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Attorneys for Minidoka Irrigation District

June 14, 2006

VIA EMAIL & U.S. MAIL

Director Karl J. Dreher
Idaho Department of Water Resources
322 E. Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Management of Eastern Snake Plain Aquifer / Request for Water Right Administration

Dear Director Dreher:

This letter is being sent on behalf of our clients, 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 (hereinafter collectively referred to as the "Surface Water Coalition" or "Coalition").

The Coalition requested administration of hydraulically connected junior priority ground water rights over a year ago in January 2005. *See* Exhibit A.[1] That request was made pursuant to Chapter 6, Title 42, Idaho Code, as well as the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) ("Rules"). The Coalition highlighted the history of the Department's management actions on the Eastern Snake Plain Aquifer ("ESPA") that dated back to 1992, including the designation of two groundwater management areas in 2001. The Coalition also filed a formal petition requesting administration of ground water rights that were not located within organized water districts and requested a groundwater management area designation for the entire ESPA. *See* Exhibit B.

The Coalition reaffirmed its request for water right administration pursuant to Idaho's Constitution and water distribution statutes again in April 2005. *See* Exhibit C. In that memorandum the Coalition specifically noted that "the Department is mandated with a clear legal duty to administer the State's water resources, including ground water, pursuant to the Idaho Constitution, Idaho statutes, governing case law, and the Director's prior orders . . ." *See id.* at 2, 3.

Finally, on May 9, 2006, Twin Falls Canal Company (TFCC) requested that water for injury calculated in 2005 be distributed immediately. *See* Exhibit D. In addition, TFCC also notified you of the likely injury in 2006 based upon observances of historical spring flow declines. TFCC's request was based upon the expectations of the company's shareholders, including water demand in 2005 and what was anticipated for 2006.[2] As of today, TFCC has yet to receive any indication of a response to its request. TFCC's letter was sent in response to your prior statements regarding the preliminary injury analysis for 2006 water right administration to satisfy the Coalition members' water rights. *See* Exhibits E, F.[3] Despite the statements in the December 27, 2005 Order and the April 25, 2006 letter, the Coalition has yet to receive any indication that you have completed your analysis for purposes of administering junior priority ground water rights in 2006.

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[1] Exhibits A to the January 14, 2005 letter and the January 15, 2005 *Petition* are voluminous and have not been attached, but can be found at http://www.idwr.idaho.gov/Calls/Surface%20Coalition%20Call/default.htm.

[2] While the Director's determination of injury in 2005 has been subject to finalization since December 27, 2005, and the method for calculation of such injury is now subject to review, in our view the Director's injury calculation of 152,200 acre-feet represents a minimum injury determination for 2005 and perhaps for 2006 based upon spring flow data and reach gains for each year. *See* Exhibit E.

[3] December 27, 2005 Order stating "The remainder of such replacement water that was due in 2005 for 2005 material injury shall be in addition to the water supplies otherwise available to the Twin Falls Canal Company in 2006 . . .and curtailment or replacement water required to mitigate for material injury determined to be reasonably likely in 2006, if any." (emphasis added). April 25, 2006 Letter to Randy Budge stating "Absent an agreement between IGWA and the Surface Water Coalition and unless IGWA successfully completes agreements for leasing additional storage water in 2006, the 37,140 acre-feet you represent as being available from Mitigation, Inc. will not be sufficient to meet the remaining 2005 obligation to the Twin Falls Canal Company, supply ground-water-to-surface-water conversions, make deliveries to Billingsley Creek via the Sandy Pipeline, and meet additional replacement water requirements for 2006, if any. . . . [I]f the obligation . . . remaining from 2005 is not met in 2006 together with additional replacement water obligations for 2006, if any, it will be necessary to curtail some amount of ground water diversions by priority in 2006." (emphasis added).

While early season precipitation and snowpack levels have improved over the last two years compared to that witnessed from 2001 to 2004, aquifer levels and resulting reach gains and spring flows have not demonstrated significant changes. In addition, while reservoir storage rights have filled to a greater extent the last two years, including a projected complete fill this year, natural flow rights have continued to be unfulfilled due to depletions caused by junior priority ground water rights. In other words, a full storage system in any given year does not necessarily mean that natural flow rights will be entirely satisfied, or that the aquifer levels, spring flows, reach gains, and storage rights will not subsequently suffer the impacts from junior priority ground water diversions. The Coalition members are still concerned about water supplies for their senior surface water rights and the Department's failure to comprehensively manage the ESPA consistent with Idaho law. Proper aquifer management must account for impacts from present ground water diversions that may not be fully realized within one year.

Accordingly, the Coalition hereby reaffirms its prior request that the Department, Director and watermasters perform their legal duties to administer hydraulically connected ground water rights according to priority. The Coalition further requests that the Director take steps to manage the ESPA in a comprehensive manner that looks beyond a single irrigation season. Any administrative action must be analyzed in conformance with recent judicial action voiding the Department's Rules.

With respect to the Rules, the Coalition's January 14, 2005 request for administration duly noted that the constitutionality of the Department's Rules was at issue in a then pending lawsuit, *Rim View Trout Company et al. v. Karl J. Dreher et al.* (Case No. CV-03-07551D, 4th Jud. Dist, Ada County Dist. Ct.). Since that time, the Rim View litigation was dismissed without prejudice, and members of the Coalition filed their own challenge to the Department's Rules in district court, *AFRD #2 et al. v. IDWR et al.* (Case No. CV-2005-600, 5th Jud. Dist. Gooding County Dist. Ct.). In the June 2, 2006 *Order on Plaintiffs' Motion for Summary Judgment*, the Gooding County District Court struck down the Department's Rules for violating Idaho's Constitution (Art. XV, § 3) and water distribution statutes (I.C. §§ 42-602, 603, and 607). Importantly, the Court highlighted the requirement for timely administration to be completed "consistent with the exigencies of a growing crop during an irrigation season." Any delay in administration impermissibly burdens and diminishes senior water rights, such as those held by the Coalition's members. Moreover, continued delay exacerbates future injury and impacts from groundwater pumping that are not necessarily realized within an irrigation season or a calendar year.

Pursuant to the Court's June 2, 2006 Order, the Coalition represents that you have the necessary information from prior submissions, prior decrees and licenses, and from the Director's Reports for the Coalition members' water rights that were recently filed with the SRBA District Court to administer water rights by priority pursuant to the Idaho Constitution and water distribution statutes as well as begin comprehensive management of the ESPA.[4]

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[4] *See Petitioners' Joint Response to Director's February 14, 2005 Information Request* filed on March 15, 2005; *Supplemental Response to Director's Information Request* filed on April 15, 2005; and *Part I Director's Report Irrigation & Other Uses IDWR Lower Basin 01 (Part I)* issued on May 15, 2006. This material has not been

As you are aware from prior requests, timing is critical for purposes of properly distributing water to the Coalition members' senior water rights and for planning to meet landowners' and shareholders' summer irrigation demands. Any additional delay in administering water rights in 2006 stands to leave the Coalition members' senior water rights unfulfilled, as happened in 2005. Finally, failing to address reduced aquifer levels, spring flows, and reach gains in a lawful and thorough manner stands to leave the ESPA's problem unaddressed for yet another year.

We look forward to your prompt response.

DATED this 14th day of June, 2006.

LING ROBINSON & WALKER

Roger D. Ling

Attorneys for A & B Irrigation District and Burley Irrigation District

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attached but can be found at http://www.idwr.idaho.gov/Calls/Surface%20Coalition%20Call/default.htm and on file with IDWR.

EXHIBIT "A"

RECEIVED

JAN 14 2005

DEPARTMENT OF
WATER RESOURCES

A & B Irrigation District
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Rupert, Idaho 83350-0675

American Falls Reservoir District #2
112 S. Apple St.
Shoshone, Idaho 83352

Burley Irrigation District
246 East 100 South
Burley, Idaho 83318

Milner Irrigation District
5924 East 3610 North
Murtaugh, Idaho 83344

Minidoka Irrigation District
98 West 50 South
Rupert, Idaho 83350

North Side Canal Company
921 N. Lincoln
Jerome, Idaho 83338

Twin Falls Canal Company
P.O. Box 326
Twin Falls, Idaho 83303-0325

January 14, 2005

VIA HAND DELIVERY

Director Karl Dreher
Idaho Department of Water Resources
322 East Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Request for Water Right Administration in Water District 120 (portion of the Eastern Snake Plain Aquifer) / Request for Delivery of Water to Senior Surface Water Rights[1]

Dear Director Dreher:

The seven surface water entities listed above (hereinafter collectively referred to as the "Surface Water Coalition"), submit this request for water right administration and delivery of water to their senior natural flow and storage water rights pursuant to Idaho law. Since the Interim Stipulated Agreement expired two weeks ago, and the State of Idaho is entering its sixth year of drought, administration of junior groundwater rights is necessary to satisfy the Coalition's senior surface water rights. Although the Surface Water Coalition requests water right administration for 2005 and beyond, the members remain committed to "good faith" negotiations with groundwater users to find a long-term agreement that will restore their water supplies and stabilize the declining spring flows and aquifer levels.

[1] A list of the relevant surface water rights and priorities is attached as Exhibit A.

The ESPA groundwater model predicts reach gains that will accrue to the Snake River (Neeley to Minidoka; near Blackfoot to Neeley, Shelley to near Blackfoot) as a result of the curtailment of junior groundwater rights. The predicted reach accruals are calculated both in cubic feet per second and acre-feet, and are time-dependant. Whereas depletions to the Snake River caused by junior ground water pumping have occurred over a number of years, the benefits from curtailment will also be realized over a number of years. The water that will accrue to these reaches (Neeley to Minidoka, near Blackfoot to Neeley, and Shelley to Blackfoot) is needed and can be put to beneficial use under the Coalition's senior surface water rights. Whenever natural flow rights are on, the Coalition can use that water under their natural flow rights, and whenever that water would accrue to fill storage rights, the water is likewise needed to satisfy those storage rights.

The extent of injury equals the amount of water diminished and the cumulative shortages in natural flow and storage water which is the result of groundwater depletions. Impacts have been occurring as a result of ground water depletions and reduced reach accruals for several years, resulting in material injury to the water rights of the Surface Water Coalition. Curtailment of junior ground water rights must therefore occur over a period of time unless substantial aquifer recovery occurs as a result of artificial or natural recharge in excess of the present rate of groundwater depletions.
Any and all water that is pumped under junior groundwater rights that would otherwise accrue to the Snake River to satisfy a senior surface water right, as demonstrated by the model, results in a "material injury" to the Surface Water Coalition's senior surface water rights. Each entity's water rights, including a list of the relevant storage rights held by the USBR, is set forth below:

Entity:	Water Rights:
A & B Irrigation District	01-14, 01-2060A, 01-2064F, 01-2068F
AFRD #2	01-6
Burley Irrigation District	01-7, 01-211B, 01-214B
Milner Irrigation District	01-9, 01-17, 01-2050, 01-02064B
Minidoka Irrigation District	01-8, 01-4045A, 01-10187, 01-10188, 01-10189, 01-10190, 01-10191, 01-10192, 01-10193, 01-10194,01-10195, 01-10196
North Side Canal Company	01-5, 01-16, 01-210A, 01-210B, 01-212, 01-213, 01-215, 01-220, 01-02064C, 01-10042B 01-10043A, 01-0045B, 01-10053A
Twin Falls Canal Company	01-4, 01-10, 01-209, 01-02064A, 01-10042A,

The Eastern Snake Plain Aquifer (ESPA) is defined as an area determined to have a common ground water supply. Rule 50. The water supply in the ESPA is hydraulically connected to the Snake River and tributary water sources at various places to varying degrees. Senior surface water rights above Milner Dam rely upon tributary spring flows and reach gains that occur at various points of the river from Shelley, Idaho downstream to Minidoka Dam (hereinafter referred to as the "American Falls reach") to fill natural flow and storage water rights. These spring flows[2] and reach gains[3] have been in steady decline over the past decade, particularly the last four years, resulting in inadequate water supplies to satisfy senior surface water rights.

Data collected by the United States Bureau of Reclamation (USBR) over the past six years indicates about a 30% reduction in reach gains to the Snake River between Blackfoot and Neeley, a loss of about 600,000 acre-feet. *See* Exhibit B. The recently recalibrated ESPA ground water model identifies ground water pumping as a major contributor to declines in the source of water fulfilling senior surface water rights. The ground water model demonstrates that pumping under junior groundwater rights results in an approximate steady state annual depletion of 1.1 million acre-feet to the Snake River in the American Falls reach.[4]

Request for Water Right Administration:

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 hereby submit this request for administration of water rights in Water District No. 120 and delivery of water to their respective Snake River natural flow water rights and to the storage water rights held by the USBR in trust for these entities, pursuant to Idaho Code Chapter 6 Title 42 and the Rules for Conjunctive Management of Surface and Ground Water Resources (Idaho Administrative Code Section 37.01.01)[5].

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[2] Compare the 2004 Spring Creek discharge data against the median discharge data at http://waterdata.usgs.gov/id/nwis/rt.

[3] According to USBR's preliminary data, the total acre-feet measured in the river between near Blackfoot and Neeley in 2004 was 1,529,549; approximately 30,000 acre-feet higher than what was measured in 2003. Despite this increase, the six-year trend is still decreasing and 2004 measurements were 596,771 acre-feet less than 1999. *See* Exhibit B.

[4] See *Snake River Plain Aquifer Model Scenario: Hydrologic Effects of Curtailment of Ground Water Pumping "Curtailment Scenario"* (October 2004, Idaho Water Resources Research Institute Technical Report 04-023) found at http://www.if.uidaho.edu/~johnson/ifiwrri/projects.html

[5] The Coalition notes that the legality of the conjunctive management rules is at issue in *Rim View Trout Company et al. v. Karl J. Dreher et al.*, Case No. CV-03-07551D (Fourth Dist. Ct., Ada County). By order of Judge Sticklen, the *Rim View* litigation is stayed until March 15, 2005 (*Order Approving Stipulation to Stay Proceedings*). In making this request for administration, the Coalition does not admit that the conjunctive management rules are constitutional and hereby reserves the right to challenge the rules as necessary. However, because the constitutionality of the rules is currently at issue in the *Rim View* litigation, the Coalition is not presently raising that issue in this request.

	01-10043, 01-10045A
U.S. Bureau of Reclamation	01-284, 01-2064, 01-4052, 01-10042, 01-10053, 01-4055, 01-10044, 01-10045, 01-2068, 01-4056, 01-4057, 01-10043

Members of the Coalition divert water pursuant to the above-listed rights at their respective canals at Minidoka and Milner Dams. The USBR stores water under its water rights at its respective project reservoirs in the Upper Snake River Basin above Milner Dam, including American Falls Reservoir. Members of the Coalition beneficially use the water for irrigation and other purposes.

By reason of the diversion of junior ground water rights located within Water District No. 120 and elsewhere throughout the ESPA, the members of the Surface Water Coalition are suffering material injury. *See* Exhibit C.[5] Accordingly, 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 hereby submit this request for the Watermaster to administer water rights in Water District No. 120 by priority in time in order to supply water to these entities under their senior surface water rights. This request is further supported by the *Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area*, which is being filed separately but simultaneously with this request.

The fact that the Surface Water Coalition requests administration of their respective water rights through a common document is not intended to be, is not, and should not be construed to be a waiver of the individual rights and benefits accruing to each entity by reason of that particular entity's water rights. Furthermore, even though the Coalition is making a request for water right administration at this time, the Coalition is committed to continued negotiations with ground water users to reach a settlement that will restore spring flows and reach gains and stabilize the ESPA.

Recent History of IDWR's ESPA Management Actions:

The history of actions taken by the Department to manage the ESPA dates back at least to 1992, when the Director issued a *Moratorium Order* on the processing and approval of all applications for permit to appropriate water from all surface and ground water sources in the Snake River Basin upstream of the USGS Weiser gauging station. *See May 15, 1992 Moratorium Order*; *January 6, 1993 Order Amending Moratorium*

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[5] In the event any entity administering water rights perceives the need for further information concerning "material injury" other than is supplied either on the face of the Surface Water Users' water rights or herein, the undersigned request notification of the same, and a timely and meaningful opportunity to provide such information.

Dated May 15, 1992; and *April 30, 1993 Amended Moratorium Order*. These moratorium orders were issued, in part, to "protect existing water rights." At that time, the Director recognized ground water levels in the ESPA had fallen due to a number of factors including the "increased volume of pumping." *See April 30, 1993 Order* at 1.

Unfortunately, despite the moratorium orders, new permits have been approved, and the ESPA water levels and the Surface Water Coalition's water rights continue to suffer deleterious effects from ground water pumping. As a result of the declining aquifer levels and water supplies available to satisfy senior surface water rights, the Director designated the American Falls Ground Water Management Area in 2001. This designation specifically recognized the ESPA along the American Falls reach "may be approaching the conditions of a critical ground water area." *2001 A.F. GWMA Order* at 3. The conditions of the ESPA have not improved since 2001, in fact, aquifer levels and water supplies in the American Falls reach have only diminished.

After the American Falls GWMA designation, interested surface and ground water users finalized an interim agreement to delay the Director's proposed management of the aquifer. The Interim Stipulated Agreement has stayed aquifer management and water right administration of ground water rights for the past three years.[6] The three-year stay was intended to provide a time period for negotiations between surface and ground water users and more importantly, to provide time for the recalibration of the ESPA ground water model. The model was and is intended to govern administration of water rights receiving water from the ESPA.

In 2003, during the term of the Interim Stipulated Agreement, the Director issued an order modifying the boundaries of the American Falls GWMA and asserted that the administration provided by that designation was duplicative or unnecessary given the creation of Water District 120.[7] Administration of water rights within Water District No. 120 could proceed without the notice requirements under the ground water management area statute, I.C. § 42-233b. Therefore, with the completion of the new ESPA groundwater model, the creation of new water districts, and the expiration of the interim agreement, the Coalition is obligated to request immediate water right administration to protect its senior surface water rights.

Although the Surface Water Coalition and interested groundwater users have diligently continued negotiations over the past three years to reach a long-term resolution over the administration of surface and groundwater rights in the ESPA, an agreement has yet to be reached. At the same time, the water supplies in the ESPA have continued to diminish and the Surface Water Coalition's water rights have continued to be interfered with and curtailed because of reduced spring flows from the ESPA while ground water

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[6] The one-year extension of the Interim Stipulated Agreement in Water District No. 120 expired on December 31, 2004.

[7] Twin Falls Canal Company and North Side Canal Company challenged the Director's order modifying the boundaries of the American Falls GWMA. The contested case has been stayed since April 2004.

diversions from the ESPA continue to exceed recharge needed to stabilize the ESPA at acceptable ground water elevations.

In making this request that the Director carry through with his statutory duty to administer water rights and based upon representations made to the parties regarding such administration, it is the hope and intent of the Surface Water Coalition that negotiations to find a mediated settlement of the conjunctive management of the resource will continue simultaneously with said administration of ground water rights in the ESPA.

A & B Irrigation District

By: Roger D. Ling, attorney

American Falls Reservoir District #2

By: President

Burley Irrigation District

By: Roger D. Ling, attorney

Milner Irrigation District

By: Scott Greening
Chairman

Minidoka Irrigation District

By: Mike Wilkins
Chairman

North Side Canal Company

By: Chairman of Board

Twin Falls Canal Company

By: Chmn. BOD

EXHIBIT "B"

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Attorneys for Minidoka Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR ADMINISTRATION 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	)	**PETITION FOR WATER RIGHT ADMINISTRATION AND DESIGNATION OF THE EASTERN SNAKE PLAIN AQUIFER AS A GROUND WATER MANAGEMENT AREA**

COMES 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 (hereinafter collectively referred to as "Petitioners"), pursuant to Rules 30 and 41 of the conjunctive management rules (IDAPA 37.03.11) and Rule 230 of the Department's rules of procedure (IDAPA 37.01.01), and hereby petitions the Director of the Idaho Department of Water Resources as follows:

BASIS FOR PETITION

1. Petitioner A & B Irrigation District is a duly organized irrigation district under the laws of the State of Idaho, with its principal place of business located at 414 11th St. in Rupert Idaho.

2. A & B Irrigation District holds the following irrigation and storage water rights to the Snake River: 01-14, 01-2060A, 01-2064F, 01-2068F. Water under these rights is diverted through a system of canals and laterals and is beneficially used for irrigation purposes.

3. Petitioner American Falls Reservoir District #2 is a duly organized irrigation district under the laws of the State of Idaho, with its principal place of business located at 112 S. Apple St. in Shoshone, Idaho.

4. American Falls Reservoir District #2 holds the following irrigation water right to the Snake River: 01-6. Water under this right is diverted through a system of canals and laterals and is beneficially used for irrigation purposes.

5. Petitioner Burley Irrigation District is a duly organized irrigation district under the laws of the State of Idaho, with its principal place of business located at 246 East 100 South in Burley, Idaho.

6. Burley Irrigation District holds the following irrigation and storage water rights to the Snake River: 01-7, 01-211B, 01-214B, 01-2064F, and 01-02068F. Water under these rights is diverted through a system of canals and laterals and is beneficially used for irrigation purposes.

7. Petitioner Milner Irrigation District is a duly organized irrigation district under the laws of the State of Idaho, with its principal place of business located at 5924 East 3610 North in Murtaugh, Idaho.

8. Milner Irrigation District holds the following irrigation and storage water rights to the Snake River: 01-9, 01-17, 01-2050, and 01-2064B. Water under these rights is diverted through a system of pumps, canals, and laterals and is beneficially used for irrigation purposes.

9. Petitioner Minidoka Irrigation District is a duly organized irrigation district under the laws of the State of Idaho, with its principal place of business located at 98 West 50 South in Rupert, Idaho.

10. Minidoka Irrigation District holds the following irrigation and storage water rights to the Snake River: 01-8, 01-4045A, 01-10187, 01-10188, 01-10189, 01-10190, 01-10191, 01-10192, 01-10193, 01-10194,01-10195, and 01-10196. Water under

these rights is diverted through a system of canals and laterals and is beneficially used for irrigation purposes.

11. Petitioner North Side Canal Company is a non-profit Idaho corporation organized under the laws of the State of Idaho, with its principal place of business located at 921 N. Lincoln St. in Jerome, Idaho.

12. North Side Canal Company holds the following irrigation and storage water rights to the Snake River: 01-5, 01-16, 01-210A, 01-210B, 01-212, 01-213, 01-215, 01-220, 01-02064C, 01-10042B 01-10043A, 01-0045B, and 01-10053A. Water under these rights is diverted through a system of canals and laterals and is beneficially used for irrigation purposes.

13. Petitioner Twin Falls Canal Company is a non-profit Idaho corporation organized under the laws of the State of Idaho, with its principal place of business located at 357 6th Ave. West in Twin Falls, Idaho.

14. Twin Falls Canal Company holds the following irrigation and storage water rights to the Snake River: 01-4, 01-10, 01-209, 01-02064A, 01-10042A, 01-10043, and 01-10045A. Water under these rights is diverted through a system of canals and laterals and is beneficially used for irrigation purposes.

15. The United States Bureau of Reclamation (USBR) holds the following irrigation storage rights to the Snake River: 01-284, 01-2064, 01-4052, 01-10042, 01-10053, 01-4055, 01-10044, 01-10045, 01-2068, 01-4056, 01-4057, 01-10043. Water is stored under these rights at Jackson Lake, Palisades Reservoir, American Falls Reservoir, and Lake Walcott. Water stored under these rights accrues to the respective space of the members of the Coalition pursuant to contracts with the United States.

16. Data collected by the United States Bureau of Reclamation over the past six years indicates an approximate 30% reduction in reach gains to the Snake River between Blackfoot and Neeley, a loss of about 600,000 acre-feet. *See* Exhibit A. The recently recalibrated ESPA ground water model identifies ground water pumping as a major contributor to declines in the source of water fulfilling senior surface water rights. The ground water model demonstrates that pumping under junior groundwater rights results in an approximate steady state annual depletion of 1.1 million acre-feet to the Snake River between Shelley and Minidoka Dam. *See Snake River Plain Aquifer Model Scenario: Hydrologic Effects of Curtailment of Ground Water Pumping "Curtailment Scenario"* (October 2004, Idaho Water Resources Research Institute Technical Report 04-023) found at http://www.if.uidaho.edu/~johnson/ifiwrri/projects.html.

18. By reason of the diversion of water by junior ground water appropriators located within the Eastern Snake Plain Aquifer (ESPA), the Petitioners are suffering material injury as a result of depletions to spring flows and reach gains tributary to the Snake River, resulting in reduced volumes of water in the Snake River available for the Petitioners to divert under their water rights which would otherwise be available in the

absence of such depletions. Impacts have been occurring as a result of ground water depletions and reduced reach accruals for several years, resulting in material injury to the Petitioners' water rights. Curtailment of junior ground water rights must therefore occur over a period of time unless substantial aquifer recovery occurs as a result of artificial or natural recharge in excess of the present rate of groundwater depletions. Any and all water that is pumped under junior groundwater rights that would otherwise accrue to the Snake River to satisfy a senior surface water right, as demonstrated by the model, results in a "material injury" to the Petitioners' senior surface water rights.

19. As a result of reduced spring flows and reach gains caused by diversions under junior ground water rights, the Petitioners' diversions under senior natural flow water rights have been interfered with and curtailed. *See* Exhibit B. Similarly, Petitioners' senior storage water rights, including carry-over supplies, have also been interfered with and reduced by diversions under junior ground water rights. *See id.*

20. The names, addresses and description of the water rights of the ground water users who are causing material injury to the rights of the Petitioners is not now known by Petitioners.

21. The ESPA is an area of common ground water supply within which junior priority ground water rights must be regulated.

22. The ESPA is a ground water basin which may be approaching the conditions of a critical ground water area and the ground water supply is insufficient to meet the demands of Petitioners and other water rights within the ESPA, an area of common water supply. The Director previously recognized a portion of the ESPA was "approaching the conditions of a critical ground water area" by an order of August 3, 2001 designating the American Falls Ground Water Management Area.[1] Ground water supplies, including spring flows and tributary reach gains have continued to decline since 2001.

23. Petitioners have also filed a water right delivery call for administration of water rights in Water District No. 120 pursuant to Rule 40 of the conjunctive management rules thereby providing the Director and the Watermaster with the ability to immediately administer water rights within the district.

24. Petitioners reserve the right to supplement this petition with additional information as necessary.

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[1] The Director later issued an order modifying the boundaries of the American Falls Ground Water Management Area on August 29, 2003. Petitioners Twin Falls Canal Company and North Side Canal Company challenged that order. The contested case regarding that matter has been stayed since April 2004.

PRAYER FOR RELIEF

WHERFORE, Petitioners request the following relief:

1. That the Director take such action as is necessary to insure the delivery of water to Petitioners' senior surface water rights, including administration of junior priority ground water rights located: 1) within the ESPA but that are not within organized water districts; and 2) within the American Falls Ground Water Management Area.

2. That the Director do all things reasonably necessary and appropriate to protect the people of the State of Idaho of depletion of ground water resources which have caused material injury to Petitioners.

3. That the Director designate the Eastern Snake Plain Aquifer as a ground water management area as provided by Section 42-233b, Idaho Code

4. That the Director otherwise supervise the allotment of water from the use of water from the ground water management area above described to insure the full utilization of the water rights of the Petitioners by the Petitioners for the benefit of lands within their respective irrigation projects.

5. For such other and further relief as deemed necessary.

DATED this 14th day of January 2005.

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LING ROBINSON & WALKER

_____
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EXHIBIT "C"

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Attorneys for Minidoka Irrigation District

April 15, 2005

Via Email & U.S. Mail

Karl J. Dreher, Director
Idaho Department of Water Resources
The Idaho Water Center
322 E. Front Street
P. O. Box 83720
Boise, Idaho 83720-0098

Re: Memorandum in Support of Surface Water Coalition's Request for Water Right Administration (Water District 120)

Dear Director Dreher:

This memorandum is being filed on behalf of members of the Surface Water Coalition[1] in support of their request for water right administration in Water District No. 120 that was filed with the Department on January 14, 2005. Subsequent to the filing of the Coalition's request, several parties have petitioned to intervene in the proceeding, including the Idaho Ground Water

[1] The Coalition consists of 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.

Appropriators (IGWA), the Idaho Dairyman's Association, Idaho Power Company, and the United States Bureau of Reclamation.[2] IGWA's petition was granted immediately on February 14, 2005. The remaining petitions were granted on April 6, 2005, except for the petition of Idaho Power Company, notwithstanding the fact Idaho Power holds rights to stored water in American Falls Reservoir which have been severely impacted by ground water diversions and other factors. IGWA also filed formal motions requesting authorization for discovery and for an order of summary judgment, despite the Department's use of informal procedures in this proceeding. Objections to the filing of a formal motion for summary judgment were made, and IGWA's motion was denied, without prejudice, in the April 6, 2005 Order.

According to your April 6, 2005 Order, it is the Coalition's understanding that you have read IGWA's motion for summary judgment and the affidavit of Charles M. Brendecke, but that you do not "intend to rely upon the information contained therein" in making an "injury" determination in the forthcoming order responding to the Coalition's request for water right administration.[3] However, since you have admittedly reviewed the motion and affidavit, it is evident that you have at least considered those materials prior to responding to the Coalition's request. Therefore, the Coalition is submitting this memorandum to address the key points in support of its water right administration request and make the Director aware of initial questions and omissions related to the Brendecke Affidavit.[4]

The issue facing the Director in this matter can be succinctly summarized. Junior ground water right holders continue to divert and use water that would otherwise be available for diversion and use by surface water users under their senior water rights. As a result, senior surface water right holders are suffering "injury" by reason of these junior ground water right depletions. Idaho law, including the SRBA District Court's order granting the State of Idaho's motion for interim administration, requires the Department to administer junior ground water rights by priority, including during periods of drought, for the benefit of senior surface water rights.

The State of Idaho Administers Water Rights According to Priority

The Idaho Department of Water Resources (Department), to the best of the Coalition's knowledge, has ***never*** curtailed a junior ground water right to satisfy a senior surface water right. Despite over a century of established water right administration across the state, no junior ground water right has ever been held to the standard required by Idaho's prior appropriation doctrine. Accordingly, it is no surprise that junior ground water right holders continue to resist the law today, and even attempt to argue that Idaho is not a "true" prior appropriation state. Contrary to this resistance and argument, the Department is mandated with a clear legal duty to administer

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[2] Despite any claimed capacity to represent their members, to the best of the Coalition's knowledge, neither the Idaho Ground Water Appropriators, Inc. or the Idaho Dairyman's Association hold water rights that would be subject to the Coalition's request for water right administration.

[3] *See* February 14, 2005 *Order* 31, ¶ 37 (explaining intention to issue order after April 1st forecasts are reviewed).

[4] This memorandum is not and should not be deemed as the Coalition's formal response to the documents filed by IGWA since the motion for summary judgment was denied.

the State's water resources, ***including ground water***, pursuant to the Idaho Constitution, Idaho statutes, governing case law, and the Director's prior orders which all plainly provide:

> "Priority of appropriations shall give the better right as between those using the water;" Idaho Constitution, Art. XV, § 3.
>
> "As between appropriators, the first in time is first in right." Idaho Code § 42-106.
>
> "It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, . . . according to the prior rights of each respectively, and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . ." Idaho Code § 42-607.
>
> "[T]he law of this territory is that the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld . . . If persons can go upon tributaries of streams whose waters have all been appropriated and applied to a useful and legitimate purpose, and can take and control the waters of such tributaries, then, indeed, the sources of supply of all appropriated natural streams may be entirely cut off, and turned away from the first and rightful appropriators. To allow this to be done would disturb substantial vested rights, and the law will not permit it." *Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411, 414-15 (1888).
>
> "While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, based upon facts like those in this case, has been so often decided adversely to such claim, and in favor of the prior appropriation, that the maxim, "First in time, first in right," should be considered the settled law here. Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity." *Drake v. Earhart*, 2 Idaho 750, 753 (1890).
>
> "10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:
>
> * * *
>
> d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director."

Final Order Creating Water District No. 120, at 5 (February 19, 2002).

There is no question the Department has a mandatory duty to distribute water in Water District No. 120 according to priority. It is further undisputed that the Coalition members hold water rights for natural flow and storage senior to those ground water rights within Water District No. 120. Therefore, under Idaho law, the Department is obligated to administer the water supply by priority and deliver water to satisfy the senior rights.

Although Idaho's water code has undergone some revisions and amendments since 1881, the bedrock principle of water right administration, "first in time, first in right" has not wavered. For example, the Idaho Supreme Court has consistently reaffirmed this guiding principle in the State's water law. *Silkey v. Tiegs*, 51 Idaho 344, 353 (1931)("a valid appropriation first made under either method will have priority over a subsequent valid appropriation"); *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9, (1944)("It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water."); *Nettleton v. Higginson*, 98 Idaho 87, 91 (1977)("it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation; i.e. first in time is first in right."); *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982)("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.").

In its most basic terms the prior appropriation doctrine requires senior water rights to be satisfied prior to junior water rights. With respect to the distribution of water within an organized water district, such as Water District No. 120, Idaho law expressly requires the Department to follow the rule of priority:

> The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ***ground water*** and other natural water sources as shall be necessary to carry out the laws ***in accordance with the priorities of rights to the users thereof.***

Idaho Code § 42-603 (emphasis added).

> ***It shall be the duty of said watermaster to distribute the waters*** of the public stream, streams or water supply, . . . ***according to the prior rights of each respectively***, and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do ***in order to supply the prior rights of others*** in such stream or water supply . . .

Idaho Code § 42-607 (emphasis added).

The Idaho Supreme Court has further defined the Director's obligation to administer water rights within a water district by priority as a "clear legal duty." *Musser v. Higginson*, 125 Idaho 392, 395 (1994). In times of shortage, as is expected in 2005, the Water District 120 watermaster must distribute water according to the priority dates of the respective water rights,

as set forth by decree or license. *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20 (1935). Any adopted rules or regulations, or subsequent actions by the Department or its agents, that stray from this mandate are patently illegal.[5]

To accomplish priority distribution within Water District 120, Idaho law requires the watermaster to distribute water according to the list of decreed, licensed, and permitted rights. I.C. § 42-607. The Idaho Supreme Court has similarly required such a duty from the state's watermasters:

> We think the position is correct, and we are also satisfied that in a case like this where the decree upon its face is explicit as to the stream from which the waters are to be distributed, that the water-master cannot be required to look beyond the decree itself.

Stethem v. Skinner, 11 Idaho 374, 379 (1905).

This priority distribution includes administration of hydraulically connected tributary ground water rights located in water districts that affect surface water supplies in neighboring districts. *See* March 10, 2004 *Amended Order* In the Matter of Distribution of Water to Water Rights Nos. 36-15501, 36-02551, and 36-07694 (order requiring curtailment of junior ground water rights within Water District No. 130 to satisfy the water delivery call of senior surface water rights in Water District No. 36-A).

Finally, priority distribution demands protection of all senior water rights, including storage water rights. A critical misunderstanding the Coalition has with the February 14, 2005 Order is the linkage between natural flow rights and storage rights. A number of the entities making calls are primarily storage right holders. A & B Irrigation District made a call on its storage right. There are only early season natural flow rights, senior though to the ground water rights, associated with those lands. AFRD#2 relies heavily upon storage water. North Side Canal Company has an early priority natural flow for part of its project, but relies primarily on storage for the majority of its lands. For those entities that do rely primarily upon natural flow, it was only after a number of years of operation in which they saw the potential shortages in the system and that they obtained storage as some assurance to delivering a full supply of water. This potential shortage was premised upon natural conditions, low snow pack, drought, etc., not the diversion by a junior water user. Did the Coalition members acquire storage to mitigate for a continued illegal diversion by a junior surface or ground water user? The answer is an emphatic "no." Entities that purchased storage space did so with their own individual financial consequences. Additional assessments were imposed upon their water users.

When the natural flow right is impaired by the actions of a junior water right holder, the remedy is against that junior water right holder, not as against the storage right. The storage rights were acquired later in time and without limitation as to whether and when the rights had to

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[5] Indeed, the rules governing this call proceeding are just such an example, and are at issue in a district court case in Ada County.

be used. Further, both Reclamation and the individual spaceholders have interests in the storage rights. Carryover has been, and remains a critical part of the storage system in the Upper Snake River Basin. Historically, the reason the system has operated so efficiently was that water users have been careful not to overburden the system and have been able to carryover water supplies for the following year. To now state that all storage water must be completely exhausted before an entity can claim injury to the natural flow right places the operation of the entire Upper Snake River Basin reservoir system at risk.

According to the Idaho Constitution, relevant state statues, and the Director's order creating Water District No. 120, the Director has a clear legal duty to curtail junior water rights to satisfy senior rights, including storage rights, in times of shortage.

Junior Appropriators Carry the Burden to Prove Non-Interference With Senior Appropriators

The Department recognizes the ESPA and hydraulically connected surface water sources are overappropriated, including in Water District 120. *Final Order Creating Water District No. 120* at 4.[6] Moreover, new appropriations seeking a consumptive use from the ESPA are prohibited by the Department's moratoriums.[7] Consequently, in time of shortage, water rights must be curtailed by priority, and the burden falls squarely upon a junior appropriator to prove that its diversion and use of water does not injure a senior appropriator. In other words, since the ESPA and its hydraulically connected surface water sources such as the Snake River and its tributaries are overappropriated, depletions under junior water rights are presumed to injure senior water rights. The Idaho Supreme Court set forth this rule of law over a century ago:

> This court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right; and it would take more than a theory, and, in fact, clear and convincing evidence in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we could depart from a rule so just and equitable in its application and so generally and uniformly applied by the courts. . . . The subsequent appropriator who claims that such diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence.

Moe v. Harger, 10 Idaho 302, 303-04 (1904).

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[6] The Idaho Legislature also recognizes that water supplies in the ESPA are overappropriated resulting in water shortages. *See* House Concurrent Resolution No. 28, 58th Legislature, 1st regular session 2005 (". . . ground water pumping has resulted in reduced spring discharges and reduced gains to the Snake River from the Eastern Snake Plain Aquifer . . . and have resulted in insufficient water supplies to satisfy existing beneficial uses relying on spring discharges and Snake River flows;").

[7] *See May 15, 1992 Moratorium Order*; *January 6, 1993 Moratorium Order*; *April 30, 1993 Amended Moratorium Order*. The latest moratorium was recently continued and reaffirmed by Governor Dirk Kempthorne through Executive Order No. 2004-02 on March 20, 2004.

The rule extends equally to those juniors who would divert water from tributary sources to the Snake River, such as the ESPA:

> It seems self evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should, as we observed in *Moe v. Harger*, 10 Idaho 305, 77 Pac. 645, produce "clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion." The burden is on him to show such facts.

Josslyn v. Daly, 15 Idaho 137, 149 (1908).

Similar to the rule of prior appropriation, the rule requiring a junior to justify his use as against a senior has been reaffirmed by the Idaho Supreme Court on several occasions. *Jackson v. Cowan*, 33 Idaho 525, 528 (1921)("The burden of proving that [the water] did not reach the reservoir was upon the appellants . . . and this they fail to do."); *Cantlin v. Carter*, 88 Idaho 179, 186 (1964)("A subsequent appropriator attempting to justify his diversion has the burden of proving that it will not injure prior appropriations); *Silkey v. Tiegs*, 54 Idaho 126, 129 (1934)("adherence to rule requiring protection of the prior appropriator, precludes relief to [the junior ground water user]"). Stated another way, a senior appropriator is ***entitled*** to have its water right ***protected from interference by junior appropriators***, and the Department has a "clear legal duty" to distribute water on that basis.

Should a junior appropriator continue to interfere with a senior's use under a prior right, the senior is entitled to have the junior diversion curtailed. For example, where, as in the ESPA, diversions under junior ground water rights interfere with the water supplies necessary to fulfill the Coalition's senior natural flow and storage rights, such diversions must be curtailed until the senior rights are fulfilled. *Arkoosh v. Big Wood Canal Company*, 48 Idaho 383, 396 (1929)("We believe that if by the construction of its dam, and its use of the natural channel of the river, appellant has interfered with respondents' rights, and by such use, unless restrained, will continue to interfere with respondents' rights and deprive them of water to which they are entitled by reason of their prior appropriation, such action is wrongful and may be enjoined.").

The rule that prohibits junior ground water diversions from interfering with senior surface water rights is even firmly announced in Idaho's Ground Water Act. Idaho Code § 42-237a(g) specifically provides for the Director, in furtherance of the State's policy to ***conserve*** ground water, to determine that ground water is not available for diversion and use when withdrawing that water would "affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right . . .". Therefore, it follows that junior ground water rights within the ESPA are limited by the superior right of senior users, such as the Coalition's water rights. In addition, Idaho law prohibits those diversions under junior ground water rights from "affecting" or "interfering" with water that can be used by a senior, either through direct diversions of natural flow or diversions to storage.

IGWA's Constitutional Arguments are Misplaced and Contrary to Idaho's Prior Appropriation Doctrine

IGWA confuses provisions in the Idaho Constitution to claim that Idaho is not a "true" prior appropriation state for purposes of water right administration. Instead, IGWA argues that the Department must perform some unspecified "balancing" test to determine how water is distributed among the state's various users. This argument is contrary to Idaho's Constitution and is simply an attempt to create "new law" in the area of water right administration.[8] This approach was clearly rejected by the Idaho Supreme Court in *Kirk v. Bartholomew*, 3 Idaho 367 (1892).

IGWA acknowledges Idaho's priority system of water distribution set forth in Article XV, Section 3, but then goes on to mischaracterize remaining sections in the constitution in an effort to erode the rule of prior appropriation. First, IGWA alleges that Article XV, Sections 4 and 5 somehow "qualify" the prior appropriation doctrine as applied between senior surface water delivery organizations and individual junior ground water right holders. A plain reading of those sections clearly indicates that they only apply to separate water right appropriations "among" users within water delivery organizations, not between those appropriations and other junior appropriations made by individuals outside the projects.

First, IGWA basically ignores the plain language of Section 4, which states:

> Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, ***under a sale, rental, or distribution thereof***, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, ***such person . . . shall not thereafter, without his consent, be deprived of the annual use of the same, when needed . . to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law.***

Idaho Const. Art. XV, § 4 (emphasis added).

The provision simply states that a shareholder of a canal company, or a landowner within an irrigation district, who is entitled to have water distributed to his or her lands for irrigation purposes, shall not be denied that distribution as long as payment is made and they comply with "equitable terms and conditions as to the quantity used and times of use." Notably, IGWA does

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[8] To the extent the Department's conjunctive management rules adopt the same "theories" espoused by IGWA with respect to Art. XV, §§ 4,5, and 7, they too are contrary to Idaho law and the rule of prior appropriation. IDAPA 37.03.11.020.03. Since the rules are presently at issue in litigation before the District Court in Ada County (*Rim View Trout Co. v. Dreher et al.*, Case No. CV-03-01755D, the Coalition will not address these deficiencies under the rules at this time.

not cite any such laws that set forth such "equitable terms and conditions as to the quantity used and times of use" for canal company shareholders or irrigation district landowners.

Although shareholders within canal companies and landowners within irrigation districts must follow the respective laws and regulations relating to their respective water delivery entities, and the entities' water rights must be used in accordance with their respective elements set forth by decrees and licenses, nothing transforms this provision into a "limitation" on an entity's water right as against individual junior ground water rights. Admittedly, IGWA provides no supporting statutes or case law that would demonstrate otherwise.

Similarly, IGWA misconstrues Article XV, Section 5 as standing for some "universal" reasonable use limitation on senior surface entities' water rights when compared to individual junior ground water rights. IGWA claims that the Coalition members have an obligation to accept "reasonable limitations" in times of shortage in order to benefit junior ground water rights. Again, IGWA ignores the critical language in the provision in an effort to interpret it out of context in its application. Article XV, Section 5, when read in its entirety, plainly states:

> Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, ***as among such persons, priority it time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same***, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of us ***as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement***, may by law prescribe.

Idaho Const., Art. XV, § 5 (emphasis added).

Similar to Section 4, the above section plainly applies "among" those persons ***within*** water delivery organizations such as canal companies and irrigation districts.[9] IGWA ignores the controlling condition that states "as among such persons" within those irrigation projects. Nothing implies that any "reasonable limitations" the Legislature might prescribe, which it hasn't, applies to junior appropriators that are not part of the irrigation project. Moreover, the only law that appears to address this question is Idaho Code § 42-904, which essentially affirms the prior appropriation doctrine as between different classes of users within an irrigation project.[10]

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[9] *See Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 604 (1904)(Sullivan, C.J., *dissenting*)("The provisions of said section 5 contemplate that ditch owners must furnish water to the extent of their ability to all settlers under their ditches in the numerical order of their settlements or improvements, thus contemplating that the rental right to the use of such waters should be given to the settlers in accordance with the priority of their settlement or improvement, carrying out the theory that the first settler in time was first in right.").

[10] *See Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 543 (1963).

Finally, contrary to IGWA's effort to stretch the application of Art. XV, Sections 4 and 5 outside the boundaries of water delivery entities' projects, the Idaho Supreme Court has expressly recognized they do not:

> As we read this decision, it construes section 4 and 5 of article 15 of the constitution as creating a priority among consumers from a canal analogous to that which exists among appropriators from a natural stream.

Geber v. Nampa & Meridian Irr. Dist., 19 Idaho 765, 768-69 (1911).

> The framers of our constitution evidently meant to distinguish settlers who procure a water right under a sale, rental or distribution from that class of water users who procure their water right by appropriation and diversion directly from a natural stream. The constitutional convention accordingly inserted secs. 4 and 5, in art. 15, of the constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes to be used "under a sale, rental or distribution" ***and to point out the respective rights and priorities of the users of such waters***. It was clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes. And so sec. 4 is dealing chiefly with the ditch or canal owner, while sec. 5 is dealing chiefly with the subject of priorities ***as between water users and consumers who have settled under these ditches and canals*** and who expect to receive water under a "sale, rental or distribution thereof." The two sections must therefore be read and construed together.
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> * * *
>
> "Mr. Claggett: Mr. Chairman, both of these sections [4 and 5] apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are 'appropriated or used for agricultural purposes under a sale, rental, or distribution.'

Mellen v. Great Western Sugar Beet Co., 21 Idaho 353, 359, 361 (1912)(emphasis added).

> The provisions of the constitution [Art. XV, § 4] . . . have peculiar application to persons or corporations organized for the purpose of appropriating water for sale, rental, or distribution and have no application to an irrigation district, except as hereinafter noted.

Yaden v. Gem Irrigation Dist., 37 Idaho 300, 307 (1923).

Pursuant to the decisions listed above, it is obvious that Sections 4 and 5 of Article XV only apply as between users within a water delivery entity. And contrary to IGWA's claim, the

Legislature has not imposed any "reasonable limitations" on the prior rights within those entities. Notably, IGWA fails to cite any specific law where the Legislature has imposed "reasonable conditions" upon priority rights within water delivery entities, let alone as between those entities and junior ground water right holders. Just the opposite, the Legislature has reaffirmed the priority doctrine as it applies between different classes of water users under a ditch or canal company. I.C. § 42-904. Therefore, IGWA's argument that the constitution requires "reasonable limitations" to be placed on the Coalition's water rights for the benefit of junior ground water rights is without merit and should be disregarded.[11]

Finally, IGWA resorts to claiming that Art. XV, Section 7 somehow allows for junior ground water right holders to divert water ahead of senior appropriators in the name of the "optimum development" of the State's water resources. Section 7, enacted to ward off the State of California's interest in diverting Snake River water from southern Idaho, authorizes the Idaho Water Resource Board to "formulate and implement a state water plan for optimum development of water resources in the public interest." Art. XV, § 7. Contrary to IGWA's claims, the State Water Plan does not call for senior water users to suffer water shortages at the hands of junior appropriators. Instead, the Plan specifically requires conjunctive administration of connected ground and surface water resources. *See State Water Plan* ¶ 1G ("It is the policy of Idaho that where evidence of hydrologic connection exists between ground and surface waters, they are managed conjunctively in recognition of the interconnection.").

Certainly the "optimum development" of the State's water resources does not mean that senior appropriators are not entitled to have their water rights protected and administered by priority. Given the state of the ESPA's declining aquifer levels and reduced reach gains to the Snake River, "optimum development" of the resource may have occurred thirty years ago, prior to the development of thousands of additional irrigated groundwater acres. If "optimum development" hinges on economics and "who" makes more money under certain water uses, then priority has no place in water right administration. Idaho law prohibits the chaos that would ensue under that scenario. Again, nothing in the constitution "limits" or "qualifies" senior surface water rights for the benefit of junior ground water rights. As such, IGWA's arguments with respect to Art. XV, § 7 should also be disregarded.

Idaho's Ground Water Act Does Not Limit Rights of Senior Surface Water Rights

IGWA attempts to carryover its misplaced constitutional arguments into Idaho's Ground Water Act in furtherance of the argument that senior surface water rights are "limited" at the

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[11] IGWA's reliance upon *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912) for the proposition that a prior appropriator is not entitled to his decreed or licensed right contrary to the policy of "reasonable use", and that this case applies to the Coalition's water right delivery call is misplaced. In *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 397 (1929), the Idaho Supreme Court carefully observed that "*Schodde* . . . is clearly distinguishable because therein the interference was not with a water right but the current. In other words, the same amount of water went to Schodde's place as before. . . . this is an action for an injunction to restrain appellant from interfering with respondents' water rights . . ."). Similar to the circumstances in *Arkoosh*, here the Coalition is requesting relief from interference by junior water right holders, not seeking to maintain the velocity characteristic of a "current" as was the case in *Schodde*.

expense of junior ground water rights. Once again, IGWA's arguments run afoul of Idaho's law of prior appropriation and prior decisions of the Idaho Supreme Court. Even the Ground Water Act itself explicitly recognizes the rule of prior appropriation and the Director's duty to protect the State's aquifers such as the ESPA as well as senior water rights. I.C. § 42-231 ("It shall likewise be the duty of the director . . . to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act."); I.C. § 42-233a ("The director, upon a determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a critical ground water area, shall order those water right holders on a time priority basis . . ."); I.C. § 42-237a ("the director . . . is empowered: . . . g. To supervise and control the exercise and administration of all rights to the use of ground waters and . . . initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. . . . Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom . . . would affect . . . the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge."). Despite these provisions, IGWA apparently claims the Ground Water Act somehow insulates junior ground water rights from water right administration.

First, IGWA asserts that Idaho Code § 42-226 applies to the Coalition's senior surface water rights, and that an exercise of those rights "shall not block the full economic development of underground water resources." The statute plainly states that the "act shall not affect the rights to the use of ground water in this state acquired before its enactment." This statement applies equally to surface water rights that rely upon tributary ground water.

The Idaho Supreme Court clearly resolved this issue in *Musser v. Higginson*, 125 Idaho 392 (1994), when it stated:

> "Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute. Therefore, we fail to see how I.C. § 42-226 in any way affects the director's duty to distribute water to the Mussers, whose priority date is April 1, 1892."

125 Idaho at 396.

IGWA ignores the Idaho Supreme Court's holding in *Musser* and fails to explain how the statute retroactively applies to the Coalition members' senior water rights acquired prior to 1951. Accordingly, IGWA's argument should be disregarded.

Next, IGWA claims that the Coalition's request for water right administration must proceed before some "local ground water board" pursuant to I.C. § 42-237b. Similar to the claims regarding the "full economic development of the resource," the statute referring disputes the local ground water boards is inapposite since Idaho's Ground Water Act does not apply to

water rights acquired prior to 1951. Idaho Code § 42-226 plainly states, in part: "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." In other words, water rights prior to 1951, like the Coalition's, are not subject to the procedures set forth in the Idaho Ground Water Act. [12]

Moreover, such procedures inherently conflict with the Department's water distribution requirements within organized water districts. *See* I.C. §§ 42-603, 42-607. The Director expressly recognized that administration of both surface and ground water rights would occur by the watermaster in Water District No. 120. *See Final Order Creating Water District No. 120* at 5. Nothing in the Water District No. 120 final order indicates that "local ground water boards" will perform the watermaster's duty and administer water rights. Additionally, it is common practice for senior water right holders in Idaho, even after passage of the Ground Water Act, to request administration through a water district, or directly from a Court when necessary. *See* March 10, 2004 *Amended Order* In the Matter of Distribution of Water to Water Right Nos. 36-15501, 36-02551, and 36-07694; *Baker v. Ore-Ida Foods*, 95 Idaho 575 (1973); *Musser v. Higginson*, 125 Idaho 392 (1994). Specifically, the Idaho Supreme Court affirmed the procedure used by the senior well owner in *Baker v. Ore-Ida Foods*, who filed a direct action in district court to prevent interference from junior ground water users. The *Baker* Court did not remand the proceeding back to a "local ground water board" but instead firmly held that "Idaho's Ground Water Act forbids 'mining' of an aquifer." 95 Idaho at 583. Therefore, IGWA's objection that the Coalition's request for water right administration must proceed before a "local ground water board" is contrary to existing practice and law in Idaho, and should similarly be disregarded.

Futile Call Does Not Apply to the Coalition's Call

Finally, IGWA argues that the Coalition's water delivery call should be dismissed because it would be "futile." The defense is inapplicable in this proceeding since curtailing junior ground water rights would result in water being available for beneficial use by the Coalition members, including for direct natural flow diversions and diversions to storage. *See* Contor, Cosgrove, Johnson, Rinehart and Wylie, Snake River Plain Aquifer Model Scenario: *Hydrologic Effects of Curtailment of Ground Water Pumping "Curtailment Scenario"*, October 2004, Idaho Water Resources Research Institute Technical Report 04-023. The Coalition members can use the water resulting from curtailment of junior ground water rights, hence there would be no "waste" as that complained of by IGWA.

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[12] The SRBA District Court has recently reiterated the Idaho Supreme Court's holding in *Musser* that the groundwater statutes do not affect the Coalition members' water rights, or any other surface or ground water right prior to 1951. *See Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits* at 27 (In Re SRBA: Case No. 39576; Twin Falls County District Court, 5th Jud. Dist.)(Subcase No. 91-00005, Basin-Wide Issue 5)("First, the groundwater management statutes do not apply to water rights prior to their enactment in 1951.").

Initial Questions/Comments Regarding Brendecke Affidavit

The Director may have his own questions regarding statements and data presented in the Brendecke Affidavit. Notwithstanding any of the Director's questions or concerns, the Coalition, after an initial review of the Brendecke Affidavit, would like to point out the following questions and comments for the Director's consideration, even though the Director does not "intend" to rely upon the affidavit for the forthcoming "injury" order.

- The flow of the South Fork of the Snake River does not represent the "total water supply" available for diversion and use by the Coalition members. It is but one "indicator" of the total water supply in any given year.
- The Upper Snake River Basin has experienced drought cycles over time. Storage reservoirs in the basin were constructed in order to provide necessary water supplies in "drought" years. The drought index demonstrates that storage is needed the most in years when the index is below "0", when impacts to water rights caused by junior diversions are exacerbated. Junior water rights do not escape liability for the depletions they cause to senior water rights during a "drought" period.
- If the current drought exhibits a deficit of nearly 2 MAF, that is all the more reason for junior ground water rights to mitigate for depletions caused to senior surface water rights.
- Ground water "withdrawals" are not the same as "depletions" to the ESPA. Pumping of all groundwater rights results in approximately 2.1 MAF of depletions to the ESPA while more water may actually be "withdrawn."
- The data or reports that demonstrate approximately "1.1 MAF" was withdrawn from the ESPA by groundwater pumping in 1980 needs to be revisited or clarified. If current groundwater "depletions" are approximately 2.1 MAF, then that would mean approximately 50% of the groundwater development in the ESPA occurred since 1980. This number appears to contradict the depiction at Exhibit R.
- Exhibit J shows the "average" reach gains on an "annual" basis. The comparison of the "Crandall" data from 1912 to 1933 to IDWR's data needs to be further evaluated. All of the reach gains under the "Crandall" data are lower during the overlap period with the IDWR data, without any explanation or qualification.
- The early drought periods on Exhibit J are not comparable given the above questions about the "Crandall" data. The reach gains these years could have actually been higher as indicated by IDWR's data.
- ¶ 23: What does "strongly related" mean? Is there a "statistically significant relationship" between the PDSI values and the annual reach gain data? Nothing in the affidavit demonstrates that a statistical relationship was conducted.
- Exhibit L. Although visually there appears to be a correspondence between aquifer discharge and Spring Creek, is it "statistically significant"?
- Exhibit M. Is there a "statistically significant relationship" between the PDSI values and the <u>estimated</u> aquifer discharges?
- Exhibits N, O, and P demonstrate a significant drop in aquifer water levels since 2000. Exhibit N: Assuming the average water level drop is 5 feet over a 10,000 square mile aquifer, that results in a 32 MAF reduction in aquifer storage. Assuming the average water level drop is 7.5 feet over a 10,000 square mile aquifer, that results in a 48 MAF

reduction in aquifer storage. Does this result in a "very little net change" in aquifer water levels as suggested?

- ¶ 26 There needs to be further quantitative evaluation of the effect on water levels in the ESPA due to changes in water management versus recorded drought effects.
- ¶ 30 The affidavit fails to recognize that approximately 60% of the reach gain reduction would be realized within 10 years if all rights junior to 1949 were curtailed, and about 50% would be realized within 7 years. Under the 1961 curtailment, approximately 71% of the reduction would be realized within 10 years.
- Exhibit R shows ground water "rights", not diversion and use. The projection of 22,000 cfs of ground water rights exaggerates what is actually being diverted and implies that ground water rights are synonymous with "depletions." Assuming 2.1 MAF of groundwater depletions each year, 5,982 cfs would have to be pumped continuously, 24 hours a day, for 180 days to equal 2.1 MAF.
- ¶ 33 Is the affiant claiming the ESPA model is wrong? It is evident from Exhibit J that there is a declining trend in annual reach gains beginning in the late 1960s.
- ¶ 34 The graph depicts plots of cumulative annual flow which do not reflect any changes in "seasonal" discharges at either station, which needs to be considered when evaluating impacts on natural flow available for senior water rights.
- ¶¶ 36,37 The statistical evaluation of <u>annual</u> reach gains in the Blackfoot to Neeley reach apparently shows no "statistically significant" difference before 1960 and after 1960, however, the data records examined includes 20 years of questionable annual reach gains, i.e. "Crandall" data, plus there is no indication of the criteria for "statistically significant."
- ¶39 The 'close relationship' between climatic conditions and near Blackfoot-Neeley , i.e. PDSI and is not demonstrated statistically and may in fact not be statistically significant.
- ¶44 The conclusion that, because the cumulative natural flow rights of the Surface Water Coalition members exceed 2500 cfs, the junior rights must always have depended on flood flows passing Blackfoot from upstream reaches, neglects two significant hydrologic facts.
    a. There are other inflows to the Snake River between Blackfoot and Milner i.e.: Raft River (historically), Portneuf River, gain between Minidoka and Milner, Bannock Creek, springs below Neeley, Marsh Creek and others.
    b. The use of average annual reach gain as an indicator of dependable level of natural flow neglects natural seasonal fluctuations and induced fluctuations caused by pumping.
- ¶45 Conclusions based on examination of only the 1905 Montgomery Ferry monthly flow and distribution according to natural flow rights of SWC members, is short sighted. Each of the members secured their natural flow water rights and proved up on the discharge to secure a decreed right. The discharge therefore was adequate, at some time, to convince the State that the right could be allocated. A more thorough analysis of early discharge data at both Minidoka (Montgomery Ferry) and Milner is required to reach any conclusion on adequacy of natural flow rights.

- ¶46 Reliance on the PDSI for comparison between isolated years (i.e. 1904 and 1905 vs. 2000-2004 is not warranted. This reliance implies that the PDSI is the only indicator of natural flow yield and/or diversion requirements.
- ¶51 The conclusion that "The only way to justify their requested curtailment of ground water uses is if their objective is to increase the supply above what they historically would have had under similar conditions" implies that ground water pumping has resulted in no depletions to natural flow. This is contrary to the ESPA ground water model simulations and recent declining trends in measured reach gains.
- ¶55 Exhibit AA shows "effects of periodic dry spells" which resulted in lowered initial storage allocations for SWC members. Regardless of the causes of the decreased storage allocations, the impact of reach-gain depletions on natural flow and/or storage impacted SWC member water supplies. The impact of the reach-gain depletions was exacerbated by the 'periodic dry spells' or drought.
- ¶56 Comparison of Twin Falls Northside and Twin Falls Canal Company storage and natural flow diversions (Exhibit BB) shows the impact of low water years and/or ground water pumping on available supplies and the variability over the period of record. However, comparison of the reduced diversions in recent years with a single year, such as 1961, neglects the influences of prior year carryover and previous years incidental recharge and pumping demands. Again statistical evidence of the 'no trend' conclusion is not supplied.
- ¶57 Exhibit CC which purports to depict SWC members' annual diversions per acre compared with average "groundwater usage" and a "crop irrigation requirement " range is at best misleading. The depicted 'ground water usage' is apparently the average ESRPA ground water depletion per acre and not the actual ground water diversion. The actual ground water diversion is not used in the ESRPA ground water model. This comparison neglects the irrigation efficiency of all users. Variations in SWC members annual per acre diversions and the comparison with some sort of 'duty of water' is dependent on the distribution and delivery system configuration of each member, the type of irrigation applications systems and management factors.
- ¶61 Flow past Milner is highly variable and the use of averaging over any period is likely not justified. Extremely high periods such as the early 1980s and 1996-1999 interspersed within drought periods skew the periodic averages (pre-1960 vs. post 1960) and are not indicative of any trends that might be related to water use and management.
- ¶62 Conclusions based upon Exhibits A-EE imply that drought is the cause of declines in reach gains since 1999 and appear to imply that depletions from ground water pumping have not occurred or are not presently impacting reach gains. Impacts from ground water pumping are present and those impacts on irrigation season natural flow and storage availability are further exacerbated by drought.
- These conclusions also imply that surface water users, because they elected to implement better water management practices, are themselves the cause of reach gain declines and, had they not done so, the impacts of ground water development would have been of no consequence. No evidence or analysis is presented to support these conclusions.
- ¶63 Reported increases in reach-gains from curtailment of ground water pumping on the ESPA do not comport with simulated reach-gain increased reported by IWRRI in their report on 'Hydrologic Effects of Curtailment of Ground Water Pumping-Curtailment

Scenario' October 2004. For instance, the Brendecke estimate of steady state curtailment of ground water pumping junior to 1949 indicates a steady state impact of about 1.35 MAF annually whereas the IWRRI simulates a steady state impact of 1.78 MAF. No explanation for the difference is offered. Similarly, the Brendecke estimate of from curtailment 1961 and later ground water pumping is 0.9 MAF whereas IWRRI simulations show 1.2 MAF.

Summary

The Director has a clear legal duty in this proceeding: the administration of water rights according to priority. The Surface Water Coalition filed its request in early January on the basis that shortages were expected in 2005. Those expectations have not changed. A timely decision on the Coalition's request has been delayed for over three months now. In the meantime, holders of junior ground water rights are currently pumping water out of the ESPA that would otherwise be available for diversion and use under the senior water rights held by the Coalition's members.

The Director's lack of action to date is a further cause of "injury" to these senior surface water rights. Without immediate action, this "injury" will continue to accrue with every acre-foot that is pumped and depleted under a junior ground water right, particularly by those ground water rights in close proximity to the American Falls reach. Therefore, the Coalition hereby requests a list of all ground water rights within Water District No. 120, along with the total volume of water pumped out of the aquifer to date. The Director may consider this request as continuing on a weekly basis. The Coalition would further request that the Department conduct ESPA-wide aquifer water level measurements in 2005 since this data has not been updated for three years. In order to ensure ground water rights are not "mining" the aquifer, and to protect senior surface water rights, the Director must continue to monitor the water levels across the ESPA.

In sum, the Director has a clear legal duty to administer water rights by priority and properly manage the resource. It is past time for the Director to carry through with this duty and hold junior ground water rights to the standard required by Idaho law.

DATED this 15th day of April 2005.

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Jim Lochhead, c/o Idaho Power Company
Kathleen Marion Carr, c/o U.S. Bureau of Reclamation
Scott Campbell, c/o Idaho Dairyman's Association
Michael Creamer, c/o IGWA
IDWR, Eastern Regional Office
IDWR, Southern Regional Office

EXHIBIT "D"

COPY

TWIN FALLS CANAL COMPANY

357 6TH AVE WEST
POST OFFICE BOX 326
TWIN FALLS, IDAHO 83303-0326

May 9, 2006

Director Karl J. Dreher
Idaho Department of Water Resources
322 E. Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

Re: 2006 Water Deliveries / "Material Injury" Determination

Dear Director Dreher:

I received your April 25, 2006 letter ("Letter") to Randy Budge which appears to make several conclusions about the 2006 water year and the delivery of water to Twin Falls Canal Company (TFCC) for injury caused by junior priority ground water diversions in both 2005 and predicted for 2006.

As noted in your Letter, IGWA (and/or the ground water districts it represents) did not deliver any water to TFCC last year despite your previous statements requiring "in time, in-kind, in place" mitigation. Further, the "preliminary" determination in your *Second Supplemental Order Amending Replacement Water Requirements* ("December Order") determined that TFCC suffered an injury of 152,200 acre-feet during the 2005 irrigation season. Moreover, TFCC has yet to receive any water in 2006 for IGWA's 2005 outstanding obligation.

Although the December Order requires IGWA to supply TFCC with 46,040 acre-feet for injuries occurring in 2005 (27,700 acre-feet plus 18,340 acre-feet), neither that order nor your recent Letter identifies what happened to the remainder of IGWA's 2005 obligation which equals 106,160 acre-feet (152,200 acre-feet less 46,040 acre-feet). Apparently the obligation identified in your December Order is now being characterized as the "net amount of minimum replacement water" required in 2005, as referenced in your Letter.

As you certainly recall, TFCC's storage filled in 2005 and your finding of injury identified in the orders was the result of depletions to the natural flow available in the irrigation season. Obviously, that injury will not be alleviated by storage filling in 2006. TFCC would appreciate a response or determination that identifies the remainder of IGWA's 2005 obligation, and when that water must be supplied. In addition, as you have previously stated, there is no basis to include the untimely 2005 mitigation obligation as part of TFCC's diversions or total water supply in 2006.

Finally, your Letter addresses the 2006 water year and the predicted injury to TFCC and other members of the Surface Water Coalition by reason of diversions under junior priority ground water rights. TFCC is pleased to know that you expect senior surface water right holders will suffer "small, if any" injuries this year.

Given the planning decision TFCC's Board of Directors must make for the 2006 irrigation season, I will rely upon your determination and assurances that TFCC's injury will be "small, if any" this season. In other words, TFCC should expect to make a 3/4 inch delivery per acre for its shareholders from what you have characterized as a "minimum full supply", or 1,075,900 acre-feet, and still carryover 38,400 acre-feet for 2007. I will advise TFCC's Board accordingly. For my own operational benefit, will you also explain the process during the irrigation season for the delivery of the additional water to ensure proper distribution to TFCC shareholders.

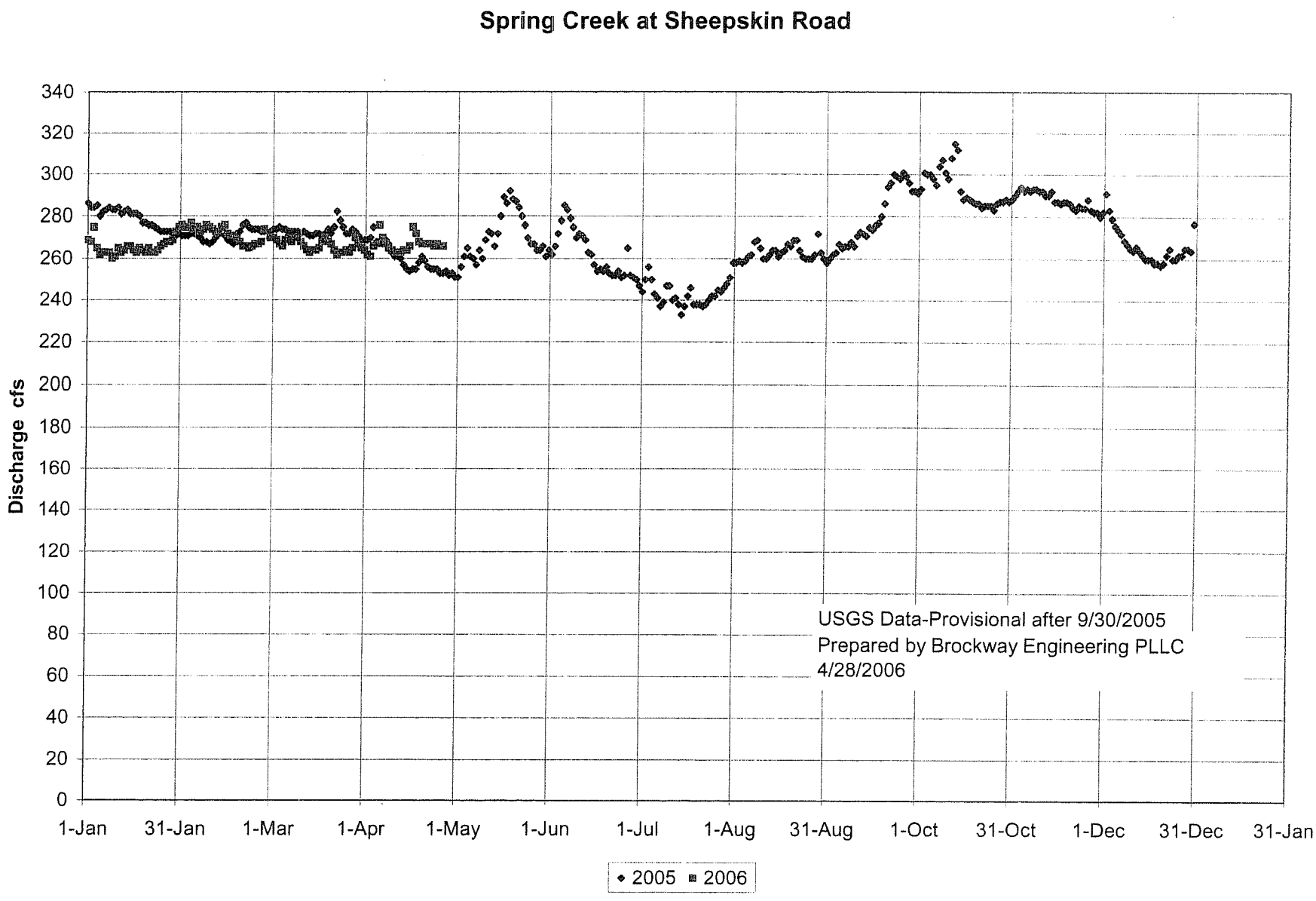
Although this current year's preliminary water measurement data on Spring Creek, an indicator of the natural flow available to TFCC in the American Falls reach, demonstrates a lower spring discharge than last year, the data is generally tracking last year's measurements. *See Attached.* If last year, and recent history, is any indication of things to come this summer, TFCC can expect a dramatic decline in available natural flow from late June through the end of August. However, your Letter apparently determines that TFCC will not suffer this decline in natural flow since the ground water districts may not even have any 2006 "replacement water obligations." Again, TFCC will rely upon your prediction for its water deliveries this year and your assurance that its injury, if any, will be completely mitigated "in time, in-kind, and in place."

Please contact me at 733-6731 if you have any questions. I trust that if your 2006 determinations regarding TFCC's predicted injury change, you will advise me accordingly.

Sincerely,

Vince Alberdi
Manager – Twin Falls Canal Company

cc: Board of Directors (TFCC)
Lyle Swank, Watermaster / Lewis Rounds
John Simpson
Tom Arkoosh
Roger Ling
Kent Fletcher
Jeff Fereday / Mike Creamer ✓
Jo Beeman / Sarah Klahn
Terry Uhling
Scott Campbell
Michael Gilmore
Allen Merritt / Cindy Yenter ✓


Spring Creek at Sheepskin Road
Discharge cfs
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1-Dec
31-Dec
31-Jan
USGS Data-Provisional after 9/30/2005
Prepared by Brockway Engineering PLLC
4/28/2006
2005
2006

EXHIBIT "E"

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF 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 (Water Districts No. 120 and No. 130)	)	**SECOND SUPPLEMENTAL ORDER AMENDING REPLACEMENT WATER REQUIREMENTS**

On April 19, 2005, the Director of the Department of Water Resources ("Director" or "Department") issued his order *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of 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.* These entities, or members, are collectively referred to herein as the "Surface Water Coalition" or "Coalition." The Order of April 19, 2005 (herein referred to as the "April 19 Order"), was amended on May 2, 2005 (herein referred to as the "May 2 Order").

The May 2 Order included a determination that surface water rights held by or for the benefit of members of the Surface Water Coalition were reasonably likely to incur material injury in 2005 because of the diversion and consumptive uses of ground water under junior priority water rights. In response, the Director ordered ground water districts representing certain holders of junior priority ground water rights to provide replacement water pursuant to a plan submitted to the Department no later than April 29, 2005, or curtailment based on the priorities of the rights would be required to the extent mitigation for out-of-priority depletions was not provided.

In determining that senior priority water rights were reasonably likely to incur material injury, the Director found that "[w]hether effects of ground water depletions result in material injury to the senior priority surface water rights held by the members of the Surface Water Coalition in a particular year depends in large part on the total water supply, under natural flow water rights and from reservoir storage, and in some instances supplemental ground water rights, otherwise available to each member of the Coalition in that year." *May 2 Order* at p. 19, Finding 88.

Findings in the May 2 Order set forth the following process in making the determination whether senior surface water rights held by or for the benefit of members of the Surface Water Coalition would be reasonably likely to incur material injury in 2005:

(1) Determine the minimum full water supply needed for irrigation (natural flow and reservoir storage releases) by the members of the Surface Water Coalition (the Director determined that 1995 was the most recent year that the members of the Surface Water Coalition received a minimum full water supply and based his determination of the minimum full water supply needed on the amounts diverted during the 1995 irrigation season);

(2) Compare the forecast as of April 1, 2005, for unregulated inflow from the Upper Snake River Basin for the time period of April 1, 2005, through July 31, 2005, with historic unregulated inflow from the Upper Snake River Basin for the period of April 1 through July 31;

(3) Select a year or years of similar unregulated inflow and assume that: (a) natural flow diversions in 2005 will be essentially the same as the natural flow diversions in the similar year(s); (b) water stored in the reservoirs after April 1 in the similar year(s) added to the volume actually stored as of April 1, 2005, adjusted for evaporation, will be the total reservoir storage available for release and use in 2005; and (c) the sum of the predicted natural flow diversions and the predicted reservoir storage, adjusted for evaporation, constitutes the "the predicted 2005 water supply"; and

(4) For each member of the Surface Water Coalition, subtract the predicted total water supply for 2005 from the minimum full water supply needed, and to the remainder[1] add the amount of carryover storage reasonably needed assuming a drought year in 2006, unless the remainder is negative and the value equals or exceeds the reasonably needed carryover storage.

Finding 96 of the May 2 Order stated in pertinent part:

[I]t is reasonable to conclude that as for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company, the A&B, Burley, Milner, and Minidoka irrigation districts each had a full supply of water in 1995 considering both natural flow and storage releases.

In Finding 100 of the May 2 Order, the Director determined that:

The joint operating forecast prepared by the USBR [United States Bureau of Reclamation] and the USACE [United States Army Corps of Engineers] for unregulated inflow from the Upper Snake River Basin predicted for the Heise Gage for the period April 1 through July 31 . . . predicts an unregulated inflow of 2,340,000 acre-feet. . . . the predicted inflow is similar to the measured, unregulated inflows at the Heise Gage for two recent years in the present sequence of drought years, 2002 and 2004.

[1] Negative remainder indicates water in excess of minimum needed without consideration of reasonable carryover storage needed. Positive remainder indicates shortage from minimum needed without consideration of reasonable carryover storage needed.

For each member of the Surface Water Coalition, the Director (1) averaged the 2002 and 2004 natural flow diversions; (2) estimated the 2005 storage allocation based on the average of the volume of water stored after April 1, 2002, and after April 1, 2004, added to the volume of water actually in storage on April 1, 2005, less estimated 2005 evaporation; and (3) summed the average natural flow diversions and estimated 2005 storage allocations. The sum of natural flow diversions averaged for 2002 and 2004 and the estimated 2005 storage allocations based on the actual storage as of April 1, 2005, and the storage after April 1 averaged for 2002 and 2004 was deemed the predicted 2005 water supply for each Surface Water Coalition Member.

For each Surface Water Coalition Member, the predicted 2005 water supply was subtracted from the water supply in 1995, which was deemed the minimum full water supply needed. If the difference was greater than zero, the difference was the "Predicted Shortage in 2005." The total predicted shortage for 2005 for the members of the Surface Water Coalition that were predicted to incur shortages was 27,700 acre-feet.

Finding 119 of the May 2 Order established a reasonable amount of carryover storage at the end of 2005 for each member of the Surface Water Coalition "by averaging (1) the amounts of carryover storage required for Coalition members to have full supplies of water in 2006 if the divertible natural flow and storage accruals in 2006 are the same as in 2002 and (2) the amounts of carryover storage required for Coalition members to have full supplies of water in 2006 if the divertible natural flow and storage accruals in 2006 are the same as in 2004."

The "Predicted 2005 Material Injury" for each member of the Surface Water Coalition was determined by summing the "Predicted Shortage in 2005," if any, and the amount, if any, that the predicted carryover storage at the end of 2005 was less than the reasonable carryover storage determined in Finding 119 of the May 2 Order. The total "Predicted 2005 Material Injury" for all of the members of the Surface Water Coalition, computed by summing the predicted injury for each of the members, was 133,400 acre-feet, 101,000 acre-feet of which was determined to be caused by the diversion and consumptive use of ground water under junior priority rights in Water District No. 120 and No. 130 based on simulations using version 1.0 of the Department's ground water model for the ESPA.

Following issuance of the April 19 Order, the Idaho Ground Water Appropriators, Inc. ("IGWA") submitted its initial plan for providing replacement water on April 29, 2005. The Director ordered that IGWA submit additional information, and IGWA submitted the required additional information on May 23 and June 3, 2005. The collective information submitted by IGWA will be referred to hereafter as "IGWA's Replacement Water Plan." On June 13, 2005, IGWA filed *IGWA's Motion to Reduce Replacement Water Obligation.* On June 24, 2005, the Director issued his *Order Approving IGWA's Replacement Water Plan* (referred to hereafter as the "June 24 Approval Order").

IGWA's Replacement Water Plan, approved by the June 24 Approval Order, offered at least 27,700 acre-feet as replacement water for the Predicted Shortage in 2005.

The Director stated in the May 2 Order at page 47, paragraph 10:

The Director will monitor water supply requirements and the water supplies available throughout the irrigation season and may issue additional orders or instructions to the watermasters as conditions warrant.

Based upon the Director's consideration of changes in the water supplies available for the 2005 irrigation season following prolific low-elevation rains during May and June, the Director issued his *Supplemental Order Amending Replacement Water Requirements* on July 22, 2005 (herein referred to as the "July 22 Order"). On August 5, 2005, IGWA filed *IGWA's Petition for Reconsideration of the July 22, 2005 Supplemental Order Amending Replacement Water Requirements*. On November 21, 2005, Twin Falls Canal Company, a member of the Surface Water Coalition, filed *Request for End of the Year Accounting*.

Based upon the Director's consideration of IGWA's petition for reconsideration and preliminary diversion data following the 2005 irrigation season, the Director enters the following Findings of Fact, Conclusions of Law, and Order, which supercede the *Supplemental Order Amending Replacement Water Requirements* of July 22, 2005.

FINDINGS OF FACT

1. The May 2 Order required that holders of certain junior priority ground water rights within Water Districts No. 120 and No. 130 either curtail the diversion and use of ground water for 2005, provide replacement water to the members of the Surface Water Coalition on an annual basis in amounts and generally at times at least equal to the increase in reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage that would result from curtailment based on simulations using the Department's ground water model for the ESPA, or a combination of both.

2. Absent curtailment of junior ground water rights within Water Districts No. 120 and No. 130 by priority date, the minimum amount of replacement water required in 2005 by the May 2 Order was 27,700 acre-feet. Although IGWA, representing the ground water districts whose members include the holders of the affected junior priority ground water rights, secured more than 27,700 acre-feet of replacement water, only incremental increases in reach gains resulting from the lease and non-use of water rights held by FMC Idaho, LLC, the non-irrigation of leased lands, and mitigation actions implemented in Water District No. 130 were provided during the 2005 irrigation season. The Department is presently performing analyses to determine the amount of replacement water provided to individual members of the Surface Water Coalition through these actions.

3. Following issuance of the May 2 Order, precipitation in May and June of 2005 was unusually high. In May of 2005, widespread areas in the Upper Snake River Basin reportedly received near or above 150 percent of the long-term average precipitation for May; with several locations reportedly receiving near or above 200 percent of average, and one location, 46 miles west of Idaho Falls, reportedly receiving more than 275 percent of average. In June of 2005, widespread areas in the Upper Snake River Basin reportedly received well above 150 percent of the long-term average precipitation for June; with several locations reportedly receiving near or above 250 percent of average, and one location, Ashton, reportedly receiving just above 400 percent of average. *Natural Resources Conservation Service, U. S. Department*

of Agriculture (ftp://ftp.wcc.nrcs.usda.gov/data/climate/basin_reports/idaho/wy2005/baprid5.txt and ftp://ftp.wcc.nrcs.usda.gov/data/climate/basin_reports/idaho/wy2005/baprid6.txt).

4. Along with some increase in snow accumulation and increased streamflows in the Upper Snake River Basin, the unusually high precipitation, coupled with cool temperatures in May and June, resulted in significant delay in irrigation demands for natural flow. Through about June 30, 2005, members of the Surface Water Coalition had limited needs to divert water for irrigation, and those limited needs were satisfied with the available natural flow and some small releases from reservoir storage in May and June.

5. The unusually high precipitation and cool temperatures in May and June, and the resulting delay in irrigation demands, also allowed runoff from the melting snow accumulation to be stored in Upper Snake River Basin Reservoirs that under normal conditions would have been diverted for irrigation, benefiting space holders in those reservoirs, including members of the Surface Water Coalition in relation to the storage space held.

6. On June 30, 2005, maximum storage in the Upper Snake River Basin Reservoirs had accrued. Preliminary accounting on July 2, 2005, showed Jackson, Walcott, American Falls, and the Palisades winter-water-savings accounts had filled to 100 percent. Henrys Lake had a total fill of 34,318 acre-feet (38.1 percent), Island Park had a fill of 124,215 acre-feet (92.0 percent), Grassy Lake had a fill of 10,279 acre-feet (67.6 percent), the Palisades 1939 water right had a fill of 427,000 acre-feet (45.4 percent), and Ririe had filled 2,641 acre-feet (3.3 percent). These reservoir fills included carryover storage from the 2004 irrigation season.

7. On July 6, 2005, the following preliminary storage accruals for the benefit of the members of the Surface Water Coalition and estimated reservoir evaporation were determined by Water District No. 01:

	2005 Max. Storage (acre-feet)	2005 Evap. (acre-feet)	Preliminary 2005 Net Storage (acre-feet)
Jackson Lake:	847,000	22,000	825,000
Palisades Winter Water Savings:	259,600	6,700	252,900
Other Palisades Reservoir:	427,000	11,100	415,900
Henrys Lake:	34,300	900	33,400
Island Park Reservoir:	134,500	3,500	131,000
Grassy Lake:	0[2]	0[2]	0[2]
Ririe Reservoir:	2,600	100	2,500
Amer. Falls Winter Water Sav.:	156,800	4,100	152,700
Other American Falls:	1,515,800	39,300	1,476,500
Lake Walcott:	95,200	2,500	92,700
Totals:	3,472,800	90,200	3,382,600

[2] Included in Island Park storage and evaporation.

8. The preliminary storage accruals in 2005 set forth in Finding 7 are the same as set forth in Finding 10 of the July 22 Order and supercede the amounts set forth in Finding 105 of the May 2 Order.

9. Using the Department's accounting program for storage, the preliminary maximum storage, less estimated evaporation for 2005, was allocated among all reservoir storage spaceholders in the Upper Snake River Basin, which resulted in the following preliminary storage allocations for the members of the Surface Water Coalition:

	Preliminary 2005 Storage Allocations (acre-feet)
A&B Irrigation District:	77,100
American Falls Res. Dist. #2:	383,400
Burley Irrigation District:	220,600
Milner Irrigation District:	65,800
Minidoka Irrigation District:	340,300
North Side Canal Company:	837,600
Twin Falls Canal Company:	239,600

10. The preliminary storage allocations in 2005 for the members of the Surface Water Coalition set forth in Finding 9 are the same as set forth in Finding 12 of the July 22 Order, except for Milner Irrigation District[3].

11. As of the end of the 2005 irrigation season (October 31, 2005), preliminary results from the Department's water rights accounting for surface water diversions from the Snake River show that members of the Surface Water Coalition diverted the following quantities of water during the 2005 irrigation season:[4]

[3] The preliminary 2005 storage allocation for Milner Irrigation District set forth in the July 22 Order was 66,200 acre-feet, which included 400 acre-feet projected to be delivered on behalf of the Palisades Water Users, Inc.

[4] Amounts are preliminary and subject to change after final year-end water rights accounting.

	Preliminary 2005 Natural Flow (acre-feet)	Preliminary 2005 Storage (acre-feet)	Preliminary Total 2005 Diversions (acre-feet)	Minimum Full Supply Needed (acre-feet)
A&B Irrigation District:	6,900	40,200	47,100	50,000
American Falls Res. Dist. #2:	110,300	287,300	397,600	405,600
Burley Irrigation District:	85,100	128,300[5]	213,400[5]	220,200[6]
Milner Irrigation District:	11,100	36,100	47,200	50,800
Minidoka Irrigation District:	127,700	192,400[7]	320,100[7]	314,300[8]
North Side Canal Company:	392,200	507,700	899,900	988,200
Twin Falls Canal Company:	722,500	189,300	911,800	1,075,900

12. Finding 11, setting forth the preliminary 2005 diversions of water, supercedes Finding 106 of the May 2 Order. The minimum full supply amounts needed, as set forth in Finding 11, are the amounts needed for full deliveries based on 1995 diversions and are equal to the amounts set forth in Finding 116 of the May 2 Order, except for the division of water between the Burley and Minidoka irrigation districts as noted.

13. The preliminary total 2005 diversions set forth in Finding 11 are less than the minimum full supply needed by each member of the Surface Water Coalition as set forth in Finding 116 of the May 2 Order and Finding 11 above, with the noted adjustments to the full supply amounts between Burley and Minidoka irrigation districts, except for the Minidoka Irrigation District.

14. The fact that members of the Surface Water Coalition generally diverted less water in 2005 than the minimum full supply determined to be needed indicates that either not as much water was generally needed by members of the Coalition in 2005, given the unusually high precipitation and cooler than normal temperatures in May and June, or members of the Coalition sought to conserve available storage water out of concern that supplies might not be adequate given the above normal temperatures and below normal precipitation in the forecast released on July 21, 2005, by the National Weather Service Climate Prediction Center for the months of August, September, and October. Generally, water not diverted during the irrigation season would be stored or remain in storage if previously diverted to storage, either of which would increase the storage available to reservoir storage spaceholders in the Upper Snake River Basin, including members of the Surface Water Coalition.

15. Shortages in 2005 to rights held by or for the benefit of members of the Surface Water Coalition resulting from depletions to the Snake River caused by the diversion and use of ground water under junior priority water rights, if any, can not be based solely on the quantities

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[5] Assumed to be 40 percent of total Minidoka Project diversions.

[6] 41.2 percent of total Minidoka Project diversions for the 1995 irrigation year from Water District 01 report.

[7] Assumed to be 60 percent of total Minidoka Project diversions.

[8] 58.8 percent of total Minidoka Project diversions for the 1995 irrigation year from Water District 01 report.

of water diverted but must also take into account the amounts of carryover storage for the various members of the Coalition.

16. Based on the preliminary storage allocations set forth in Finding 9 and the preliminary amounts of storage water diverted set forth in Finding 11, the following are the preliminary amounts of carryover storage at the end of the 2005 irrigation season:[4]

	Prelim. 2005 Storage Alloc. (acre-feet)	Prelim. 2005 Storage Used (acre-feet)	Prelim. 2005 Carryover Storage (acre-feet)
A&B Irrigation District:	77,100	40,200	36,900
American Falls Res. Dist. #2:	383,400	287,300	96,100
Burley Irrigation District:	220,600	128,300[5]	92,300
Milner Irrigation District:	65,800	36,100	29,700
Minidoka Irrigation District:	340,300	192,400[7]	147,900
North Side Canal Company:	837,600	507,700	329,900
Twin Falls Canal Company:	239,600	189,300	50,300

17. The preliminary 2005 shortages in surface water supplies, if any, for members of the Surface Water Coalition are determined by subtracting the sum of the total 2005 diversions (set forth in Finding 11 above) and the preliminary carryover storage (set forth in Finding 16 above) from the sum of the minimum full water supply needed (set forth in Finding 11 above) and the reasonable carryover storage (set forth in Finding 119 of the May 2 Order). The preliminary 2005 shortages in surface water supplies, if any, for members of the Coalition are as follows:

	Minimum Full Supply Needed (acre-feet)	Reasonable Carryover (acre-feet)	Preliminary Total 2005 Diversions (acre-feet)	Preliminary 2005 Carryover (acre-feet)
A&B Irrigation District:	50,000	8,500	47,100	36,900
American Falls Res. Dist. #2:	405,600	51,200	397,600	96,100
Burley Irrigation District:	220,200[6]	0	213,400[5]	92,300
Milner Irrigation District:	50,800	7,200	47,200	29,700
Minidoka Irrigation District:	314,300[8]	0	320,100[7]	147,900
North Side Canal Company:	988,200	83,300	899,900	329,900
Twin Falls Canal Company:	1,075,900	38,400	911,800	50,300

	Minimum Full Supply Needed + Reas. Carryover (acre-feet)	Preliminary Total 2005 Diversions + Carryover (acre-feet)	Preliminary 2005 Shortages and Material Injury (- *is surplus*, no shortage) (acre-feet)
A&B Irrigation District:	58,500	84,000	*- 25,500*
American Falls Res. Dist. #2:	456,800	493,700	*- 36,900*
Burley Irrigation District:	220,200	305,700	*- 85,500*
Milner Irrigation District:	58,000	76,900	*- 18,900*
Minidoka Irrigation District:	314,300	468,000	*-153,700*
North Side Canal Company:	1,071,500	1,229,800	*-158,300*
Twin Falls Canal Company:	1,114,300	962,100	152,200

18. Finding 17 supercedes Finding 120 of the May 2 Order. The preliminary total shortage and material injury of 152,200 acre-feet is 14 percent greater than the total material injury of 133,400 acre-feet predicted to be likely in the May 2 Order. Given the climate variability anticipated in the May 2 Order and the assumptions that are necessary to predict reasonably likely material injury in advance of the major portion of an irrigation season, a deviation of 14 percent is reasonable.

19. Of the members of the Surface Water Coalition, only the Twin Falls Canal Company had shortages and material injury in 2005; preliminarily, 152,200 acre-feet. There are two primary reasons for this outcome. First, only about 22 percent of the minimum full supply determined for the Twin Falls Canal Company (1,075,900 acre-feet) is derived from storage when Twin Falls receives a full storage water allocation. Thus, the benefit derived by the Twin Falls Canal Company from the unanticipated and enhanced storage allocations following the unprecedented precipitation in May and June of 2005 was significantly less than for other members of the Surface Water Coalition who receive a greater portion of their overall water supply from storage. Secondly, the reach gains to the Snake River, upon which the Twin Falls Canal Company depends to supply water to its natural flow water rights, between the Near Blackfoot Gage and the Neeley Gage declined dramatically beginning in about the second week of July, recovering in August to levels similar to those observed in August of prior years, 1995 for example, based on preliminary diversions of natural flow by Twin Falls. This caused the Twin Falls Canal Company to use considerably more storage in July of 2005, as compared to

storage used in July of 1995, although the total average supply diverted in July of 2005 was about 92 percent of the total average supply diverted in July of 1995. Average storage diversions in August and September of 2005 were 67 percent and 56 percent, respectively, as compared to average storage diversions in 1995, presumably to conserve carryover storage.

20. The accounting for surface water diversions from the Snake River described in Findings 11, 16, and 17 is preliminary. Gage shift adjustments and other adjustments must be made prior to the final accounting, but cannot be made until gage shift data is provided by the USGS. The final accounting for surface water diversions from the Snake River will be completed in mid-February or early March of 2006. In the event the final accounting for surface water diversions shows that the preliminary declines in natural flow diverted by the Twin Falls Canal Company are too large, less storage will have been diverted by Twin Falls, which will result in an increase in carryover storage and a corresponding decrease in the shortage and material injury set forth in Finding 17.

21. In addition to the adjustments made for the final accounting for surface water diversions from the Snake River described in Finding 20, the Department is continuing to evaluate the water supplies available to members of the Surface Water Coalition in 2005 and may determine that adjustments to the amounts of minimum full supply needed, as set forth in Finding 11 and Finding 116 of the May 2 Order, are warranted to account for differences in climatic variations between 2005 and 1995, the year for which diversion amounts were used to determine the amounts of minimum full supply needed, based on evapotranspiration and effective precipitation in 2005 as compared to evapotranspiration and effective precipitation in 1995. These adjustments may or may not affect the final determination of shortages and material injury resulting from depletions to the Snake River caused by the diversion and use of ground water under junior priority water rights, which determination will be made following the final accounting for surface water diversions.

Simulated Curtailment of Junior Priority Ground Water Rights

22. Nearly all ground water rights authorizing the diversion and use of ground water from the ESPA are junior in priority to the surface water rights held by or for the benefit of the Surface Water Coalition. Based on simulations using version 1.1 of the Department's ground water model for the ESPA, using the average annual consumptive use for irrigation beginning in 1980 through 2001, curtailing all ground water diversions in Water District No. 120 would, over time, increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 422,500 acre-feet, which equals 65 percent of the total average annual ground water depletions in Water District No. 120, for each year of curtailment. Curtailing all ground water rights in Water District No. 130 would, over time, increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 198,800 acre-feet, which equals 35 percent of the total average annual ground water depletions in Water District No. 130, for each year of curtailment. Curtailing all ground water diversions in Water Districts No. 120 and No. 130 for one year would, over time, increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 621,300 acre-feet, which is more than four times the material injury preliminarily

determined to have occurred in 2005 to the water rights held by or for the benefit of the Surface Water Coalition members.

23. Based on the Department's water rights data base and version 1.1 of the ground water model for the ESPA, curtailing all ground water diversions, which at steady-state conditions reduce reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is the uncertainty in model simulations, see Finding 30 of May 2 Order), within the modeled area for one year under water rights having priority dates of July 23, 1977, and later will increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 152,500 acre-feet, over time.

24. Based on the Department's water rights data base and version 1.1 of the ground water model for the ESPA, curtailing the subset of ground water diversions for one year under water rights described in Finding 23 within the area defined as the area of common ground water supply for the ESPA in Rule 50 of the Conjunctive Management Rules (IDAPA 37.03.11.050.01) would increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 142,100 acre-feet, over time.

25. Based on the Department's water rights data base and version 1.1 of the ground water model for the ESPA, curtailing the subset of ground water diversions for one year under water rights described in Finding 23 within Water Districts No. 120 and No. 130, which are wholly within the area of common ground water supply for the ESPA defined in Rule 50 of the Conjunctive Management Rules (IDAPA 37.03.11.050.01) would result in the curtailment of irrigation of 65,400 equivalent[9] acres and 26,300 equivalent acres, respectively, and would increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by 89,200 acre-feet and 24,700 acre-feet, respectively, over time. The number of acres on which irrigation would be curtailed in Water Districts No. 120 and No. 130 total 91,700 equivalent acres, and the total amount of the simulated increase in reach gains over time between the Near Blackfoot Gage and the Minidoka Gage from curtailment in Water Districts No. 120 and No. 130 is 113,900 acre-feet.

26. Based on the Department's water rights data base and version 1.1 of the ground water model for the ESPA, curtailing the subset of ground water diversions for one year under water rights described in Finding 23 within the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, using the most recent boundaries of the districts provided to the Department, within the area of common ground water supply for the ESPA defined in Rule 50 of the Conjunctive Management Rules (IDAPA 37.03.11.050.01) would result in the curtailment of irrigation on the following equivalent

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[9] For the ESPA ground water model, an algorithm is used to simulate the effects of supplemental ground water irrigation where surface water is deliverable for some portion of the irrigation of those lands. For each model cell, acreages simulated to be irrigated with both surface water and supplemental ground water are replaced with acreages simulated to be irrigated using all ground water such that the simulated consumptive use on the replacement acreage equals the consumptive use on the acreage with supplemental ground water irrigation. The equivalent acreage consists of the sum of acreages irrigated solely with ground water and the replacement acreages for acreages irrigated with both surface water and ground water.

acreages and increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage over time by the following amounts:

	Acres Curtailed	Total Accruals (acre-feet)	1st 6-month Accruals (acre-feet)	2nd 6-month Accruals (acre-feet)	3rd 6-month Accruals (acre-feet)
North Snake District:	5,340	3,030	0	0	20
Magic Valley District:	19,390	20,410	40	280	570
Aberdeen-Amer. Falls District:	37,930	58,230	16,360	15,850	6,660
Bingham District:	13,620	16,860	3,860	4,360	1,980
Bonneville-Jefferson District:	9,700	8,100	250	1,010	1,030
Totals:	85,980	106,630	20,510	21,500	10,260

	4th 6-month Accruals (acre-feet)	5th 6-month Accruals (acre-feet)	6th 6-month Accruals (acre-feet)	7th 6-month Accruals (acre-feet)	8th 6-month Accruals (acre-feet)
North Snake District:	40	60	70	80	90
Magic Valley District:	740	810	830	810	790
Aberdeen-Amer. Falls District:	3,820	2,540	1,860	1,430	1,140
Bingham District:	1,210	850	640	500	410
Bonneville-Jefferson District:	860	690	570	460	380
Totals:	6,670	4,950	3,970	3,280	2,810

27. The total reach gain accruals set forth in Finding 26 are the total accruals that are simulated to occur over a time period of about 20 years or more from the curtailment of the diversion and use of ground water under the water rights and for the irrigation of the lands described in Finding 26 for a single year. The 6-month accruals set forth in Finding 26 are the simulated incremental additions to the reach gains for the first 4 years following curtailment for a single year. By the end of the fourth year, approximately 70 percent of the total reach gain accruals will have occurred. Additional reach gains would continue to accrue until the effects of the single year of curtailment have been fully realized.

28. If curtailment of the diversion and use of ground water under these same rights occurred within the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts during each and every year of a four-year period, the following 6-month accruals to the reach gains are simulated to occur using the Department's ground water model:

	Acres Curtailed	Total Accruals (acre-feet)	1st 6-month Accruals (acre-feet)	2nd 6-month Accruals (acre-feet)	3rd 6-month Accruals (acre-feet)
North Snake District:	5,340	12,120	0	0	20
Magic Valley District:	19,390	81,640	40	280	600
Aberdeen-Amer. Falls District:	37,930	232,920	16,360	15,850	23,020
Bingham District:	13,620	67,440	3,860	4,360	5,840
Bonneville-Jefferson District:	9,700	32,400	250	1,010	1,290
Totals:	85,980	426,520	20,510	21,500	30,770

	4th 6-month Accruals (acre-feet)	5th 6-month Accruals (acre-feet)	6th 6-month Accruals (acre-feet)	7th 6-month Accruals (acre-feet)	8th 6-month Accruals (acre-feet)
North Snake District:	50	80	120	160	210
Magic Valley District:	1,020	1,410	1,840	2,220	2,630
Aberdeen-Amer. Falls District:	19,670	25,560	21,530	26,990	22,670
Bingham District:	5,570	6,690	6,220	7,200	6,630
Bonneville-Jefferson District:	1,870	1,980	2,430	2,440	2,810
Totals:	28,180	35,720	32,140	39,010	34,950

29. The total increase in reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage from curtailment for a single year within ground water districts is less than the total increase in reach gains from curtailment within Water Districts No. 120 and No. 130 by 7,270 acre-feet because not all ground water rights having priority dates of July 23, 1977, and later that are within Water Districts No. 120 and No. 130 are also within ground water districts. Nearly all such rights are located east of American Falls Reservoir in an area adjacent to the Aberdeen-American Falls Ground Water District. The amount 7,270 acre-feet is 12.5 percent of the 58,230 acre-feet increase in reach gains that would occur over time from curtailment for a single year in the Aberdeen-American Falls Ground Water District.

30. Findings 22 through 29 supercede Findings 123 through 130 of the May 2 Order.

CONCLUSIONS OF LAW

1. Conclusions of Law set forth in the May 2 Order, as applicable, are incorporated into this Supplemental Order.

2. Based on changed water supply conditions and preliminary water rights accounting through October 31, 2005, only the Twin Falls Canal Company preliminarily

incurred material injury during the 2005 irrigation season. The preliminary material injury to the Twin Falls Canal Company during the 2005 irrigation season was 152,200 acre-feet.

3. Because of the unusually high precipitation and cool temperatures in May and June of 2005, the Director should continue to evaluate the water supplies available to members of the Surface Water Coalition in 2005 and determine whether adjustments to the amounts of minimum full supply needed and shortages incurred by members of the Surface Water Coalition are warranted to account for differences in climatic variations between 2005 and 1995, the year for which diversion amounts were used to determine the amounts of minimum full supply needed, based on evapotranspiration and effective precipitation in 2005 as compared to evapotranspiration and effective precipitation in 1995. These adjustments, if any, should be combined with final adjustments from the accounting for surface water diversions from the Snake River anticipated to be completed in mid-February or early March of 2006 and may affect the final determination of material injury resulting from depletions to the Snake River caused by the diversion and use of ground water under junior priority water rights. The final determination of shortages and material injury will be made once the final accounting for surface water diversions from the Snake River has been completed.

4. Although IGWA secured at least 27,700 acre-feet of replacement water in 2005, which was the minimum amount required by the May 2 Order, only incremental increases in reach gains resulting from the lease and non-use of water rights held by FMC Idaho, LLC, the non-irrigation of leased lands, and mitigation actions implemented in Water District No. 130 were provided during the 2005 irrigation season.

5. The Department should complete the determination of the amount of replacement water provided by IGWA to individual members of the Surface Water Coalition during and subsequent to the 2005 irrigation season from incremental increases in reach gains resulting from the lease and non-use of water rights held by FMC Idaho, LLC, the non-irrigation of leased lands, and mitigation actions implemented in Water District No. 130.

6. Because IGWA is providing replacement water in lieu of curtailment of ground water rights later in priority than July 23, 1977, the Director should continue to require that IGWA provide replacement water in amounts and generally at times at least equal to the increases in reach gains between the Near Blackfoot Gage and the Minidoka Gage that would have resulted from curtailment of such rights based on simulations using the Department's ground water model for the ESPA.

7. IGWA should be required to provide the Twin Falls Canal Company with the remainder of the 27,700 acre-feet of minimum replacement water that was required in 2005 that was not provided from incremental increases in reach gains plus an additional 18,340 acre-feet of replacement water in 2006,[10] subject to the final determination of 2005 material injury, such that the remainder of the replacement water that was due in 2005 is provided at the beginning of the irrigation season in 2006 (March 15) in addition to the water supplies otherwise available to the Twin Falls Canal Company.

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[10] Total of 46,040 acre-feet equals the first and second six month accruals set forth in Finding 26 plus an additional 12.5 percent of the first and second six month accruals for the Aberdeen-American Falls Ground Water District as described in Finding 29.

8. Additional replacement water or curtailment should be required in 2006 to equal the third and fourth six-month reach gain accruals of simulated curtailment for the preliminary material injury in 2005,[11] unless the reservoir storage space held by the members of the Surface Water Coalition under contract with the USBR fills, and in addition to curtailment or replacement water required to mitigate for material injury determined to be reasonably likely in 2006, if any.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

1. Requirements set forth in the May 2 Order, as applicable, are incorporated into this Supplemental Order.

2. The amount of replacement water required to mitigate the preliminary material injury in 2005 caused by the diversion and use of ground water under water rights having priority dates later than July 23, 1977, shall be provided by the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts as follows:

North Snake Ground Water District	3,030
Magic Valley Ground Water District	20,410
Aberdeen-American Falls Ground Water District	65,500
Bingham Ground Water District	16,860
Bonneville-Jefferson Ground Water District	8,100

These amounts equal the increase in reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage that would occur over time based on the ground water model simulations described in Finding 26, except for the Aberdeen-American Falls Ground Water District. The required amount of replacement water for the Aberdeen-American Falls Ground Water District is 12.5 percent more than described in Finding 26 to provide replacement water as mitigation for ground water rights that are within Water Districts No. 120 and No. 130 but that are not within any of the ground water districts. Nearly all such rights are located east of American Falls Reservoir in an area adjacent to the Aberdeen-American Falls Ground Water District. *See* Finding 29.

3. The required replacement water can be provided over time on an annual basis in amounts and generally at times at least equal to the increase in reach gains in the Snake River between the Near Black Foot Gage and Minidoka Gage that would result from curtailment of the affected ground water rights based on simulations using the Department's ground water model for the ESPA. The simulated increase in reach gains in the Snake River from curtailment of affected ground water rights for irrigation in 2005 for the first four years is set forth in Finding 26, not including the additional reach gains from the simulated curtailment of ground water

[11] An additional 18,240 acre-feet for preliminary 2005 material injury to the Twin Falls Canal Company (sum of 10,260 acre-feet, plus 6,670 acre-feet, plus 12.5 percent of the sum of 6,660 acre-feet and 3,820 acre-feet). *See* Findings 26 and 29.

rights that are within Water Districts No. 120 and No. 130 but that are not within any of the ground water districts.

4. Because IGWA, on behalf of the ground water districts representing holders of the affected junior-priority ground water rights, only provided replacement water in 2005 through incremental increases in reach gains resulting from the lease and non-use of water rights held by FMC Idaho, LLC, the non-irrigation of leased lands, and mitigation actions implemented in Water District No. 130, IGWA shall provide the Twin Falls Canal Company with the remainder of the 27,700 acre-feet of minimum replacement water that was required in 2005, that was not provided from incremental increases in reach gains, plus an additional 18,340 acre-feet of replacement water at the beginning of the irrigation season in 2006 (March 15), subject to the final determination of 2005 material injury. The remainder of such replacement water that was due in 2005 for 2005 material injury shall be in addition to the water supplies otherwise available to the Twin Falls Canal Company in 2006, 18,240 acre-feet of replacement water or curtailment for the third and fourth six-month reach gain accruals of simulated curtailment for the preliminary material injury in 2005 (unless the reservoir storage space held by the members of the Surface Water Coalition under contract with the USBR fills), and curtailment or replacement water required to mitigate for material injury determined to be reasonably likely in 2006, if any.

5. Failure by IGWA to provide the Twin Falls Canal Company with the remainder of the 27,700 acre-feet of minimum replacement water required in 2005, that was not provided from incremental increases in reach gains, plus an additional 18,340 acre-feet of replacement water in 2006, subject to the final determination of 2005 material injury, such that the remainder of the replacement water due for 2005 material injury is provided at the beginning of the 2006 irrigation season (March 15) in addition to the water supplies otherwise available to the Twin Falls Canal Company in 2006 shall result in the immediate curtailment of ground water rights in Water Districts No. 120 and No. 130, preliminarily having priority dates of July 23, 1977, and later.

DATED this 27th day of December, 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

EXHIBIT "F"

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DEPARTMENT OF WATER RESOURCES
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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

April 25, 2006

Randall C. Budge
Racine Olson Nye Budge & Baily Chartered
201 East Center Street
Pocatello, ID 83204-1391

VIA FACSIMILE TO (208) 232-6109 AND FIRST CLASS MAIL

Re: North Snake Ground Water District – Mitigation Water

Dear Randy:

In response to your letter yesterday, I spoke with Ted Diehl by telephone this morning and gave him verbal authorization for the Northside Canal Company to divert water released from storage held by Mitigation, Inc. In your letter, you indicate that 37,140 acre-feet of water is presently available pursuant to the *2005 WATER LEASE AGREEMENT* between Mitigation, Inc. and the Idaho Ground Water Appropriators, Inc. ("IGWA").

Priority for using water released by Mitigation, Inc. and diverted by the Northside Canal on behalf of IGWA or the North Snake Ground Water District should be given to the approximately 9,200 acres of ground-water-to-surface-water conversions within the North Snake Ground Water District, since these conversions provide a portion of the approved substitute curtailment required in response to the 2005 delivery calls from Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. (Snake River Farm). Water can also be diverted by the Northside Canal Company for delivery to Billingsley Creek via the Sandy Pipeline. However, Sandy Pipeline deliveries to Billingsley Creek are not currently part of any approved or required replacement water plan, substitute curtailment plan, or mitigation plan.

Please note that IGWA, on behalf of various ground water districts representing holders of certain junior-priority ground water rights, still has an obligation to provide the Twin Falls Canal Company with 27,700 acre-feet of minimum replacement water in 2006, less reach gains from the non-use of ground water rights held by FMC Idaho, LLC and substitute curtailment. The net amount of minimum replacement water was required in 2005 but was not provided and must be provided in 2006 pursuant to the order I issued on December 27, 2005. There may also be additional replacement water obligations in 2006, although such additional obligations are expected to be relatively small, if any. Absent an agreement between IGWA and the Surface Water Coalition and unless IGWA successfully completes agreements for leasing additional

storage water in 2006, the 37,140 acre-feet you represent as being available from Mitigation, Inc. will not be sufficient to meet the remaining 2005 obligation to the Twin Falls Canal Company, supply ground-water-to-surface-water conversions, make deliveries to Billingsley Creek via the Sandy Pipeline, and meet additional replacement water requirements for 2006, if any. Unless otherwise provided by agreement between IGWA and the Surface Water Coalition, if the obligation to the Twin Falls Canal Company remaining from 2005 is not met in 2006 together with additional replacement water requirements for 2006, if any, it will be necessary to curtail some amount of ground water diversions by priority in 2006.

Sincerely,

Karl J. Dreher
Director

copies via facsimile
and first class mail to:

Ted Diehl – Northside Canal Company
Vince Alberdi – Twin Falls Canal Company
Tim Deeg – IGWA
Lynn Tominaga – IGWA
Lyle Swank – Water District 01
John Simpson
Jerry Rigby