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RECEIVED

FEB 27 2007

DEPARTMENT OF
WATER RESOURCES

February 23, 2007

VIA EMAIL & U.S. MAIL

Interim Director David R. Tuthill
Idaho Department of Water Resources
322 E. Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

**Re: 2007 Request for Water Right Administration / Distribution to Senior
Surface Water Rights**

Dear Director Tuthill:

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 originally requested administration of hydraulically connected junior priority ground water rights in January 2005. 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") then in effect. The Coalition reaffirmed its request for water right administration pursuant to Idaho's Constitution and water distribution statutes in April 2005, again by letter of June 12, 2006, and again by a petition for reconsideration filed *In the Matter of Distribution to Water Rights Held By or For the Benefit of A&B Irrigation District et al.* on July 12, 2006.¹

The District Court in Gooding County declared the Department's conjunctive management rules unconstitutional on June 2, 2006. *See Order on Plaintiffs' Motion for Summary Judgment; AFRD #2 et al. v. IDWR et al.* (Case No. CV-2005-600, 5th Jud. Dist. Gooding County Dist. Ct.). The Coalition immediately brought this order to the Director's attention on June 14, 2006 for purposes of water right administration in 2006. The Director responded with a letter on June 30, 2006, stating that since "no judgment" had been entered in the case, it was not possible to "anticipate whether and how such judgment may affect this contested case." *See* June 30, 2006 Letter. Coincidentally, the District Court entered its *Judgment Granting Partial Summary Judgment* that very day. The judgment was later certified as "final" on July 11, 2006, at the Defendants' request. Accordingly, the Coalition filed a petition for reconsideration with the Director on July 12, 2006, seeking lawful administration for 2006. He responded with an order suspending the hearing schedule and stating that he would consider the Coalition's petition for reconsideration and "issue a subsequent order regarding reconsideration" at some unidentified time in the future. A *Fourth Supplemental Order Regarding Replacement Water Requirements* was issued on July 17, 2006. However, the Director in this *Fourth Order* continued to apply the conjunctive management rules for 2006 ("All other provisions of the June 29 Order remain in effect", including the "no injury" determination), despite the District Court's final judgment declaring the Rules void and unconstitutional.²

Despite the various filings before the District Court and Idaho Supreme Court this past summer, it is clear that the Department completely failed to perform any proper water right administration in 2006. The failure to reconsider prior orders in accordance with Idaho law left the Coalition members to suffer through yet another irrigation season without proper regulation of hydraulically connected junior priority ground water rights. Since the 2006 irrigation season is now complete, and the Coalition members have ceased

¹ On May 9, 2006 Twin Falls Canal Company requested that water for 2005's injury be distributed immediately and notified the Director of the likely injury in 2006 based upon observances of historical spring flow declines. That notwithstanding, the final injury determination was substantially less than that first determined by the Director. *See* December 27, 2005 Order. (Of course, TFCC disagrees with these calculations, since, among other reasons, they were made pursuant to the conjunctive management rules which have been declared unconstitutional).

² The Defendants in the *AFRD #2* litigation moved to stay the effect of the District Court's judgment, both at the trial court level and before the Idaho Supreme Court. The District Court denied the stay motion and the Supreme Court denied the stay motion on September 27, 2006.

direct diversions for irrigation in 2006, any future efforts to cure the lack of administration will be untimely and contrary to law.

The Coalition members' landowners and shareholders expected more from the Department, particularly since the District Court's order was issued in early June. The lack of administration was inexcusable under the law and resulted in an obvious diminishment of the Coalition members' private property rights.

You have indicated, in recent announcements, that you are preparing to address outstanding delivery calls against groundwater users by those holding senior rights to the use of spring waters and reach gains of the Snake River arising from inflows from the ESPA. It is essential that you promptly address the delivery call of the Surface Water Coalition and that administration occur pursuant to relevant statutes of the State of Idaho and legal precedent. We look forward to and expect prompt action on the Surface Water Coalition delivery call for 2007.

At the same time, we have some concern with your recent indications that you intend to limit the effects of delivery calls by employing what you have indicated to be the "futile call doctrine." We are concerned that you intend to provide your own definition of "futile call," to the detriment of the Surface Water Coalition.

The "futile call doctrine" has been addressed by Idaho courts on numerous occasions. As a result, certain principles have been adopted by the courts that should be explicitly followed in any application of this doctrine. It has generally been stated that a futile call is not a defense to a delivery call by a senior water right holder so long as the use by a junior water right holder diminishes the volume of water to which the senior would otherwise be entitled. The security and reliability of water rights turn on the enforceability of priorities when natural supply is not adequate to fill all decreed water rights and administration of decreed rights is necessary to ensure the property value of water rights. Security for the rights of water users with senior water rights largely depends upon the sound exercise of curtailment enforcement power by your office.

Idaho has never recognized any legal precedent by which the futile call could be applied whenever the recovery of the volume of water in the source of the senior appropriator is not instantaneous or within a reasonable time after curtailment. The standard in Idaho is that "so long as the water flowing in its natural channels would reach the point of downstream diversion", curtailment may not be avoided by the futile call doctrine. It is also clear that the "useable quantity standard" is applicable only when the only source is that water actually diverted by the junior appropriator. It is not sufficient to show that unless all or a significant portion of the water diverted under a junior water right, upon curtailment, becomes available for use by a senior diverter, the curtailment is futile.

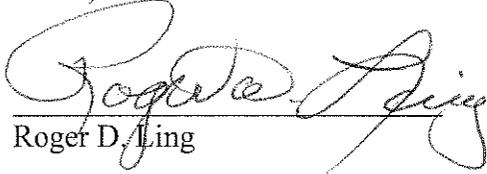
The Idaho Supreme Court has clearly stressed that the "policy of the law against the waste of irrigation water cannot be misconstrued or misapplied in such a manner as to permit a junior appropriator to take away the water right of a prior appropriator." The

sister to the futile call doctrine is the “unappropriated water” theory. Under this theory, if it can be shown that the water sought to be appropriated or diverted by a junior water right holder would not reach the diversion or source of a senior water right holder, such water would be deemed to be “unappropriated water.” This theory is not available in the Eastern Snake Plain, as the Department and court have clearly held that the Eastern Snake Plain Aquifer and the Snake River are interconnected sources.

Finally, those legal decisions have clearly held that a junior diverter must establish the conditions for a “futile call” or that he is diverting “unappropriated water,” by clear and convincing evidence. The ESPA ground water model contradicts any ability to make such a showing by a junior appropriator, and the Department should not attempt to apply newly created standards in water administration in the ESPA.

We look forward to your prompt response to this request, that you will fulfill your statutory and constitutional duties and that you will administer hydraulically connected junior priority ground water rights that are diminishing the volume of the water to which the senior water rights of the surface water coalition would otherwise be entitled in 2007 and subsequent years.

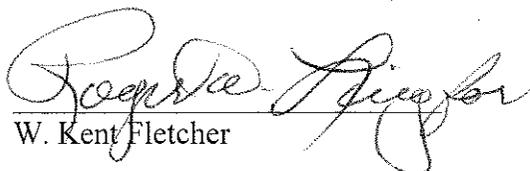
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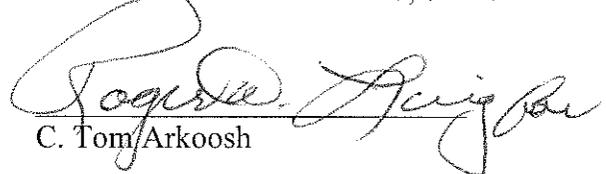
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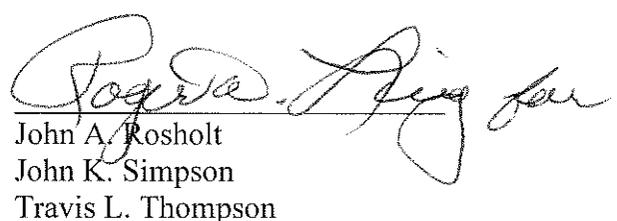
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