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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 GROUND WATER)
DISTRICTS' APPLICATION FOR)
APPROVAL OF MITIGATION PLAN)
FOR THE AMERICAN FALLS REACH)
OF THE SNAKE RIVER)

**SURFACE WATER COALITION'S
PROTEST AGAINST APPROVAL
OF PROPOSED MITIGATION PLAN**

Names / Mailing Addresses / Phone Numbers of Protestants

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PROTEST

COME 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 Company¹ (hereinafter collectively referred to as the “Surface Water Coalition” or “Coalition”), and do hereby protest the *Application for Approval of Mitigation Plan (AFR)* dated February 8, 2005 for which approval is being sought by the applicant Ground Water Districts and Irrigation District (collectively referred to as “Districts”) on the grounds and for the reasons that:

I.

That the proposed mitigation plan for mitigation of material injury to senior surface water rights within the near-Blackfoot to Minidoka reach of the Snake River (hereinafter “American Falls Reach” or “AFR”), caused by the diversion of ground water in the Eastern Snake Plain Aquifer (ESPA), fails to contain the information required by Rule 43 of the Idaho Department of Water Resources’ (“Department’s”) conjunctive management rules (IDAPA 37.03.11.043), including but not limited to:

A. Identification of the water rights for which the mitigation plan has been submitted to protect and the water rights which are to be benefited by the mitigation plan.

B. The description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies,

including the names of the owner or owners of storage water sought to be rented from the rental pool of the Committee of Nine of Water District 1, the names of the owner or owners of surface or ground water supplies sought to be purchased on a permanent basis or under a dry-year lease, and the rights of the Idaho Water Resource Board (“IWRB”) which authorizes it to pump ground water for mitigation or replacement water.

C. Information necessary to evaluate the factors set forth in Rule subsection 043.03, including but not limited to a failure to provide:

1. Legal authority, identification of rights, and agreements by which water may be delivered, stored or used pursuant to the proposed mitigation plan.
2. Information sufficient to establish that any proposed replacement water under the proposed mitigation plan is sufficient to offset the depleted effect of ground water withdrawal on the water available in the surface water sources at the time and place required by any senior-priority water right which will satisfy the rights of diversion from surface water sources within the AFR.
3. Information which will establish that the mitigation plan proposed will provide replacement water supplies or other appropriate compensation to senior-priority water rights when replacement water is needed during a time of shortage, even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed; or to provide information which would allow a review of contingency provisions to ensure that such provisions would assure protection of senior-priority water rights in the event mitigation water sources are unavailable.

¹ While the Coalition members are filing a joint “protest”, the members are submitting individual protest fees thereby reserving their individual rights to appear and participate as individual protestants in this matter.

4. Information which would allow a determination that any proposed artificial recharge of an area of common ground water supply would be sufficient to protect ground water pumping levels, and the levels sought to be protected.
5. Sufficient information to establish that computer simulations and calculations used by the Districts used generally accepted and appropriate engineering and hydrogeologic formulae for the calculations relied upon by Districts.
6. Sufficient information to determine whether the mitigation plan uses generally accepted and appropriate values for the ESPA characteristics.
7. Sufficient information to establish that the proposed mitigation plan reasonably calculates the consumptive use component of ground water diversion and use.
8. Sufficient information to establish the reliability of the sources of replacement water that may ultimately be identified for the term for which it is proposed replacement water is to be used under the mitigation plan.
9. Information which would establish that any diversion of ground water, under existing or future rights, to provide replacement water would not enhance, increase and enlarge the ground water diversions in the ESPA, and cause additional material injury to senior surface water rights.
10. Sufficient information to establish that the proposed mitigation is consistent with the conservation of water resources, and the public interest, and would not injure other water rights or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.
11. Sufficient information to establish how Districts intend to establish that acts of third parties in monitoring and adjustment of water diversions can be treated as a mitigation plan of Districts or any water right holder that they may be representing.

II.

It is clear that the ESPA is over-appropriated, that surface and ground water are hydraulically connected, and that junior water right holders have the burden of proving that their depletions are not causing injury. Until such time as the extent of injury to senior surface water rights caused by junior ground water appropriations and diversions over multiple years has been acknowledged, it is clear that the extent and nature of the proposed mitigation plan that would allow out-of-priority diversion of water by junior-priority ground water users is wholly inadequate. Any attempt to approve a mitigation plan that does not address the full extent of injury that has occurred and is occurring as a result of ground water depletions by diversions by junior ground water appropriators, would be contrary to the laws of the State of Idaho and would cause irreparable injury to the Coalition and their right to divert water under their surface water rights for irrigation and storage.

III.

The proposed mitigation plan of "Districts" is based on speculation, goals and objectives without the submission of any information which will support the ability of the Districts to meet any goals which would or could be considered as mitigation for out-of-priority ground water diversions. The proposed mitigation plan further attempts to rely upon proposed actions of the State of Idaho at some time in the future as mitigation for ground water depletions by its members, which is contrary to any law in effect in the State of Idaho and cannot be used to mitigate injury caused by the diversions of junior ground water appropriators, nor does the proposed mitigation plan attempt to identify the means by which the State of Idaho or any other person will in fact identify and obtain water supplies sufficient to provide "artificial recharge".

IV.

The proposed mitigation plan relies upon replacement water which cannot be and has not been identified, curtailment through dry-year leasing without explaining which rights will

be curtailed, and how and where funds will be generated to provide such dry-year leasing. The proposed mitigation plan proposes curtailment of early and late irrigation season diversions which cannot and do not reduce diversions nor is information provided to support any basis for making such allegation, and proposed curtailment of ground water diversions that are neither within their jurisdiction to control such diversions (if any authority exists even within their jurisdiction), and attempts to incorporate proposed curtailment by persons not within the "Districts".

V.

The historical facts relied upon by the Districts are neither accurate nor probative, and such allegations of historical facts are therefore denied. Even to the extent accurate historical facts are established, such facts are not relevant to the validity of a delivery call and injury to a senior water right.

VI.

The proposed mitigation plan is insufficient as a matter of law to provide mitigation to senior surface water users in the AFR, as it proposes to limit ground water diversions, up to a maximum of ten percent (10%) of ground water irrigated by their members, without identifying who their members are or how such a limitation will provide adequate mitigation, how the Districts intend to include in their mitigation plan the designation of acres, whether or not located in the Districts' boundaries, that must be curtailed, without regard to priority, location or ownership.

VII.

The proposed mitigation plan provisions for long-term reduction are neither reliable nor likely to occur. Benefits cannot be identified or relied upon from a proposed "CREP" program, which by the terms of the draft mitigation plan is contingent upon third parties, including the federal government and the State of Idaho; conversions of acres being irrigated with ground water to surface water irrigation when surface water supplies are fully

appropriated; or other voluntary set-aside programs neither identified nor in existence. The proposed mitigation plan further fails to define, identify or refer to any existing funding or implementation program whereby large-scale aquifer recharge can take place, or the extent of funding required without identifying the source of the water and the ability to use facilities of third parties.

VIII.

The basis for denying any approval of the alleged mitigation plan being proposed is supported by the unlawful limitations that the Districts attempt to place on their members' obligations for mitigation, including the limitation of 65,000 acre-feet of replacement water under all of their short-term strategies, and an attempt to limit the Districts' members from providing mitigation in the way of replacement water or curtailment to serve any surface water-irrigated lands irrigated with an appurtenant water right that has been decreed in the Snake River Basin Adjudication as an enlargement of a decreed water right, without regard to the priority of such water rights, an attempt to avoid mitigation to surface water users who have adopted and implemented conservation measures which have reduced surface water diversions and incidental recharge from operational waste, all of which is contrary to the laws of the State of Idaho, and finally seeks to avoid mitigation as the result of adverse effects on surface water users' water rights resulting from the rental of water through existing water banks, while at the same time using the water bank and rental pools as a primary source of water for the limited mitigation they seek to provide. Finally, Districts seek to assert that mitigation will not be provided unless surface water users can establish that they have fully collected on their insurance policies (stored water purchased by surface water users) before they can be made whole by the junior ground water appropriators who have not been curtailed and will continue to divert water under junior water rights and materially injures the natural flow and storage rights of the Coalition.

IX.

The Coalition reserves the right to supplement this Protest for such other and further reasons as may be discovered or set forth at the hearing on this matter. Moreover, by the filing of this Protest, the Coalition does not waive its right to challenge the validity of the Department's Rules For Conjunctive Management Of Surface And Ground Water Resources (IDAPA 37, Title 03, chapter 11).

X.

The Coalition requests that the Director appoint an independent hearing officer who is not an employee of the Department to preside over all proceedings, including any and all pending motions in this matter, pursuant to Rule 410 of the Department's Rules of Procedure (IDAPA 37.01.01.410).

REQUEST FOR RELIEF

WHEREFORE, the Coalition and its members respectfully submit that the mitigation plan submitted by the Districts is wholly inadequate, fails to meet the standards established by the conjunctive management rules of the Idaho Department of Water Resources, contains unlawfully proposals, fails to provide sufficient information to analyze any lawful proposals, and should be summarily denied.

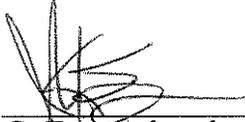
Respectfully submitted this 21st day of March, 2005

LING, ROBINSON & WALKER

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CERTIFICATE OF MAILING

I hereby certify that on the 21st day of March, 2005, I served copies of the foregoing *Surface Water Coalition's Protest Against Approval of Proposed Mitigation Plan* upon the following persons by the method indicated below:

Via Hand Delivery

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