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DEPARTMENT OF WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF PETITION TO  
AMEND RULE 50.01 OF THE  
CONJUNCTIVE MANAGEMENT RULES

**Docket No.**  
**SURFACE WATER COALITION'S  
SECOND SUPPLEMENTAL  
COMMENTS**

AMERICAN FALLS RESERVOIR DISTRICT #2, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY (the "Surface Water Coalition" or "Coalition"), by and through their attorneys of record, file these second supplemental comments in the above-referenced matter.

The Coalition submits these comments pursuant to the Idaho Administrative Bulletin, Volume 14-10 (pp. 447-48), and the Department's notice of public hearing and the deadline to submit comments identified in the October 10, 2014 notice to water users. These comments supplement the Coalition's initial comments filed back on May 25 and 31, 2011, and supplemental comments filed on June 23, 2014.

## SECOND SUPPLEMENTAL COMMENTS

The Department proposes to repeal Rule 50 of the conjunctive management rules, which describes the Eastern Snake Plain Aquifer as “an area of common ground water supply”, on the basis that “the rule is no longer necessary and that the administrative hearings and deliberations associated with individual delivery calls is the proper venue to address which ground water rights should be subject to administration under a delivery call.” *See 10/14/14 Notice to Water Users.*

The Snake River Basin Adjudication Court defined which water rights are subject to conjunctive administration within a given administrative basin. Notably, the Court decreed the following “connected sources” general provision, which applies to all water rights (unless decreed with a separate streams general provision):

Except as otherwise specified above, all other water rights within Basin \_\_\_ ***will be administered as connected sources of water*** in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

*See Exhibit A to Memorandum Decision and Order of Partial Decree (Subcase 91-00005) (Basin Wide Issue No. 5 Connected Sources General Provision Conjunctive Management) (In Re SRBA Case No. 39576, Twin Falls County Dist. Ct., Fifth Jud. Dist., Feb. 27, 2002) (emphasis added)*

The Court held the following with respect to the above-referenced general provision:

2. The Court finds that a general provision on connected ground and surface sources is necessary to efficiently administer the water rights decreed by the SRBA District Court by notifying water right holders as to how their water rights will be administered in order to avoid future controversy in the administration of such rights.

\* \* \*

5. The Court concludes, as a matter of law, that a general provision on connected ground and surface sources is necessary to efficiently administer the water rights decreed by the SRBA District Court by notifying water right holders as to how their water rights will be administered in order to avoid future controversy in the administration of such rights.

*Memorandum Decision* at 4.

In connection with the Surface Water Coalition delivery call, both the Hearing Officer and Director recognized that ground water rights in the Eastern Snake Plain Aquifer are subject to conjunctive administration:

**3. Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights.** Once it is established that the Snake River and the Eastern Snake Plain Aquifer are connected the conclusion is inevitable that withdrawal of water from the aquifer reduces flow in the Snake River . . . The evidence in this case establishes that during recent periods of water shortage ground water pumping has affected the quantity and timing of water available to SWC members. Natural flow rights have been exhausted earlier and storage has been used earlier and more extensively, limiting the application of water during the irrigation season and diminishing the amount of carryover storage to which the surface water users are entitled.

*Opinion Constituting Findings of Fact, Conclusions of Law, and Recommendation* at 29-30 (emphasis in original).<sup>1</sup>

The Hearing Officer also found that it was appropriate for the Director to use the groundwater model (ESPAM) in conjunctive administration and that it represented “the best science available.” *Id.* at 33. Further, the Hearing Officer recommended that “as improvements are made that lead to a more reliable model those results should be utilized.” *Id.* at 34.

The Eastern Snake Hydrologic Modeling Committee (ESHMC) and the Idaho Water Resources Research Institute (IWWRI) assumed the task of making improvements to the model, resulting in the development of ESPAM 2.1. The Director has accepted ESPAM 2.1 and used it in conjunctive administration. Recently, the Director found ESPAM 2.1 to be the “best scientific tool currently available to predict the effect of ground water pumping on flows from springs located in the Rangen cell” and that “[t]here is no other technical instrument as reliable as ESPAM 2.1 that can be used to determine the effects of ground water pumping on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries.” *Final Order (Rangen)* at 22, 37.

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<sup>1</sup> Former Director Tuthill adopted this finding in the *Final Order* issued on September 5, 2008.

Since the Surface Water Coalition has an outstanding water delivery call regarding administration of hydraulically connected junior ground water rights in the Snake River Basin, it follows that the Director would adopt the same finding and reasoning for using ESPAM 2.1 in the Coalition's case.<sup>2</sup> The Coalition has a significant interest in ensuring that all junior ground water rights that affect the Snake River are properly included for purposes of conjunctive administration.

Given the SRBA Court's decreed "connected sources" general provision, the Director's prior findings in the SWC case, and the fact the ESPAM 2.1 represents the "best available science", there is no basis to limit or qualify conjunctive administration based upon a definition of an "area of common ground water supply." In accordance with these facts and existing law, the Director should clarify that the lack of a defined "area of common ground water supply" is not jurisdictional or a condition to conjunctive administration.

Moreover, if the Director's preference is to not include a definition for an "area of common ground water supply" in any case, then all references to that designation should be removed from the remaining CM Rules identified as follows:

Title and Scope

Rule 001

Definitions

Rule 010.01

Rule 010.02

Rule 010.03

Rule 010.15

Rule 010.19

General Statements

Rule 020.01

Rule 020.06

Rule 020.07

Rule 020.10

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<sup>2</sup> The Director has yet to apply ESPAM 2.1 to the Coalition's delivery call. However, with the district court's ordered remand to revise the present "methodology" for conjunctive administration in response to the Coalition's delivery call, it is expected the Director will incorporate and utilize ESPAM 2.1, rather than the outdated version ESPAM 1.1.

Outside Organized Water Districts

Rule 030.01.d  
Rule 030.05  
Rule 030.06  
Rule 030.07.d  
Rule 030.07.h  
Rule 030.09

Areas of Common Ground Water Supply

Rule 031

Organized Water Districts

Rule 040.01

Material Injury

Rule 042.01.c  
Rule 042.01.h

Mitigation Plan

Rule 043.03.d  
Rule 043.03.l  
Rule 043.03.n

Removing all references to an “area of common ground water supply” would clarify the CM Rules and ensure there is no confusion as to future administration. For example, Rule 40’s title reads: “Responses to Calls for Water Delivery Made by the Holders of Senior-Priority Surface or Ground Water Rights Against the Holders or Junior-Priority Ground Water Rights from Areas Having a Common Ground Water Supply in an Organized Water District (Rule 40).” The phrase “from areas having a common ground water supply” could be misinterpreted to qualify any such conjunctive administration. While the Coalition would disagree and reserves the right to challenge any such misinterpretation, the removal of terms that will no longer be deemed necessary would alleviate these concerns.


In summary, the Coalition supports the Department’s efforts to use the most accurate and current information for conjunctive administration. Provided the repeal of CM Rule 50 is not viewed or used as a jurisdictional qualifier to administration of the Coalition’s senior surface water


rights together with all hydraulically connected junior ground water rights that impact and affect flows in the Snake River, the Coalition is supportive of the intent of the proposed amendment to the conjunctive management rules.

DATED this 24<sup>th</sup> day of October, 2014.

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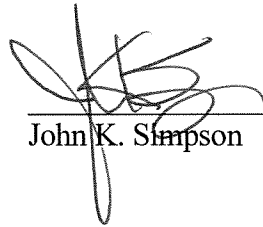
  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 24<sup>th</sup> day of October, 2014, I served a copy of the foregoing, by hand delivery to the following:

Director Gary Spackman  
Rich Rigby  
IDWR  
322 E. Front St.  
Boise, Idaho 83720-0098



John K. Simpson