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 Irrigation District, Milner Irrigation District,  
 North Side Canal Company, and  
 Twin Falls Canal Company*

**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 District Nos. 34, 110, 120 and 130) )  
 \_\_\_\_\_ )

**SURFACE WATER COALITION'S  
 RESPONSE TO JOINT MOTION TO  
 STRIKE PREFILED LAY  
 TESTIMONY OF SURFACE WATER  
 COALITION AND IGWA'S MOTION  
 TO STRIKE COALITION  
 MANAGERS' AFFIDAVITS**

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 (collectively the “Surface Water Coalition,” “SWC” or “Coalition”), by and through counsel of record, and hereby submits this *Response to Joint Motion to Strike Prefiled Lay Testimony of Surface Water Coalition and IGWA’s Motion to Strike Managers’ Affidavits*. For the reasons stated below, the Hearing Officer should deny the motions.

## **INTRODUCTION**

The *Joint Motion to Strike Prefiled Lay Testimony of Surface Water Coalition*, filed by Idaho Ground Water Appropriators, Inc. (IGWA) and the City of Pocatello (Pocatello) (collectively referred to as “groundwater users”) on January 11, 2008, and the *Motion to Strike Coalition Managers’ Affidavits*, filed by IGWA on January 14, 2008, are merely another attempt by the groundwater users to prevent the Hearing Officer from hearing the testimony of the managers and farmers of the irrigation districts and canal companies that comprise the Coalition. Although the managers and farmers have first hand knowledge of their operations, water use and water shortages, the groundwater users are determined to preclude their testimony. This is the case, even though the managers and farmers are most impacted by groundwater pumping.

The groundwater users allege that portions of the Coalition’s lay testimony should be excluded because either (1) it was not properly disclosed in conformance with the scheduling orders, (2) the witnesses are testifying as experts and are not qualified to provide such testimony under the Idaho Rules of Evidence and (3) portions of the testimony are hearsay. As discussed below, these arguments are without merit and should be rejected.

In addition, IGWA argues that the affidavits of Coalition managers, attached to the Coalition’s pre-hearing brief, should be stricken from the record merely because the affidavits were not considered for the specific and limited purposes of the June 22, 2007, hearing on the 2007 Replacement Water Plan. This is the case, notwithstanding the fact that Counsel for IGWA

expressed that IGWA had “no objection that [the affidavits] remain on file” and the Director’s determination that the affidavits would “be part of the overall record in this case and will be assessed accordingly.” See Attachment A (excerpt from portions of the transcript of the June 22, 2007 hearing regarding the 2007 IGWA Replacement Water Plan). Accordingly, IGWA’s motion should be denied.

### **ALL WITNESSES HAVE BEEN DISCLOSED AS ORDERED**

Contrary to the assertions of the groundwater users, all witnesses of the Coalition have been disclosed as required by the orders entered in this action. First, in 2005, the Coalition provided a witness list, which indicated the general basis of each witness’ testimony. This witness list was then updated in response to the August 1, 2007, Scheduling Order. Even though the groundwater users took the depositions of the various Coalition managers in 2005, they have not, *at any time*, sought to take the depositions of any other lay witness. There is no surprise as to who would be testifying for the Coalition. Had the groundwater users wanted more detail from the lay witnesses they could have deposed them. It is untimely and disingenuous for the groundwater users to wait over two years and now, at the eleventh hour, claim that they were not aware of everything each witness was going to say. The disclosures of the Coalition were properly made.

### **THE IDAHO RULES OF EVIDENCE DO NOT BIND THE HEARING OFFICER**

The Hearing Officer’s October 10, 2007 *Status Conference Minutes* plainly stated that:

- b) Idaho Code § 67-5251 and IDWR 600 and 602 address the admission of additional evidence and the scope of that admission. Those provisions shall govern the admission of evidence in these proceedings;

*Status Conference Minute* at 2, ¶ 4.

Idaho Code § 67-5251(1) states that “All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.”

IDWR's Rules of Procedure follow the statute's approach and further provide that:

***Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development.*** The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. . . . All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.

IDAPA 37.01.01.600 (emphasis added).

The groundwater users' motion to strike the Coalition's pre-filed lay testimony is an attempt to "frustrate" the development of the record contrary to Idaho's APA and the Department's rules of procedure. The Coalition set forth the initial topics for its witnesses' expected testimony over two years ago. IGWA and Pocatello have waited until the eve of the hearing to now claim those topics are solely for "experts" in this case and that the Coalition managers and water users cannot provide testimony about their projects and their operations. The motion is squarely aimed at frustrating this hearing process and the development of a complete record. Since Idaho's APA and the Department's Rules of Procedure provide a more liberal standard for taking evidence, in the furtherance of a complete hearing and record, the Hearing Officer should deny IGWA's motions to strike. The topics of the testimony was properly disclosed over two years ago and the prefiled testimony is of a "type commonly relied upon by prudent persons in the conduct of their affairs." Since the testimony is allowed by the Department's rules and the witnesses have personal knowledge of the irrigation projects and their farming operations, the Hearing Officer should allow and consider this testimony, not strike it as suggested by the groundwater users.

**I. The Scheduling Order and Rules of Evidence do not preclude the SWC Managers and Water Users From Presenting Testimony and Evidence regarding their operations, water use, or their industry.**

IGWA asserts that “certain portions of the lay testimony submitted by Coalition constitutes expert testimony,” that should be precluded by the provisions of Idaho Rules of Evidence 702 and 703, and that since they were not disclosed with the other Coalition experts the Hearing Officer should exclude the testimony. *Motion to Strike Lay Witness Testimony*, p. 5. Again, the motion is made in an effort to frustrate the hearing process and the development of a full record.

First, as explained above, IDWR’s Rules of Procedure specifically provide for the receipt of evidence “commonly relied upon by prudent persons in the conduct of their affairs,” notwithstanding the groundwater users’ objections:

**600. RULES OF EVIDENCE -- EVALUATION OF EVIDENCE:**

Evidence should be taken by the agency to assist the parties’ development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency’s experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IDAPA 37.01.01.600. Accordingly, pursuant to Rule 600, the real question is whether the testimony of the managers and farmers is the type commonly relied upon by prudent persons in the conduct of their affairs?

The SWC Managers and water users have provided testimony and evidence of a type “commonly relied upon by prudent persons in the conduct of their affairs.” Whether the groundwater users believe it is “expert” testimony or not is of no consequence for purposes of

this hearing and taking evidence to develop a full record. Furthermore, Rule 600 has a built in protection, should the Hearing Officer determine that a witness is overreaching in his testimony: “The agency’s experience, technical competence and specialized knowledge may be used in evaluation of evidence.”

Finally, most of the testimony claimed by the groundwater users to be “expert” testimony is actually first hand observations of the witness concerning water supplies, the effect of reduced water supplies and related issues. These witnesses have specific knowledge of their operations and projects.

‘most courts have permitted [owners and officers] to testify . . . without the necessity of qualifying the witness as an . . . expert. Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of *the particularized knowledge that the witness has by virtue of his or her position in the business.*”

*Tampa Bay Shipbuilding & Repair v. Cedar Shipping*, 320 F.3d 1213, 1222 (11th Cir., 2003)  
(emphasis added).

Here, the Coalition managers and water users are testifying about their experiences based upon their positions in their respective businesses. The managers have witnessed declining natural flow and storage supplies for their projects and the water users have provided testimony regarding the effects of those reduced water supplies. The witnesses have a right to present this evidence in this matter and IGWA’s effort to characterize it as “expert testimony” is made for the sole purpose of frustrating this process.

In addition to the Department’s Rule 600, it is obvious that IDWR regularly requires or receives sworn information from non-expert water right applicants, claimants and owners regarding their proposed or existing diversion and use of water in the form of narrative at contested case hearings like this one. Water right applicants are required to describe the “proposed method of diversion, conveyance system and system for distributing and using the

water.” IDWR’s *Water Appropriation Rules*, IDAPA 37.03.08.035.03.ix; I.C. § 42-202(4).

When submitting proof of beneficial use in order to obtain a water right license, the permit holder is required to “submit a statement that he has used such water for the beneficial purpose allowed by the permit,” including “the extent of the use.” I.C. § 42-217. Similarly “[a]ny person, entitled to the use of water” who wishes to change an element of the water right is required to submit a transfer application describing the proposed change[s]. I.C. § 42-222(1). Testimony of non-expert water right owners and their officers/employees regarding their diversion and use of water is regularly received by IDWR in contested case proceedings and by the SRBA District Court subcases. Classifying the applicant or water manager or user as an “expert” does not preclude the testimony and development of a record in such matters and it should not do so here.

In short, there is no basis to strike the testimony offered by the SWC lay witnesses. The topics of their testimony were timely submitted in August 2005 and pre-filed testimony was filed for the benefit of the parties and the efficiency of the hearing. The purpose of this proceeding is to develop a full record, as provided for by statute and rule. The groundwater users should not be permitted to frustrate that purpose.

## **II. Idaho’s APA and the Department’s Rule 600 Do Not Preclude Hearsay Evidence.**

The groundwater users object to some of the testimony of the Coalition witnesses on the grounds that it is hearsay. Many of the statements claimed to be hearsay are based upon the observation of the witness and their experiences on their irrigation projects and farms. The Hearing Officer should allow these witnesses’ testimony in furtherance of the development of a complete record. As explained above, the testimony is allowed by Idaho’s APA and Rule 600.

Notwithstanding the objections, the applicable statutes and rules provide the Hearing Officer with broad discretion in admitting hearsay evidence. *See* Rule 600, *supra*; I.C. 67-SURFACE WATER COALITION’S RESPONSE TO JOINT MOTION TO STRIKE PREFILED LAY TESTIMONY OF SURFACE WATER COALITION AND IGWA’S MOTION TO STRIKE COALITION MANAGERS’ AFFIDAVITS

5251(1) (Evidence “may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs”). In fact, the Supreme Court has long held that the discretion provided recognizes that the presiding officer may even admit hearsay. *See Lockhart v. Idaho Dept. of Fish & Game*, 127 Idaho 546, 550, 903 P.2d 135, 139 (recognizing that “the Commission correctly concluded that hearsay is admissible in hearings before the Commission and its hearing officer”). In *Hoyt v. Morrison-Knudsen Co., Inc.*, 100 Idaho 659, 660-61, 603 P.2d 993, 994-95 (1979), the Court stated:

We reject appellant’s argument that admission in evidence of hearsay at the administrative hearings constituted error. Our [APA] provides that in contested cases, “(t)he rules of evidence as applied in non-jury civil cases in the district courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs ...” I.C. § 67-5210(1). *In our view, this liberality as to the admission of evidence allows hearsay evidence to be admitted in hearings before the Commission at the discretion of the hearing officer.*

(Emphasis added).

Consequently, Idaho law recognizes that it may be appropriate to admit hearsay evidence in administrative proceedings. The purpose behind the statute and taking evidence at agency hearings is to develop a full record, not frustrate it. It is clear that the groundwater users’ motives are just the opposite as their motions are directed toward excluding relevant testimony and evidence offered by the Coalition witnesses. The Hearing Officer should deny the motions to strike.

### **III. The Managers’ Affidavits Have Already Been Admitted and are a Part of the Agency Record and IGWA Previously Agreed The Affidavits Could Be Used as Pre-Filed Testimony.**

IGWA seeks to exclude evidence that is already part of the agency record in this case and which was already admitted by the Director at the June 22, 2007, Hearing on IGWA’s

Replacement Plan. The scope of the agency record is defined by statute (I.C. § 67-5249), by

SURFACE WATER COALITION’S RESPONSE TO JOINT MOTION TO STRIKE PREFILED LAY  
TESTIMONY OF SURFACE WATER COALITION AND IGWA’S MOTION TO STRIKE COALITION  
MANAGERS’ AFFIDAVITS



Department rule (Rule 650), and by the Hearing Officer's *Status Conference Minutes* (at 2, ¶ 4(a)). The agency record in this case includes all "(a) pleadings, motions, briefs, petitions, and intermediate rulings; (b) evidence received or considered." I.C. § 67-5249(2); Rule 650. The Manager affidavits were filed in this proceeding this summer to update the Director on the state of their water supplies for the 2007 irrigation season and beyond. The affidavits, along with water supply updates prepared by the Coalition's experts, were submitted to the Director to provide an update on water supply conditions for 2007. The information, including the affidavits, was admitted into this case as determined at the June 22, 2007 hearing. Indeed, counsel for IGWA stipulated to the submission of the affidavits provided it was considered as part of the "pre-filed testimony":

MR. BUDGE: One preliminary matter I want to take up is you've described the limited nature and scope of this hearing . . . What happened at the eleventh hour that seems to be the case is that the filing that occurred sometime late yesterday – we discovered it on e-mail this morning – that the Surface Water Coalition has made a number of filings in this proceeding. They have submitted eight affidavits [of the managers] . . . All of these documents are an attempt to place into evidence information regarding things that are entirely irrelevant to this proceeding beyond the scope of this order. Accordingly, we would move to strike all of those affidavits including the earlier letter of Mr. Harmon as being irrelevant to this proceeding beyond the scope of the order.

...

*If the intent is to use these affidavits as pre-file testimony of these witnesses for purposes of the future hearing scheduled in the beginning of November, then we have no problem with it.*

...

*We have not objection that they remain on file if the intent of the Surface Water Coalition is to use those as pre-filed testimony in that case.*

MR. TUTHILL: Yes, Mr. Budge, I have reviewed some but not all of those documents that have been recently filed. As I read the documents, I read them as preliminary to what's happening later this year and not – the ones I've seen so far are not germane to the proceeding for this morning. *I don't see striking them but rather keeping them as part of the record.*

MR. BUDGE: *As long as we have clarification they'll be disregarded for purposes of the ruling on today's proceeding then we're fine with that.*

MR. TUTHILL: With that I would thank the parties for providing the information. I understand the spirit in which this information was provided.

...

If there's a need for an additional hearing, I will make that assessment and you'll be advised in due course. So I understand the submittals that have been made, but they're really not a part of this morning's, but yet I understand the presentation that they're felt to be important for review this summer and not at the end of the summer.

*Thank you for the presentation and the information, and we'll review the documents that have been submitted. They won't be stricken. They'll be part of the overall record in this case and will be assessed accordingly.*

Exhibit A (emphasis added) (June 22, 2007 Hearing Transcript, p. 9, Ins. 10-23, p. 10, Ins. 9-15, and p. 11, Ins. 3-4, 14-23, p.17, Ins. 17-20, p. 18, Ins. 9-20).

The Director has already accepted the Coalition's filings as part of the agency record. Moreover, IGWA agreed the manager affidavits could be used as "pre-filed" testimony for this hearing. The Managers incorporated the affidavits into their pre-filed testimony. As such, there is no basis for IGWA's present motion and it should be denied accordingly.

### CONCLUSION

The Coalition's witnesses and the topics of their testimony were timely and properly disclosed pursuant to the scheduling orders entered in this action. Idaho's APA, the Department's Rule 600, and case law allows the testimony of the witnesses who have the experience with their water projects and farming operations. Accordingly, the Motions to Strike should be denied.

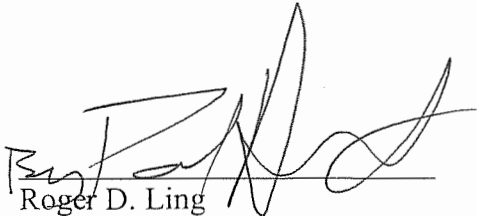
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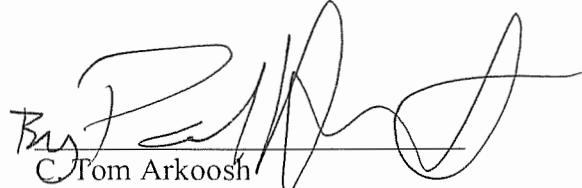
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Respectfully submitted this 15<sup>th</sup> day of January, 2008.




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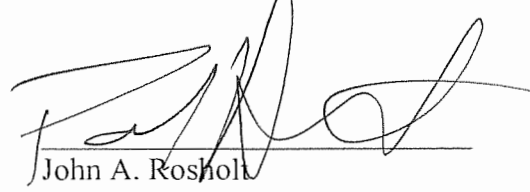
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## CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of January, 2008, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S RESPONSE TO JOINT MOTION TO STRIKE PREFILED LAY TESTIMONY OF SURFACE WATER COALITION AND IGWA'S MOTION TO STRIKE COALITION MANAGERS' AFFIDAVITS** on the following by the method indicated:

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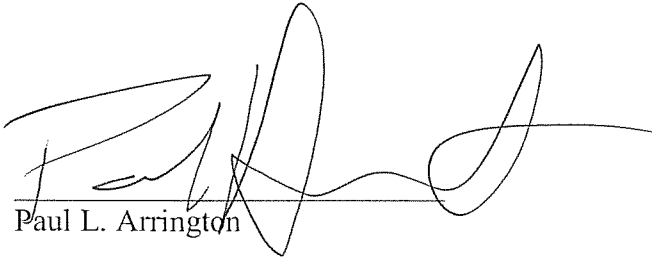
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Paul L. Arrington

# ATTACHMENT A

TAPE TRANSCRIPT OF IGWA 2007 REPLACEMENT WATER PLAN

AT THE IDAHO DEPARTMENT OF WATER RESOURCES

JUNE 22, 2007

BOISE, IDAHO

Suzanne Gribbin

1 IGWA's 2007 amended replacement water plan as  
2 preliminarily approved and set a hearing date for June  
3 21st and a status conference for June 5, 2007.

4 On June 4, 2007, IGWA and the City of Pocatello  
5 requested that the hearing on the 2007 replacement plan  
6 be vacated. On June 11, 2007, I issued an order  
7 denying a motion to vacate the hearing but ordered that  
8 the hearing be rescheduled to June 22, 2007, today.

9 Finally, the June 11, 2000 order limited the scope  
10 of today's hearing as follows. This is the scope that  
11 we'll be following this morning. Quote, Presentation  
12 of information regarding the implementation of the plan  
13 by the Idaho Ground Water Appropriators to demonstrate  
14 the timely in-season replacement water and reasonable  
15 carry-over water can be provided to members of the  
16 Surface Water Coalition is what is required. IGWA  
17 should be prepared to identify with specificity the  
18 water it has acquired, the quantities it has acquired,  
19 and the means by which such water can be timely  
20 delivered to members of the Surface Water Coalition,  
21 end quote.

22 So the hearing this morning is to look at the  
23 adequacy of the plan and implementation of the plan and  
24 is not for the purpose of identifying the amounts that  
25 will be provided by the plan, not in replacement for

1 on behalf of IGWA and the districts. Based on the  
2 order that essentially directs IGWA to come up with  
3 information here that you just read from the order  
4 described, it would appear appropriate that IGWA go  
5 forward. What we would propose to do is I will present  
6 in evidence, in evidence of a proposed document, that  
7 summarizes, as requested by the order, all of the  
8 leases that IGWA has available at this time, identifies  
9 them by lessor, by quantity and terms. We have copies  
10 of each of those leases available. I would propose to  
11 simply present that in evidence without further  
12 testimony. We'll provide copies to everyone.

13 I also have information on other tendered leases  
14 that we could negotiate should it be necessary. And  
15 I'll make a representation to the parties with respect  
16 to those leases. I'll do that in a moment. Then our  
17 intention would be to call Ron Carlson, and he would  
18 provide brief testimony to explain how the plan would  
19 be implemented, the plans with the order, and he  
20 further will explain the timing of this delivery based  
21 upon the accounting procedures used in Water District  
22 01 based on his knowledge and experience.

23 That would be all that we would present, and we  
24 propose to do that. I do have one preliminary matter  
25 before I go into that that I'd like to take up, if I

1 the various members of the Surface Water Coalition.  
2 That issue which has been brought as objected to by the  
3 members of the Surface Water Coalition has been  
4 subsumed into the hearing that is to take place later  
5 this year. I recognize that there are concerns about  
6 the amounts that have been identified in the order.  
7 However, that issue is sufficiently complex that the  
8 concern about the amounts has been subsumed into the  
9 upcoming hearing to provide for opportunities by all  
10 the parties to make argument on those computations.

11 So with that as background information, here is --  
12 uh, there are a couple of ways that we can proceed this  
13 morning. But with that I would ask of the parties that  
14 they come forward to make a recommendation. In this  
15 case, because the focus of this hearing is on the  
16 Ground Water Appropriators' plan, I would ask that  
17 Mr. Budge come forward and make a recommendation of how  
18 to proceed, and if you can do that from the podium,  
19 please, Mr. Budge, thank you.

20 While we have a speaker at the podium, this is the  
21 pick-up mike, so I think those on the phone should be  
22 able to hear you from there. Soon after you start,  
23 we'll check with those on the phone to make sure they  
24 can hear. Thank you.

25 MR. BUDGE: Thank you. I'm Randy Budge appearing

1 could.

2 MR. TUTHILL: Yes. Mr. Budge. Let's just pause  
3 for one moment. For those on the phone, does this  
4 sound adequate?

5 UNIDENTIFIED SPEAKER: Works for me.

6 UNIDENTIFIED SPEAKER: Works for me.

7 MR. TUTHILL: Okay, very good, thank you. Please  
8 proceed, Mr. Budge.

9 UNIDENTIFIED SPEAKER: That's fine.

10 MR. BUDGE: One preliminary matter I want to take  
11 up is you've described the limited nature and scope of  
12 this hearing, and I quote further by reading your  
13 second to the last paragraph of your June 11th order  
14 that says the hearing on IGWA's 2007 replacement plan  
15 will not include argument or presentation of evidence  
16 on any other orders issued by the director or the  
17 director's method and computation of material injury.

18 What happened at the eleventh hour that seems to  
19 be the case is that the filing that occurred sometime  
20 late yesterday -- we discovered it on e-mail this  
21 morning -- that the Surface Water Coalition has made a  
22 number of filings in this proceeding. They have  
23 submitted eight affidavits, one from Dan Temple on  
24 behalf of A & B, one from Vince Alberdi on behalf of  
25 Twin Falls Canal Company, one on behalf of Walt Bones



1 on behalf of MIV. Randy Bingham on behalf of Burley  
2 Irrigation District. Ted Beal on behalf of Northside  
3 Canal Company. Billy Thompson on behalf of MIV, and  
4 furthermore there was an earlier letter submitted by  
5 Lyn Harmon under date of June 5, 2007, that was written  
6 directly to the director. It appears quite obviously  
7 that it was drafted by counsel for (inaudible),  
8 Mr. Arkoush, and was sent directly to the director.

9 All of these documents are an attempt to place  
10 into evidence information regarding things that are  
11 entirely irrelevant to this proceeding beyond the scope  
12 of this order. Accordingly, we would move to strike  
13 all those affidavits including the earlier letter of  
14 Mr. Harmon as being irrelevant to this proceeding  
15 beyond the scope of the order.

16 Quite frankly, it seems to me to be in  
17 considerable disrespect to what the director has  
18 directed the purpose of this hearing as being in a  
19 limited scope. If the intent is to use these  
20 affidavits as pre-file testimony of these witnesses for  
21 purposes of the future hearing scheduled in the  
22 beginning of November, then we have no problem with it.

23 The stipulation we entered into set the schedule  
24 for (inaudible) to file a pre-file testimony mandatory  
25 for expert witnesses. It's optional for lay witnesses.

1 move forward in this proceeding if there's a different  
2 perspective on that, there will be opportunity for  
3 other counsel to present that perspective. And in  
4 fact, it looks like Mr. Arkoush is ready to present on  
5 that right now. As you brought up this preliminary  
6 matter, perhaps we should proceed to take care of this  
7 at this time.

8 MR. BUDGE: (Inaudible) him with an opportunity to  
9 give all the arguments he wants.

10 MR. TUTHILL: Okay, thank you, Mr. Budge. Please,  
11 Mr. Arkoush.

12 MR. ARKOUSH: Thank you very much. I just want to  
13 briefly respond, and then Mr. Thompson will respond.  
14 It's probably appropriate at this time to renew the  
15 objections as put on the record at the status  
16 conference and remind the director that in the fifth  
17 supplemental order, especially in footnote 3, you  
18 indicated that you would commence using the 1995 year  
19 as a basis in conjunction with the director's estimates  
20 of what this weather and water would look like this  
21 year.

22 Then using the term "granularity," you said that  
23 you would modify through the irrigation season in  
24 compliance with the Supreme Court's mandate that the  
25 provision of water be timely provided that (inaudible).

1 These all could be lay witnesses, or I suppose they may  
2 have some degree of expertise that relates to the  
3 operation of their particular systems. We have no  
4 objection that they remain on file if the intent of the  
5 Surface Water Coalition is to use those as pre-file  
6 testimony in that case.

7 There being no limit as to when they file it, we  
8 simply had a deadline that was the cutoff date. So if  
9 this is earlier pre-file testimony we're fine with  
10 that. For the purpose of this proceeding, they should  
11 be stricken and disregarded from the record. We're not  
12 here to go into all those other things. I think the  
13 order makes that clear.

14 MR. TUTHILL: Yes, Mr. Budge, I have reviewed some  
15 but not all of the documents that have been recently  
16 filed. As I read the documents, I read them as  
17 preliminary to what's happening later this year and not  
18 -- the ones I've seen so far are not germane to the  
19 proceeding for this morning. I don't see striking them  
20 but rather keeping them as part of the record.

21 MR. BUDGE: As long as we have clarification  
22 they'll be disregarded for purposes of the ruling on  
23 today's proceeding then we're fine with that.

24 MR. TUTHILL: Yes, Mr. Budge. I don't see that  
25 they're germane at this point. With that said, as we

1 In footnote 3 you indicated in the last sentence that  
2 as of yet we have not demonstrated the need, meaning  
3 the Surface Water Coalition did not provide that  
4 information or that that did not happen that would  
5 require you to change the quantities that you put in  
6 (inaudible).

7 At the status conference both Mr. Fletcher and I  
8 indicated to you that you believe that by June, by the  
9 end of June, if you were going to provide water to  
10 these managers it was in fact time to act if you were  
11 going to meet the mandate of the Supreme Court that the  
12 administration (inaudible). We did send on June 5 from  
13 American Falls Municipal District 2 a letter indicating  
14 that based upon the manager's calculations that you  
15 would need 20,000 more acre feet. For American Falls  
16 to have full head-gate deliveries, as promised by the  
17 May 9, 2005 order, and as of yet (inaudible) the other  
18 managers have followed up plus we emphasized ours in  
19 the filings that we've done yesterday. So I would  
20 respond that there's no intention here today to, as  
21 counsel said, disrespect the order.

22 I mean you're running this. We're going to abide  
23 by how you run it. That's just the way it is. But we  
24 are required to make a record, and we are entitled to  
25 make a record. Even beyond today's hearing, if there's

1 going to be granularity, the director may -- and there  
 2 are managers here in the back of the room -- the  
 3 director may want to give us some guidance when the  
 4 next stop in the scale of granularity is going to be  
 5 put on the page. I think it's time.

6 I would also like to say that, if what I am  
 7 hearing is what I think I'm hearing, we're going to  
 8 have to begin this year in November after the fact  
 9 accounting the water needs that we need now for, as  
 10 Judge Wood put it, when the fields are green. I  
 11 vehemently object to that, and I'm hearing the  
 12 anticipation is to wrap this up at the end of the year.  
 13 that both the District Court and the Supreme Court have  
 14 said no. Mr. Director indicated the Department needs  
 15 to do that now.

16 So that's the purpose of all of the filings. It  
 17 was not to intermeddle [sic] with your hearing or  
 18 ruling (inaudible). I think Mr. Thompson (inaudible).

19 MR. TUTHILL: Thank you, Mr. Arkoush. Mr.  
 20 Thompson.

21 MR. THOMPSON: Thank you. Travis Thompson on  
 22 behalf of the Coalition. Just to update, we submitted  
 23 the request for an updated material and pre-  
 24 determination of the affidavits of the managers  
 25 yesterday consistent with the director's prior

1 methodology. You can take data available today, roll  
 2 it into the May 2nd order methodology, and we can have  
 3 a hearing on whether that 1995 date is the right date,  
 4 whether the methodology is correct on November 28th,  
 5 and to consider the manager's testimony on this point  
 6 essentially amounts to reconsidering that 1995 date  
 7 because they're all arguing for a different date now.

8 So that would be the distinction I draw. And the  
 9 footnote 3 that Mr. Arkoush read to you, I think that  
 10 sentence should be interpreted to mean that the Surface  
 11 Water Coalition has not yet demonstrated any need  
 12 because we haven't had a hearing because, rather than  
 13 have a hearing last year, we were all at the Supreme  
 14 Court chasing down the (inaudible) challenge. That's  
 15 my clarification. Thank you.

16 MR. TUTHILL: Okay. Thank you, Ms. Klahn.  
 17 Mr. Thompson.

18 MR. THOMPSON: Just for the record, we object to  
 19 Pocatello's participation given the limited scope of  
 20 this hearing on IGWA's replacement plan. Pocatello is  
 21 not subject to that fifth amended order or the --  
 22 they haven't offered any replacement plan this year  
 23 either, so we would make that point for the record  
 24 Ms. Klahn's statement that she objects to our  
 25 submitting information while they've objected to the

1 orders that your amendment had the June 5 status  
 2 conference to update that computation based on the  
 3 actual reservoir allocation which (inaudible), uh, the  
 4 duty to continue to monitor water supply conditions  
 5 throughout the season.

6 The managers have put together their best  
 7 available information at this time to give you what we  
 8 feel is a proper update at this point, and it's not to  
 9 introduce them with evidence today at this hearing.  
 10 it's for your benefit, the most up-to-date information  
 11 from the water district, actual water supply conditions  
 12 that they're experiencing that they're forecasted to  
 13 experience this year and what they can count on for  
 14 deliveries.

15 MR. TUTHILL: Okay. Thank you, Mr. Thompson. I  
 16 appreciate that. Go on, please. Come forward.

17 MS. KLAHN: Good morning, Sarah Klahn from the  
 18 City of Pocatello. While we're all making our record  
 19 here, I'd like to clarify a couple of things. Your  
 20 fifth amended order does indeed mention the possibility  
 21 of taking another look at the water supply situation as  
 22 the summer goes on. I would suggest that you can do  
 23 that without the help of the Surface Water Coalition.

24 You had objected they be used in the first place.  
 25 Then you sort of rolled into the May 2nd order

1 lack of information we provided to the director the  
 2 last two years. So I find it inconsistent that we're  
 3 trying to provide information in a timely manner to  
 4 update on water supply (inaudible).

5 MR. TUTHILL: Thank you, Mr. Thompson.

6 MS. KLAHN: Just one quick point, if the --

7 MR. TUTHILL: Ms. Klahn.

8 MS. KLAHN: I'm Sarah Klahn for the City of  
 9 Pocatello. If the affidavits and pleading that were  
 10 filed yesterday are considered and adopted by the  
 11 Department, Pocatello will have to curtail many wells,  
 12 and we're already looking at how to do a replacement  
 13 water plan in the event that the 228,000 acre foot  
 14 number were to be adopted by the Department, so we have  
 15 a dog in this fight. Thank you.

16 MR. TUTHILL: Thank you, Ms. Klahn. Any other  
 17 discussion on this issue? Okay. With that I would  
 18 thank the parties for providing the information. I  
 19 understand the spirit in which this information is  
 20 provided. I do believe that this is a different issue  
 21 in the same case. What we're talking about this  
 22 morning is the acceptability of the Ground Water  
 23 Appropriators' plan. The Surface Water Coalition  
 24 members are coming forward to say that the 1995  
 25 comparison is not acceptable.