



Company, and Twin Falls Canal Company (hereinafter collectively referred to as the “Surface Water Coalition” or “Coalition”), and hereby file this *Petition for Reconsideration and Review* of the Director’s May 23, 2007 *Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 & Estimated 2007* (“*Fifth Order*”) pursuant to I.C. § 42-1701A(3) and the Department’s Rules of Procedures (IDAPA 37.01.01 *et seq.*). The initial bases for this petition are as follows:

**I. The Coalition Incorporates its Prior Petitions, Protests, and Motions By Reference**

The Coalition previously protested and moved to dismiss IGWA’s “replacement water plans” that were submitted in 2005 and 2007. The Coalition readopts those protests and motions and fully incorporates them herein by reference. Moreover, to the extent that IGWA’s Amended *Joint Replacement Water Plan For 2007* (“IGWA Replacement Plan” or “Plan”) is deemed to be a “mitigation plan” pursuant to the conjunctive management rules, the Coalition incorporates herein by reference each provision of the *Surface Water Coalition’s Motion to Dismiss the Ground Water District’s Application* dated March 21, 2005 and the *Surface Water Coalition’s Protest Against Approval of Proposed Mitigation Plan* dated March 21, 2005.<sup>1</sup> Similar to the treatment of the protests and motions to dismiss IGWA’s “replacement water plan”, the Director has yet to acknowledge or take any action on the protests and motions to dismiss the mitigation plan filed by several ground water districts on February 8, 2005.<sup>2</sup>

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<sup>1</sup> Reclamation and Idaho Power also filed protests and motions to dismiss the Ground Water Districts’ mitigation plan on March 21, 2005. In addition, the City of Pocatello, Basic American Foods, and ConAgra/Lamb Weston filed a joint protest to the mitigation plan.

<sup>2</sup> Although the application was originally filed by the American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, and South West Irrigation District, it was IGWA, not these referenced ground water districts that filed the “replacement water plan” with the Director. There is no basis to assume that IGWA can adopt and incorporate a separate mitigation plan filed by the ground water districts listed above in order to provide “mitigation” for any of IGWA’s members that are not members of the referenced ground water districts.

The Coalition further readopts its prior petitions for review and reconsideration of the Director’s previous orders and incorporates the points and issues identified in those petitions as if fully set forth herein. Those filings include petitions filed with the Director in 2005 (May 5, 17, July 6, August 5) and 2006 (January 11 and July 12).

**II. The Director’s *Fifth Order* Fails to Properly Administer Water Rights for 2007.**

Given the irrigation season is already two months underway, the Director must reconsider the unlawful system of administration that is perpetuated by the *Fifth Order*. The Director’s actions, including the failure to distribute water to the Coalition’s water rights in a timely manner during the irrigation season, are contrary to the constitution, water distribution statutes, and the Idaho Supreme Court’s recent decision in *AFRD #2 v. IDWR*, 154 P.3d 433 (Idaho 2007).

**2007 Water Right Administration**

1. The Director fails to distribute water to the Coalition’s “water rights” in 2007, and continues to use a “minimum full supply” calculation which is based upon the Coalition’s diversions in 1995.
2. The Director’s prediction of the Coalition’s total water supply for 2007 fails to take into account the best scientific information available, including information provided by the Coalition on April 13, 2007 (*Surface Water Coalition 2007 Water Supply Assessment*).
3. The Director’s prediction of the Coalition’s storage water supplies is erroneous as demonstrated below by comparing the *Fifth Order* with the preliminary storage allocation performed by Water District 1 on May 29, 2007:

<u>Entity</u>	<u>Fifth Order 2007 Storage</u>	<u>WD 1 2007 Storage</u>	<u>Difference</u>
A&B	130,718 af	117,177 af	- 13,541 af
AFRD #2	385,200 af	383,201 af	- 1,999 af
BID	219,960 af	213,265 af	- 6,695 af
Milner	85,786 af	79,008 af	- 6,778 af
MID	353,392 af	334,143 af	- 19,249 af
NSCC	830,100 af	788,363 af	- 41,737 af
TFCC	238,701 af	230,956 af	- 7,745 af
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		Total	- 97,774 af

4. Given the Director's miscalculation of the Coalition's total storage supplies, the Director must reconsider his finding that "all storage accounts are predicted to nearly fill in 2007" and that "it is reasonable to conclude that IGWA will be able to acquire sufficient storage water to mitigate for material injury that is predicted to occur to the Twin Falls Canal Company." *Fifth Order* at 15, ¶ 4. If storage supplies for all spaceholders in Water District 1 do not fill, and the water supply for 2007 is inadequate for the various spaceholders in the district, it is not "reasonable" to presume that storage water will be rented to IGWA. The failure of IGWA to provide any documentation of executed leases of stored water for 2007 is evident of this fact.<sup>3</sup>
5. The Director continues the untimely administration of water by perpetuating a so-called "mitigation debit and credit" system. The Director has no authority to allow junior ground water rights to pump out-of-priority and order "mitigation" to be provided sometime in the future to mitigate injury that is occurring this year and into the next storage season. In addition, the finding that these "debits and credits" will continue "until such time as the storage space" of the Coalition fills is similarly unlawful.
6. The Director fails to require IGWA to identify and provide "replacement water" in a timely manner. Instead, the Director states that it is "reasonable to conclude that IGWA should be able to provide replacement water" and that IGWA's Plan "should mitigate material injury". *Fifth Order* at 16, ¶ 7. Despite the obvious deficiencies in IGWA's Plan, the Director concludes that the plan "will mitigate for the predicted material injury to members of the Surface Water Coalition and is therefore conditionally approved . . ." *Id.* at 17, ¶ 3.
7. Nothing in Idaho's statutes or the Department's conjunctive management rules provides for "conditional approval" of "mitigation" or "replacement water plans" where no water is identified for supply and where it is not agreed to by the senior water right holder. By accepting IGWA's flawed plan, the Director and the Department have assumed the obligations of the injury and taking of the Coalition's senior surface water rights caused by junior priority ground water rights.
8. The Director's *Fifth Order* contradicts the criteria for "replacement water plans" identified in the Director's May 6, 2005 *Order Regarding IGWA Replacement Water Plan*. In that order, the Director stated that "IGWA did not submit documentation that the storage had been placed in the Water District 01 Rental Pool and was committed to IGWA for release as mitigation." May 6, 2005 Order at 6, ¶ 32. The Director further ordered IGWA to provide documentation of

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<sup>3</sup> The reference to Water District 01's preliminary storage allocation for 2007 is for information purposes to demonstrate an apparent discrepancy between the Director's estimated supplies and what has been allocated. The official preliminary allocation for all spaceholders should be obtained from Water District 01. The Coalition's reference herein is not an adoption or acceptance of those preliminary allocation storage numbers.

leases of stored water and information regarding its commitment to the Water District 01 Rental Pool. *Id.* at 12, ¶ 2. Here, IGWA has failed to provide documentation that it has even entered into leases for the stored water required to be provided in-season, let alone documentation that the water has been placed in the Water District 01 Rental Pool.

9. Since the Director's "conditional approval" in the *Fifth Order* contradicts the prior criteria in approving "replacement water plans" in the May 6, 2005 Order, the *Fifth Order* should be reconsidered.

### **III. The Facts and Circumstances Regarding the Approval of IGWA's Replacement Plan Must be Addressed at Hearing.**

The ex parte process in which the apparent "acceptance" of IGWA's plan was pre-determined by the Director or Department exposes the arbitrary and unlawful steps that have been taken to avoid administration of junior priority ground water rights in Water District 120 for yet another year. *See Plan* at 2 ("It is the understanding of the Ground Water Districts that the methodology used in their May 8, 2007 Joint Replacement Water Plan is acceptable . . ."). The Director's "acceptance" of IGWA's Replacement Plan was apparently communicated to IGWA between May 8<sup>th</sup> and the filing of the amended plan on May 15<sup>th</sup>. Consequently, the Director's *Fifth Order* has been characterized as a "compromise" or "agreement" between the Department and junior priority ground water users. *See Exhibits A, B, C* (newspaper articles). The facts and circumstances regarding the "conditional approval" of IGWA's Plan must be addressed at hearing.

Coincidentally, during the time of the filing of IGWA's first replacement plan on May 8<sup>th</sup> and its amended plan on May 15<sup>th</sup>, IGWA also filed a lawsuit against the Director and Department in the Jerome County District Court on May 7<sup>th</sup> (*IGWA v. IDWR*, Case No. CV-2007-527, Fifth Jud. Dist., Jerome County). In that case IGWA alleges, among other things, that the Director has no authority to administer junior priority ground water rights. The lawsuit identifies water delivery calls made by spring users in Water District 130 and fails to address the

Coalition's request for administration. Accordingly, it appears that the Director's "conditional approval" of IGWA's Replacement Plan may have been provided to avoid an additional lawsuit against the Director regarding the Coalition's call affecting junior priority ground water rights in Water District 120, on similar or the same grounds as the case filed in Jerome County regarding junior priority ground water rights in Water District 130.

**IV. The Director's *Fifth Order* is Based Upon Speculation and Presumptions Regarding IGWA's Ability to Mitigate / Not Real Water.**

IGWA's Replacement Plan completely fails to address the Coalition's estimated injury for 2007. The Director's *Fifth Order* ignores the deficiencies in the plan and speculates that "IGWA *should be able to provide replacement water* to the members of the Surface Water Coalition that are predicted to experience material injury in 2007." *Fifth Order* at 16, ¶ 7 (emphasis added). Whether or not IGWA "should" be able to provide water does not provide certainty to the Coalition members' landowners and shareholders regarding their 2007 water supplies.

The Director "conditionally approves" IGWA's Replacement Plan on the basis that he believes it is "reasonable to conclude" that IGWA will acquire stored water to provide to the Coalition during the irrigation season. *Fifth Order* at 16, ¶ 7. While IGWA's so-called "promises" or "guaranty" apparently satisfy the Director, they do not provide any real water to the Coalition in 2007. This form of untimely and speculative administration leaves the Coalition without any certainty as to its water supply for 2007. Instead, the Director and the Department assume IGWA's obligation and "guaranty" by "conditionally approving" the promise that water will be provided. It is undisputed on the record before the Director that IGWA has not entered into any leases for stored water for 2007, all the while pumping water out-of-priority (for

approximately two months now in 2007). The *Fifth Order* arbitrarily ignores this obvious deficiency.

In addition, if IGWA fails to provide the required mitigation in 2007, the Director continues the unlawful and untimely system of administration whereby “mitigation debits and credits resulting from year-to-year mitigation will continue to accrue and carry forward until such time as the storage space held by members of the Surface Water Coalition under contract with the USBR fills. At that time, any remaining debits and credits will cancel.” *Fifth Order* at 16, ¶ 5. In other words, IGWA can continue to pump out-of-priority, continue to injure senior surface water rights every year, and all the Director will do is order “mitigation debits” to compile on paper as long as at some point in the future the Upper Snake River Basin watershed witnesses record precipitation and snowfall and the reservoirs fill. The *Fifth Order* continues this unlawful system of administration and utterly fails to identify any “real water” that will be provided to the Coalition in 2007.

Further, the arbitrary commencement of calculation of injury using the weather and water conditions extant in 1995 rather than presuming that a senior water right holder will necessarily need the amount of water set out in its decree so that full headgate deliveries may be made constitutes impermissible burden shifting to the senior users which the Idaho Supreme Court condemned as constitutionally impermissible in its recent decision in the *AFRD #2* case. See *AFRD #2*, 154 P.3d at 444-45., 448-49. In addition, although the Director acknowledges that senior storage water right holders are entitled to carry storage water over to the next year, adherence to the limitation of an arbitrary “reasonable carryover” amount further constitutes impermissible burden shifting by allowing hydraulically connected junior water right holders to

take water during the 2007 irrigation season without first proving that the water taken is unnecessary to satisfy the senior's water rights in spring of 2008, and thereafter.

In sum, the Director's *Fifth Order* wrongly approves speculative mitigation offered by IGWA's Replacement Plan and does not address the injury determined by the Director, let alone the injury that is required to be addressed by Idaho law. The Director's order should be reconsidered and revised accordingly.

**V. The Fifth Order Fails to Specify What Part of IGWA's Plan is Approved.**

IGWA conditionally approved its provision of "replacement water" in 2007 with a host of accounting procedures and conditions. *See* Replacement Water Plan at 8-10. The Director's *Fifth Order* fails to specify whether or not those conditions have been denied or dismissed. As set forth in the Coalition's *Motion to Dismiss*, there is no basis for those conditions. The Director should reconsider and revise the *Fifth Order* to clarify that IGWA's requirement to provide "replacement water" is unconditional and that the procedures and issues identified in IGWA's Replacement Plan are rejected.

**VI. The Director Should Revise 2007 Water Supply Estimates**

Since Water District 01 has released its preliminary reservoir storage allocation for 2007, the Director should reconsider and revise the *Fifth Order* accordingly ("The Director should continue to monitor water supply and climatic conditions in 2007 and require additional replacement water, or involuntary curtailment if replacement water cannot be secured." *Fifth Order* at 16, ¶ 6). The Director should further take into account and consider the 2007 Water Supply Assessment provided by the Coalition in April, any updates to that assessment, and the fact that ground water rights in Water Districts 120 and 130 have been diverting out-of-priority for approximately two months now. The resulting injury and impacts on water supplies of the



Coalition for 2007 and beyond should be considered by the Director in reconsidering and revising the *Fifth Order*.

#### **VII. The Coalition Disputes the Director's Final 2006 Injury Determination.**

The Director's *Fifth Order* determines that "No member of the Surface Water Coalition was materially injured in 2006". *Fifth Order* at 16, ¶ 2. The Coalition disputes this determination and submits that the Director and Department failed to administer any water rights in 2006. Given administration did not occur in 2006, the Director and Department ignored Idaho's constitution, water distribution statutes, and rules. Since 2006 is over, no administration undertaken now for 2006 can remedy the Director's and Department's unlawful actions. The Coalition reserves the right to raise additional issues or protests with the Director's Final 2006 determination.

#### **REQUESTS FOR RELIEF**

1. The Coalition renews its request made on May 4, 2005 that the "replacement water plan" be denied and/or dismissed on the grounds that the entire procedure violates Idaho law and the conjunctive management rules. Junior ground water right holders affected by the Director's *May 2, 2005 Order* desiring to submit mitigation plans should be required to comply with the existing conjunctive management rules pertaining to submittal of those plans.

2. The Coalition requests the Director to revise the 2007 water supply estimates and re-calculate the predicted in-season injury using reach gain data, precipitation, and temperature forecasts.

3. The Coalition requests the Director to advise all Coalition members, including AFRD #2, NSCC, and TFCC, whether adequate water will be made available during the 2007

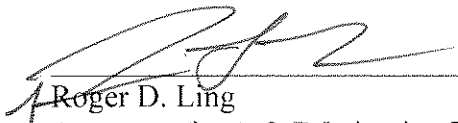
irrigation to provide the “full headgate deliveries” as contemplated in the May 2 Order, and further calculate the effect of doing so upon the need for carryover for the 2008 irrigation season.

4. The Coalition requests an immediate hearing and opportunity for oral argument and testimony on the adequacy and validity of the Director’s *Fifth Order*. Given the exigencies of the irrigation season, the Coalition requests the hearing to be held on June 21, 2007 (the date for hearing on the Coalition’s *Protest and Motion to Dismiss* IGWA’s Replacement Plan).


5. The Coalition requests the Director to reconsider the *Fifth Order* and provide for timely and lawful water right administration for 2007 consistent with Idaho’s constitution, water distribution statutes, and the Idaho Supreme Court’s decision in *AFRD #2 v. IDWR*. The Director has a legal duty to distribute water to the Coalition’s water rights in a timely manner during the irrigation season.

DATED this 4<sup>th</sup> day of June 2007.

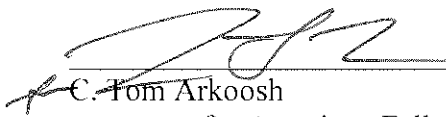
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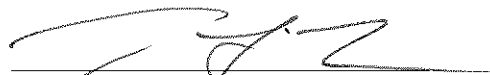
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## CERTIFICATE OF SERVICE

I hereby certify that on this 4<sup>th</sup> day of June, 2007, I served a true and correct copy of the foregoing *Surface Water Coalition's Petition for Reconsideration and Review of Director's Fifth Supplemental Order Amending Replacement Water Requirements Final 2006 And Estimated 2007* on the following by the method indicated:

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Travis L. Thompson

# Exhibit

# A

# New deal might postpone shutdown of hundreds of Magic Valley wells

By Matt Christensen  
Times-News writer

BURLEY — The Idaho Department of Water Resources and a group of groundwater pumpers have reached an agreement that could postpone the shutdown of more than 700 Magic Valley wells, the department announced Wednesday.

This is the second time this month a curtailment order has been derailed. A previous order that affected pumpers in the Thousand Springs reach is on hiatus, pending a court hearing later this month.

The latest postponement, which affects users in the American Falls reach near Burley, comes after the Idaho Ground Water Association offered to guarantee the Twin Falls Canal Co. 1.075 million acre feet of water for its surface users. That's

**"We've put together a plan that will provide Twin Falls (Canal Co.) the water that's required for them to give a full water supply."**

**— Lynn Tominaga, IGWA president**

likely enough to postpone curtailment until at least November, when the canal company assesses how much water it provided for the previous season.

"We've put together a plan that will provide Twin Falls (Canal Co.) the water that's required for them to give a full water supply," said Lynn Tominaga, IGWA president. "We think it's a pretty fair deal."

Tominaga said IGWA will lease storage water at a cost of \$6.30 an acre foot, plus \$3 per acre foot for transporting the water through canal systems. IGWA is yet to finalize the purchases.

IDWR Director Dave Tuthill said he is relieved the agreement will postpone curtailment. But he said he's not ruling out shutdown later this summer. As the season progresses, if it appears the pumpers won't be able to provide the water they've agreed to, he may still order pumps closed.

"My assessment has been to delay the curtailment order and continue to monitor IGWA's progress," Tuthill said.

Though the agreement satisfies the state and pumpers, surface water users say they're not sure pumpers can find the water they've promised to lease.

"The question is whether water users will be willing to lease their storage water," said John Simpson, an attorney for the canal company. "It's pretty dry out there."

*Times-News staff writer Matt Christensen covers the environment. He welcomes comments at 735-3243 and at matt.christensen@lee.net.*

# Exhibit B

# Groundwater users get a reprieve

Compromise comes one day before state water department had planned to shut down pumps

BY TODD DVORAK  
THE ASSOCIATED PRESS

More than 750 groundwater users reached a compromise with the state Wednesday, preventing the shutdown of pumps that supply water to farmers, dairymen and industry across a broad swath of southern and eastern Idaho.

The deal comes one day before Idaho Department of Water Resources Director David Tuthill had threatened to turn off groundwater pumps to ensure enough water to a coalition of users with more senior water rights.

Tuthill said he agreed to delay the curtailment order after agency scientists signed off on a plan drafted by the Idaho Ground Water Appropriators to set aside enough water to meet the needs of seven senior rights holders.

"The plan that has been submitted by IGWA is a good-faith start toward providing replacement water to potentially injured senior water rights holders," Tuthill said in a statement. "I'm very pleased that these steps have been taken instead of taking the matter to court."

The curtailment order issued May 10 was the second in a month and affects 760 users across more than 46,000 acres from Jerome to Idaho Falls, who draw water from the Eastern Snake Plain Aquifer.

"We believe we presented a common sense solution to avoid

a potentially extensive curtailment that would damage local economies, and we appreciate the director's acceptance of the plan," said Lynn Tominaga, executive director of the groundwater group.

The first curtailment order, issued April 30, would have affected about 771 groundwater users across 33,000 acres of the Magic Valley north of the Snake River. At the time, Tuthill said shutting down those wells was the only option to ensure enough water to two trout farms during a summer when water supplies are expected to be tight.

That shutdown was initially set for May 14 but was put on hold by a legal challenge filed by the groundwater group.

A state judge issued a temporary restraining order barring the state from enforcing the curtailment and scheduled a hearing May 30 to determine whether to issue a permanent injunction.

The second curtailment order would have been one of the most expansive in department history, affecting groundwater pumps that draw water for crops, dairy cattle, businesses and several cities and towns.

Tuthill said the state will continue monitoring water flows in the Snake River as the groundwater group obtains storage water to provide for shortfalls anticipated by the seven, senior surface water users.



# Exhibit C

# Water shutdown averted

■ A plan to send enough water to western Idaho users avoided a shutdown for cities, farmers and businesses here.

BY MATTHEW EVANS  
mattevens@postregister.com

Crisis averted, for now.

The head of the Idaho Department of Water Resources was poised to order dozens of eastern Idaho farmers, business owners, city leaders, school district administrators and others to shut down their wells today.

On Wednesday, though, Director Dave Tuthill said he changed his mind because the Idaho Ground Water Appropriators had come up with a plan to send enough water downstream to satisfy disgruntled irrigators, most of whom are in the Twin Falls area.

"I'm very pleased that these steps have been taken instead of taking the matter to court," Tuthill said.

On May 10, Tuthill warned more than 750 groundwater pumpers with water rights obtained after June 28, 1985, that they could temporarily lose those rights because senior water rights holders downstream had dibs on the water.

More than 46,250 acres would have gone dry, from American Falls north to Clark and Fremont counties — and not just farmland. Football fields, parks and cemeteries would have been hit, too, an unprecedented step that would have devastated the state's economy, many said.

The plan calls for diverting 1,075,000 acre-feet downstream, with the burden shared among the members of the groundwater districts targeted in Tuthill's warning.

One million seventy-five thousand acre-feet is the amount the downstream irrigators had deemed satisfactory in 2005, when seven of them filed claims with the

state saying their livelihood was suffering because they weren't getting all the water to which they were entitled.

When then-water resources Director Karl Dreher asked the irrigators to show how they'd been hurt by a lack of water, the farmers sued.

The fight went before the state Supreme Court in late 2006, and the court's March ruling put it back before the Department of Water Resources.

The plan Tuthill OK'd Wednesday puts to rest that aspect of the fight between irrigators who pump water from the East Snake Plain Aquifer and their peers downstream who water crops with Snake River surface water.

But other battles are raging.

Tuthill in early May warned hundreds of groundwater pumpers in the Thousand Springs area that their fields could go dry, too. A 5th District judge put a hold on that potential action; however, a hearing is set for Wednesday.

Also, Idaho Power recently

■ Idaho Power is challenging a 1984 water-use deal challenged in court a 23-year-old deal it made with the state that dictates how much water the company is allowed to use to generate power at Swan Falls Dam.

The company thinks it's being shorted, arguing that the 1984 Swan Falls agreement was flawed because of incorrect information about how much water was available.

The state disagrees.

"It's quite surprising that now the company wants to renegotiate the agreement and 23 years of history for the state," Attorney General Lawrence Wasden said earlier this week.

If Idaho Power emerges victorious, irrigators who received their water rights after 1984 could be in trouble.

"That would put a lot of people out of business," said Lynn Tominaga, executive director of the Idaho Ground Water Appropriators.

Therefore, Tominaga's reaction to Wednesday's news that curtailment had been averted was tempered.

"We're not done with this by any means," he said. "We've still got three calls and one lawsuit out there, so we're not done. ... I wish we'd get all this solved, that's all."

The Associated Press contributed to this report.

## Did you know?

An acre-foot is enough water to cover one football field with a foot of water.

