 3.9) With a procedure established under Rule 5 for space holders to assign annually 50,000 AF to the Rental Pool, including as the lowest “fourth priority: rental for uses below Milner.” (Rule 5.1) Permitting a water to be leased below Milner to the highest bidder in disregard of the Rental Pool Procedures will unquestionably result in a new use and evacuation of water from the Upper Snake storage system. The effect will be to reduce storage water, reduce carry-over storage and increase the annual Rental Pool price resulting in injury to the water rights of IGWA’s ground water users members. Accordingly, the proposed Application and Lease should be denied.

ARGUMENT

- 1. Idaho Code §§ 42-108A and 108B are Inapplicable. The City must comply with the Water District 01 Rental Pool Procedures.**

A review of the history regarding the water supply bank and use of local rental pool¹ shows that the provisions under Idaho Code, Chapter 14 Title 17 relating to Board's water supply bank govern in areas where the Board has established a local rental pool, and that I.C. §§ 42-108A and 108B should not apply. Otherwise the Director of the Department would in effect be improperly granted the power and authority to usurp the Board's rules and regulations that govern the operation of the water supply bank and establishment of local rental pools contrary to the Board's authority. See I.C. § 42-1763.

A review of the history of the water supply bank and the timing of the enactment of I.C. §§ 42-108A and 108B render it clear that these statutory provisions only apply to a water district where a water supply bank has not been established. Rentals from the Upper Snake have been occurring since the mid to early 1930s. In 1976, the Board recommended in its first State Water Plan that a water supply bank be established. Idaho State Water Plan – Part Two, December 29, 1976, p. 100. In 1979, the Idaho Legislature passed I.C. § 42-1761 *et. seq.* which formalized the program of annual leases of storage water. The purpose of the water supply bank created in 1979 was to “make use of and obtain the highest duty for beneficial use from water, provide a source of adequate water supply to benefit new and supplemental water uses, and provide a source of funding for improving water user facilities and efficiencies.” I.C. § 42-1761. The Legislature placed responsibility for the water supply bank with the Board and provided in I.C. § 42-1765 that the Board may “appoint local committees” to “facilitate the rental of stored water. The Committee shall have the authority to market stored water between consenting owners and consenting renters under rules and regulations adopted by the Board.” *Id.* In 1979, the Board appointed the Committee of Nine to oversee and administer a local rental pool program in the Upper Snake River which encompasses Water District 01. In 1980, the Committee and the

¹ Pursuant to Idaho Code § 42-62 the Idaho Water Resource Board is given the authority to operate the Idaho Water Supply Bank and establishes local rental pools. The Water District 1 Rental Pool covering the Upper Snake was established by the Board in 1979. The Committee of Nine was designated by the Board to operate the Water District 1 Rental Pool and has established Rental Pool Procedures governing the operation of the rental pool and lease of water.

Board adopted the first Water Supply Bank Rules, IDAPA 37.02.03.001.02. The Water District 01 Rental Pool Procedures were adopted by the Committee of Nine of Water District 01 pursuant to this authority.

When water rights are leased from the water supply bank or a local rental pool, there is generally a temporary change in the place of use. As the statutes indicate, water leased from the water supply bank is a method to facilitate a water right transfer without going through the formal transfer procedure in I.C. § 42-222. When the water supply bank was first created, I.C. § 42-1763 specifically stated that the “approval of a lease or rental may be a substitute for the requirements of section 42-222, Idaho Code,” this statement is now contained in I.C. § 42-1764(1). However, because the water supply bank statutes were tied to I.C. § 42-222, concern arose in 1980 that because Idaho statutes did not allow for a change in period and nature of use under I.C. §§ 42-108 or 222, that leasing irrigation water for hydroelectric generation purposes may violate the statutes and could not be allowed until there was a change to those two code sections. In 1981, the Idaho Legislature amended I.C. §§ 42-108 and 222 to allow for a change in period and nature of use.² This change allowed the water supply bank to be able to facilitate leases of water for hydroelectric generation purposes when the water users of the Upper Snake determined there was water available. That same year, the Legislature also added two new sections to Title 42: I.C. §§ 42-108A and 42-108B.

Idaho Code § 42-108A generally relates to the leasing of water for hydroelectric generation and states that so long as the application does not exceed one year, then “[s]uch a lease or leases shall not constitute a change in the nature of use of such water” making it unnecessary to go through the formal transfer process. Idaho Code § 42-108B provides “generally for the leasing of water under

² Section 42-108, Idaho Code was amended to read: Change in Point of Diversion, Place of Use, Period of Use, or Nature of Use; Section 42-222, Idaho Code was amended to read: Change in Point of Diversion, Place of Use, Period of Use, or Nature of Use.

established water rights” by those people “who shall desire to lease the water pursuant to section 42-108A, Idaho Code.” These two statutes create an exception to filing a transfer when a lease between a willing buyer and willing seller is executed for a period not to exceed one year. However, these statutes do not apply where there is an established local rental pool, as in the Upper Snake River, because the statutes governing the water supply bank allowed leases through the water supply bank for hydroelectric generation purposes when I.C. §§ 42-108 and 222 were amended. Sections 108A and 108B were not necessary in order to allow the Board’s rental pool in the Upper Snake to facilitate rental and lease of water for hydroelectric generation purposes and can only be reasonably read to be necessary for those areas of the state where there was no water supply bank.

This conclusion is further supported when one reads all of Chapter 42, Title 17 which specifically defers to the rules and regulations adopted by the local committee and approved by the Board. Idaho Code §§ 42-108A and 108B should not render those rules and regulations meaningless. It is more reasonable to conclude that the legislature’s passage of I.C. §§ 42-108A and 108B was an attempt to address those situations in the state where there was no established rental pool. That is not the case in the Upper Snake. The authority to market stored water between consenting owners and consenting renters as established under I.C. § 42-1765 rests with the local committee.³

The above described interpretation readily reconciles any apparent conflict between Idaho Code § 42-108B and Idaho Code § 42-1765 by providing a separate and distinct circumstance where each applies, the former to areas where no local rental pool exists and the later to areas where a local rental pool does exist. Such is in accord with our Supreme Court’s ruling in *State v. Barnes*, 133 Idaho 378,

³ The Legislature intended for the local committee to be a key advisor to the Board and the Director on matters involving the water supply bank. Idaho Code § 42-1765 provides that the Director of the Department of Water Resources “may approve a general lease which the local rental committee may utilize to meet the approval requirements enumerated in Section 42-1763, Idaho Code.” This adds further support for the fact that when there is a local rental committee and an established water supply bank, that its rules and regulations govern as set forth in Idaho Code §§ 41-1761 et seq. and that the more general statutes, Idaho Code §§ 42-108A and 108B have no applicability.

987 P.2nd 290, 292 (1999) holding that “statutes relatın to the same subject matter, although in apparent conflict, are to be construed in harmony, if reasonably possible.” Furthermore, from a reading of these statutes it is clear that I.C. § 42- 108B is a general statute while I.C. § 42-1765 is much more specific in providing specific procedures for local rental pool operations. Where two statutes appear to apply to the same case or subject matter, the specific statute will control of the more general statue. *Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107, 115, 73 P. 3d 721, 729 (2003).

Based upon the forgoing, the City’s request to circumvent the water supply bank using I.C. §§ 42-108A and 108B should be denied.

2. Does the City’s Contract with Reclamation allow the lease of water below Milner for hydroelectric generation purposes without complying with the Water District 01 Rental Pool Procedures?

Reclamation did not participate in the hearing. Instead, Reclamation’s Regional Director J. William McDonald sent a letter dated July 30, 2008, to the Director which states in pertinent part: “We do not believe that Reclamation’s Contract with Pocatello is germane to these determinations. Accordingly Reclamation does not plan to attend the hearing.”

There is no dispute that the primary purpose of the City’s storage contract with Reclamation was to provide a source of water to mitigate or “replace” in the Snake River depletions associated with the City’s wells, to-wit:

“ . . . The City, securing water for all municipal purposes by pumping from underground and from surface flows that would, if not intercepted by the City, flow into the Snake River below Palisades Dam, desires to replace in the Snake River by means of storage at Palisades Reservoir water in volume approximately the equivalent of that removed by pumping from a Snake River tributary underground and surface flows, and it having been determined that 50,000 AF of active capacity in Palisades Reservoir will furnish such approximate equivalent volume;” (Lease, Par.4, p.2)

Paragraph 16A of the Contract 4 specifies the manner in which water delivered through the City's system will be accounted for and offset by storage water. While "the City may rent storage water which it has accrued to its credit, . . . such rent shall be for only one year at a time and at rates to be approved in advance by the secretary and the advisory committee." There is no evidence in the record these required consents have been obtained.

The Mayor acknowledged in his testimony that the primary purpose and function of the City's storage contract was to provide mitigation water to offset depletions associated with the City's wells. Since the City has never constructed a means to divert and deliver storage water from the Snake River, up until now its sole use has been to provide its own mitigation and replacement water with any excess available to place in the rental pool or lease to other water users in Water District 01 for use above Milner. Thus, no precedent exists for the City to lease water below Milner other than through the Water District 01 Rental Pool. The City's contract with Reclamation does not appear to allow or preclude the proposed Lease.

- 3. Any lease below Milner for power production purposes without complying with the Water District 01 Rental Pool Procedures will cause injury to the water rights of the Ground Water Users and other Protestants, adversely affect the local economy and conflict with the local public interest contrary to I.C. §42-1763.**

Idaho Code § 42-1763 provides that the terms and conditions of any rental of water must be approved by the director. To grant approval under this statute the Director must first find that the proposed lease will not "reduce the quantity of water available under other existing water rights," "conflict with the local public interest," or "adversely affect the local economy of the water shed or local area..." I.C. § 42-1763. To permit water to be leased below Milner to the highest bidder in disregard of the Rental Pool Procedures will unquestionably result in a new demand, use and evacuation

4 IGWA believes that the Director need not determine whether a proposed lease is allowed under the terms of the storage contract for the reasons set forth in Argument 1 above and 3 below.

of water from the Upper Snake Storage System. The effect will be to reduce storage water, reduce carry-over storage and increase the annual Rental Pool price. These facts were established by the undisputed testimony of Lyle Swank, Water District 01 Watermaster and manager of the Rental Pool..

The proposed lease will result in irreparable injury and harm to IGWA and its ground water user members by diminishing the storage water supplies available to lease for mitigation purposes and potentially imposing an increased obligation to supply carryover water to the Surface Water Coalition under the 2005 and subsequent Orders issued by the Director. Furthermore, supplies of storage water available to rent will be at an increased price under Rental Pool Rule 6.1 where the Rental Pool rate increases from \$5 when the storage system fills to \$12 when it does not fill but flow augmentation is provided and to \$18 when the storage system does not fill and no mitigation is provided. The testimony presented by IGWA President Tim Deeg and evidence presented by Exhibits 1, 2 and 3 was undisputed and clearly establish not only the importance to IGWA to be able to lease storage water to meet mitigation obligations to avoid curtailment of its members, but also the critical role the City's storage water plays in such leases. The City has been the largest lessor of water to IGWA in 2007 and 2008 at a favorable price of \$10 per AF, less than the Rental Pool rate in each year, and less than one-third of the \$35 price offered by Idaho Power in 2007 and 2008. As testified to by Mr. Deeg, during a critically short 2007 water year, IGWA likely could not have made its mitigation obligation without the City's leases. No explanation is needed why Idaho Power chose to lease water from the City at \$35 when a greater amount is presently available through the Rental Pool at a mere \$12. Quite obviously, Idaho Power's motivation is to use the City's lease to establish a precedent that would allow it to lease Upper Snake storage without limitation and thus render meaningless the Rental Pool Procedures established to protect Upper Snake storage for irrigation purposes and use above Milner.

Even if the City can circumvent the Rental Pool Rules under I.C. §§ 42-108A and 108B, the evidence is clearly convincing and overwhelming that other water rights of will be injured, and thus, the Application must be denied.

CONCLUSION

The proposed lease by the City to Idaho Power for delivery of water below Milner for hydroelectric purposes cannot be approved under I.C. §§ 42-108A and 108B, which do not apply in Water District 01 where a local rental pool has been established governing any rental of water pursuant to I.C. §§ 42-1761 *et seq.* The City and Idaho Power have failed to comply with the Water District 01 Rental Pool Procedures and have not obtained the requisite consent of the Committee of Nine, the Board and the Director. If the City is allowed to circumvent the Rental Pool Procedures under I.C. §§ 42-108A, 108B, then the application must be denied because it is clear that the proposed lease would cause injury to other water rights by decreasing storage water, decreasing carryover storage and increasing rental rates.

Respectfully submitted this 8th day of August, 2008.

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By: Randall C. Budge
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2008, 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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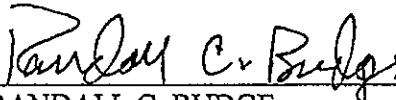
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