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Attorneys for Idaho Ground Water Appropriators, Inc.

**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 CO.

**GROUND WATER
DISTRICTS' JOINT REPLACEMENT
WATER PLAN FOR 2007**

COMES NOW the Idaho Ground Water Appropriators acting for and on behalf of its member ground water districts: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Magic Valley Ground Water District and North Snake Ground Water District (collectively referred to herein as Ground Water Districts), through the undersigned counsel, and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities, and hereby

provide this Joint Replacement Water Plan for 2007 (2007 Joint Replacement Water Plan) in response to the above captioned matter. This 2007 Joint Replacement Water Plan is provided in response to the 2007 Request for Water Right Administration/Distribution to Senior Surface Water Rights dated February 23, 2007 submitted 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, hereinafter "the Surface Water Coalition". This request is referred to herein as the "Water District 120 Delivery Call."

I. WATER DISTRICT 120 DELIVERY CALL IS NOT OUTSTANDING AND PRIOR ORDERS HAVE BEEN FULLY SATISFIED

The Ground Water Districts assert that there is no outstanding delivery call because the Water District 120 Delivery Call was made pursuant to "relevant statutes of the State of Idaho and legal precedent" but not under the Conjunctive Management Rules. See Water District 120 Delivery Call first paragraph on page 2 (unnumbered) and second paragraph on page 3 (unnumbered). The Water District 120 Delivery Call was made prior to the Supreme Court's decision in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 2007 WL 677947 (Idaho March 5, 2007) with the presumption that the Conjunctive Management Rules were invalid, thus it cannot be reasonably concluded that the Water District 120 Delivery Call was made under the Conjunctive Management Rules.

Notwithstanding the status of the Water District 120 Delivery Call, there is also no order on the Water District 120 Delivery Call. The Director's Orders issued in 2005 and 2006 on prior delivery calls have been satisfied under approved replacement water plans for 2005 or by the finding that no material injury was predicted in 2006. See *Order Approving IGWA's Replacement Water Plan for 2005* dated June 24, 2005, *Second Supplemental Order*

Amending Replacement Water Requirements dated December 27, 2005, *Third Supplemental Order Amending Replacement Water Requirements Final 2005 and Estimated 2006* dated June 29, 2006, *Fourth Supplemental Order on Replacement Water Requirements for 2005* dated July 17, 2007.

Although a hearing on those prior orders regarding IDWR's factual and legal findings has not occurred, the Director's Orders for 2005 and 2006 were final as to those years with no expectation that the orders were to be applied prospectively. However, because it appears that the Director is intending to issue curtailment orders, despite the fact that the Water District 120 Delivery Call seems to specifically contemplate proceeding outside the Conjunctive Management Rules and without any detailed order that includes factual or legal development for this year, the Ground Water Districts submit this proposed 2007 Joint Replacement Water Plan.

II. RESERVATION OF DEFENSES

By submitting this 2007 Joint Replacement Water Plan, the Ground Water Districts do not waive and expressly reserve any and all objections and defenses they may have to the Water District 120 Delivery Call and any Director's Orders relating to delivery calls in this or prior years. Furthermore, the Ground Water Districts do not admit that any of its members or any ground water users are causing any material injury to the surface water users affecting the surface water supplies as set forth in the Water District 120 Delivery Call or any Director's Orders relating to delivery calls in this or prior years. The Ground Water Districts reserve the right to challenge any definitions, application and underlying data and conclusions in the Water District 120 Delivery Call and any Director's Orders relating to delivery calls in this or prior years.

III. REQUEST FOR HEARINGS

The Ground Water Districts reiterate their prior requests for a full evidentiary hearing on the Director's 2005 Orders and subsequent orders related thereto. In addition, the Ground Water Districts further request a full evidentiary hearing prior to the issuance of any curtailment order in 2007 if this 2007 Joint Replacement Water Plan is not accepted to preclude the issuance of any curtailment order in 2007.

IV. BACKGROUND

To date the Surface Water Coalition has not presented to the Department sufficient factual basis in support of its Water District 120 Delivery Call establishing the nature and extent of their alleged material injury for 2007 as required by the Conjunctive Management Rules and the recent Idaho Supreme Court Decision in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 2007 WL 677947 (Idaho March 5, 2007). As noted by the Supreme Court, the petitioner who files the delivery call is required to provide "all available information to support the call in order to assist the Director in his fact-finding." *Id.* at 14 and 20.

Furthermore, with respect to the Director's *Amended Order of May 2, 2005*, (May 2 Order) to date the Surface Water Coalition has also failed to provide the Director all available information to support the call addressed in that order. Notwithstanding, the Director proceeded to issue his May 2 Order without that information, and in fact acknowledging that the information submitted prior to his May 2 Order was incomplete. See Finding of Fact 9 at 3. The supplemental information submitted by the Surface Water Coalition was not considered because the Director did not have "sufficient time to evaluate the supplemental submittal." May 2 Order Finding of Fact 18 at 5. Notably, the Director, in his *Order*

Denying the Surface Water Coalition's Motion for Partial Summary Judgment (May 31 Order) noted that “[a] primary issue in the May 2005 Order was the extent to which the Surface Water Coalition was experiencing material injury, . . . [and] resolution of factual issues relating to the existence of material injury is pivotal to address the legal arguments raised by the Surface Water Coalition and the ground water users in this case.” (May 31 Order at 12). Finally, the Director stated the he “must make a factual determination of whether the full amounts of the water rights are necessary for the authorized beneficial uses at the time the delivery call is made . . . [and will distribute] such amount as is necessary to achieve the authorized beneficial use . . . [and noted that] the amount of need will vary over time.” *Id.* at 13. Proceeding to issue curtailment notices against ground water users without holding a hearing to determine the nature and extent of any material injuries and address other defenses and pivotal factual and legal questions deprives ground water users of due process of law.

Notwithstanding the substantial and material omissions of fact described above, during the course of informal discussions with the parties, the Director has verbally indicated he has made findings that Twin Falls Canal Company will have a 58,913.7 acre-feet shortage to its irrigation season diversion requirement for the 2007 irrigation season; that Twin Falls Canal Company will have a carryover storage shortage of 38,400 acre-feet; and, that American Falls Reservoir District No. 2 will have a carryover storage shortage of 43,017 acre-feet. These shortages are purportedly based on the methodology contained in the May 2 Order, in this matter as amended by the *Third Supplement Order Amending Replacement Water Requirements Final 2005 and Estimated 2006* dated June 29, 2006 which determined that Twin Falls Canal Company's minimum full supply needed was 1,075,900 acre-feet.

The irrigation seasonal diversion requirement figure in the May 2 Order was incorrectly based on a $\frac{3}{4}$ of a miner's inch per acre as a full head gate delivery. In fact, the full supply for Twin Falls Canal Company is no more than 1,009,100 acre-feet based upon $\frac{5}{8}$ inch per acre full head gate delivery.¹ See Charles M. Brendecke Affidavit, Expert Report pp. 17, 25-26.

V. 2007 REPLACEMENT WATER PLAN

Without waiving their objections and request for hearing, and in response to the Director's verbal findings and threatened curtailment order to ground water users in Water District 120 and Water District 130, the Ground Water Districts propose as their 2007 Joint Replacement Water Plan to mitigate any and all material injury by guaranteeing and underwriting Twin Falls Canal Company's irrigation season supply as measured at the broad crested weir at the main canal headgate up to 1,009,100 acre-feet based upon $\frac{5}{8}$ inch per acre headgate delivery. Should the combined sum of the storage allocated to Twin Falls Canal Company and the natural flow delivered to Twin Falls Canal Company during the irrigation season be less than 1,009,100 acre-feet as calculated by the Water District 1 Watermaster in the manner described below, the Ground Water Districts will pay the Water District 1 Rental Pool charges or otherwise supply sufficient water to eliminate the resulting water debt of Twin Falls Canal Company on the books of Water District 1. This proposed 2007 Replacement Water Plan will fully mitigate and compensate Twin Falls Canal Company for the alleged material injury and is predicated upon Water District 1 using the same water distribution and accounting procedures the Watermaster has used since 1978.

¹ The Twin Falls Canal Company Operation Policy (1998) states that the TFCC water right is $\frac{5}{8}$ ths of a miner's inch per share. In their 1999 Water Management Plan, the Company states that the system was planned and constructed to deliver 1 cfs per 80 acres (this converts to $\frac{5}{8}$ ths of a miner's inch per acre). This is consistent with the findings of the 1912 Idaho Supreme Court case of *State vs. Twin Falls Canal Company*, Idaho

In determining the 2007 water supply available to Twin Falls Canal Company and any actual shortfall to be made up by the Ground Water Districts, the Watermaster shall apply appropriate accounting procedures determined by the Department, including but not limited to the following:

- (1) If Twin Falls Canal Company diverts natural flow and storage of 1,009,100 acre-feet or more, then there is no in-season injury and no mitigation is required.
- (2) All water spilled at the end of the Twin Falls Canal Company canal system shall be measured and accounted for by the Watermaster. Unreasonable waste shall be accounted for and deducted from any obligation of the Ground Water Districts.
- (3) Any water leased to others by Twin Falls Canal Company shall be accounted for and not the obligation of the Ground Water Districts.
- (4) Only water diverted and used by Twin Falls Canal Company for beneficial purposes of providing irrigation water to its shareholders for irrigation of lands within the service area during the 2007 irrigation season shall be included in calculating the obligation of the Ground Water Districts.
- (5) Existing accounting procedures employed by Water District 01 should not be modified and the accounting will be the final year-end accounting by the Water District 01 Watermaster.
- (6) Any water released past Milner Dam during the 2007 water year for hydropower generation or related to Endangered Species Act requirements shall be accounted for by the Water District 01 Watermaster.
- (7) The supply of 1,009,100 acre-feet shall not be required and no mitigation requirement shall exist if Twin Falls Canal Company diverts less than 1,009,100 acre-feet and has carryover storage remaining when the final 2007 Water District 01 water right accounting is complete.

- (8) The Department of Water Resources shall examine the diversion and climate-based water requirements of the 2007 irrigation season and adjust mitigation obligations downward if sufficient precipitation or other circumstances indicate that a full water supply was available to Twin Falls with a diversion less than 1,009,100 acre-feet.

The calculated water debt resulting from Twin Falls Canal Company's irrigation season diversions will be replaced by the Ground Water Districts during or at the end of the irrigation season from storage water procured by the Ground Water Districts which will be credited to the storage water account of Twin Falls Canal Company. The replacement water will be delivered to Twin Falls Canal Company as it is needed during the irrigation season, but the total amount of water debt to be offset by the Ground Water Districts under this proposed 2007 Joint Replacement Water Plan will not be known until the end of the irrigation season.

The Ground Water Districts have acquired water leases from Aberdeen-Springfield Canal Company (20,000 acre-feet), FMC (5,000 acre-feet) and Snake River Irrigation District (10,000 acre-feet). To the extent this water is not used to supply water under the North Snake Ground Water District and Magic Valley Ground Water Districts Joint Replacement Water Plan for 2007 for Water District 130, it will be dedicated to this proposed 2007 Joint Replacement Water Plan. In addition, water from storage water available under other leases is being negotiated. If the above-described sources are inadequate to off-set the water debt and to the extent necessary, the Ground Water Districts will reimburse Twin Falls Canal Company the cost of the 40,000 acre-feet of storage water which it has proposed to lease from the Water District 1 Rental Pool for the 2007 season.

The Ground Water Districts reserve the right to modify this Plan as needed to comply with other requirements that may be imposed by the Director to secure approval and make any curtailment order unnecessary.

VI. SUPPORTING BASIS

This 2007 Joint Replacement Water Plan is based upon the Supporting Affidavit of Charles M. Brendecke, Ph.D., P.E., together with his report attached thereto prepared on behalf of the Idaho Ground Water Appropriators, Inc., together with the previous Affidavits of Charles M. Brendecke dated March 23, 2005 and August 5, 2005, submitted in response to the Surface Water Coalition's 2005 Delivery Call and in support of the Idaho Ground Water Appropriator's April 5, 2005, Replacement Water Plan.

The Ground Water Districts submit the following points to the Water District 120 Delivery Call which has yet to be determined at an evidentiary hearing and in support of this 2007 Joint Replacement Water Plan:

- (1) By their delivery call, the Surface Water Coalition seeks to establish water rights that are greater in quantity and reliability than what was originally appropriated. Their rights have yet to be adjudicated in the Snake River Basin Adjudication and remain pending subject to objections of record.
- (2) Drought conditions, not ground water pumping, have reduced gains in the near-Blackfoot to Neeley reach in recent years. See Brendecke Report, page 7.
- (3) Surface Water Coalition entities' natural flow rights are supplied primarily from the reach gains that accrue to the river in the Blackfoot to Neeley reach and have experienced substantial annual and seasonal variation in their natural flow supplies well before the beginning of ground water development and could never have expected their natural flow rights to be fully satisfied from reach gains arising below Blackfoot. See Brendecke Report, page 10.

- (4) The natural flow supply available to Twin Falls Canal Company has not been materially affected by ground water pumping. See Brendecke Report, page 11.
- (5) The Palisades storage projects were intended to enhance water supplies available to the Surface Water Coalition entities but not to preclude water shortages which were anticipated in dry years as a part of the planning process. See Brendecke Report, page 13.
- (6) The storage supplies available to the Surface Water Coalition have not been substantially affected by ground water pumping. See Brendecke Report, pages 15.
- (7) Water Bank activity by the Surface Water Coalition entities since 1960 indicates they believed they had excess supplies in most of those years. See Brendecke Report, page 16.
- (8) Twin Falls Canal Company overstated its water right in the 2005 delivery call by asserting a full headgate delivery in their system of 3/4ths of a miner's inch. The Twin Falls Canal Company Operation Policy (1998) states that their water right is 5/8ths of a miner's inch per acre. Their 1999 Water Management Plan states that the canals were planned and constructed to deliver 1 cfs per 80 acres which converts to 5/8ths of a miner's inch per acre. Accordingly, Twin Falls Canal Company's irrigation seasonal diversion requirement is 1,009,100 acre-feet. See Brendecke Report, pages 17 and 25-26.
- (8) The Ground Water Districts' 2007 Joint Replacement Water Plan which entails making targeted deliveries of storage water to Twin Falls Canal Company makes far more sense than curtailment as reach gains generated by curtailment would arise in part in reaches above Blackfoot or below Milner where they would be inaccessible and/or when there was no demand and no place to store them. See Brendecke Report, pages 22-23.
- (9) The Director's May 2 Order relating to material injury and mitigation, while done within the framework of the Conjunctive Management Rules, raises three important issues: (1) whether the material injuries threshold was properly determined; (2) whether the thresholds represented an improved water supply over what was historically anticipated by the SWC entities; and (3) whether the thresholds properly address actual irrigation water needs, i.e., do they bear a relationship to actual beneficial use requirements. See Brendecke Report pages 24-28. These determinations are factual in nature and

require an evidentiary hearing and determination by the Director in order to properly determine any mitigation requirements and as a condition precedent to the issuance of any curtailment order.

- (10) The Ground Water Districts' 2007 Joint Replacement Water Plan is submitted under objection and protest to ensure Twin Falls Canal Company of a full irrigation season water supply and render unnecessary any need for a curtailment order.
- (11) All other Surface Water Coalition members including American Falls Reservoir District No. 2 are totally dependent upon storage, and they have no entitlement to ground water.

With reservoirs expected to fill and spill in 2007, there can be no shortage or injury to any Surface Water Coalition entities. The Director's apparent finding that Twin Falls Canal Company will have a 58,913.7 acre-feet shortfall for their irrigation season diversion requirement and 38,400 acre-feet shortfall of storage has not been technically supported and bears no relationship to any alleged material injury to Twin Falls Canal Company or any other Surface Water Coalition entity. The Director has apparently used updated statistical relationships that are poorer predictors of natural flow supplies than were the relationships contained in the May 2 Order and subsequent orders. The predictive ability of the original relationships was weakened by the inclusion of years with substantially reduced water demand, thus skewing the relationships toward under-prediction of available supply.

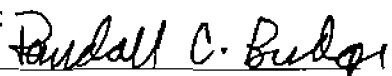
The mathematical result created by the Director's analysis creates a substantially higher shortage in 2007 than the 27,700 acre-feet requirement ordered in 2005, despite the fact that the natural flow this year is the same or better and storage full or near full compared to the low amount predicted in 2005.

VII. CONCLUSION

Based on the foregoing, the Ground Water Districts' 2007 Joint Replacement Water Plan prevents any alleged material injury and addresses any alleged shortfall to the irrigation season diversion requirement to Twin Falls Canal Company and should be approved, thus rendering unnecessary any curtailment order in Water District 120. If the proposed 2007 Joint Replacement Water Plan can be approved with modification, the Ground Water Districts request direction and an opportunity to amend the 2007 Joint Replacement Water Plan to secure approval. If the 2007 Joint Replacement Water Plan is rejected, the Ground Water Districts request a full evidentiary hearing before any curtailment order is issued.

DATED this 8th day of May, 2007.

RACINE OLSON NYE
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By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of May, 2007, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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