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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY A & B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTHSIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY and IN THE MATTER OF GROUND WATER DISTRICTS' APPLICATION FOR APPROVAL OF MITIGATION PLAN FOR THE AMERICAN FALLS REACH OF THE SNAKE RIVER	**OBJECTION TO MOTION TO CONSOLIDATE FORMAL PROCEEDINGS ON AMENDED ORDER OF MAY 2, 2005 WITH PROCEEDINGS FOR APPROVAL OF MITIGATION PLANS**

COMES NOW Applicant A & B Irrigation District and hereby submits, by and through its attorney, its objection to the motion of the Idaho Ground Water Appropriators, Inc. ("IGWA") to consolidate proceedings on its application for approval of IGWA's mitigation plan with formal proceedings and hearing on the Amended Order of Director Karl J. Dreher dated May 2, 2005, and in support of said objection states:

BACKGROUND

On January 14, 2005, A & B Irrigation District, Burley Irrigation District, Minidoka Irrigation District, Twin Falls Canal Company, American Falls Reservoir District #2, Milner Irrigation District, and Northside Canal Company, known as the "Surface Water Coalition" ("SWC") delivered a letter to Karl J. Dreher, Director of the Idaho Department of Water Resources, requesting water right administration in Water District 120, and for the delivery of water to members of the SWC under their senior natural flow and storage water rights pursuant to Idaho law. The response to this call for water delivery is governed by Rule 040. of IDAPA 37.03.11— Conjunctive Management of Surface and Ground Water Resources. As required by Rule 040.01 the delivery call of the SWC pursuant to its letter stated that by reason of diversion of water by holders of junior-priority ground water rights within Water District 120 and having a common ground water supply, was causing members of the SWC to suffer material injury. The Amended Order of May 2, 2005 issued by the Director was in response to that delivery call as required by Rule 040.01.

The SWC also filed with the Director on January 14, 2005 a formal Petition for

Water Rights Administration and Designation of the Eastern Snake Plain Aquifer ("ESPA") as a ground water management area pursuant to Rule 030.01 of IDAPA 37.03.11 of the Conjunctive Management Rules of the Department. This rule allows the holders of senior-priority surface water rights to call for water delivery against the holders of junior-priority ground water rights within areas of the state not in an organized water district or within water districts where ground water regulation has not been included in the functions of such district or within areas that have not been designated ground water management areas. The procedures to be taken in responses to this petition are governed by Rule 030. of the Conjunctive Management Rules. The inclusion in the petition of a request for designation of the ESPA as a ground water management area is contemplated by Rule 030.06. Under Rule 030.02. the department is required to consider this petition as a petition for contested case under its rules of procedure. As shown by these Rules, the response to a formal petition under Rule 030. is substantially separate and distinct from the response required under Rule 040.

Notwithstanding the separate and distinct petitions filed by the SWC, and the separate and distinct responses required by the Director and the Department of Water Resources, there appears to have been a de facto consolidation by the Director, first indicated by the Director's Order of January 25, 2005. A subsequent Order of the Director on February 14, 2005 again addressed and issued orders in regard to both the letter petition and the formal petition.

On April 19, 2005 the Director entered an Order addressing issues primarily involved only in the letter petition filed by the SWC. On May 2, 2005 the Director issued an Amended Order, without hearing, amending the April 19, 2005 Order and again addressing

issues raised by the letter petition and issues raised by the formal petition of the SWC. It is unclear as to who may be legally bound by the findings of facts and conclusions of law contained in the Amended Order of May 2, 2005, as the same was not served upon those parties who had answered or responded to the formal petition of the SWC after service of the petition by the SWC on ground water appropriators in the ESPA. This issue may need to be addressed before proceeding to a hearing on the formal petition as requested by the SWC and as provided by the Conjunctive Management Rules of the Department.

Although the Amended Order of May 2, 2005 addresses factual and legal issues common to the entire ESPA, the Order addresses only the administration of water within Water Districts 120 and 130. As part of that administration, the Director has set forth requirements for "replacement water", apparently as a designed and acceptable mitigation plan, if followed by the holders of junior ground water rights in Water Districts 120 and 130.

IGWA'S MOTION TO CONSOLIDATE

IGWA filed an "Initial Plan for Providing Replacement Water" ("Replacement Plan") with the Director on April 29, 2005. The Replacement Plan incorporates and relies heavily on the ground water districts' proposed mitigation plan for the American Falls reach of the Snake River dated February 8, 2005 ("Mitigation Plan"). The Replacement Plan was filed to comply with the terms of the Amended Order of May 2, 2005 to mitigate, in lieu of curtailment, the diversion under the junior water rights ordered to be curtailed in the Amended Order of May 2, 2005. The curtailment order and replacement water provisions were in response to the letter delivery call made by the SWC against junior ground water appropriators in Water District 120,

later expanded by the Director to include Water District 130. At this time, there has been no Order approving the replacement plan, and no request for a hearing under Rule 043.02. of the Conjunctive Management Rules of IDWR, IDAPA 37.03.11, which provides that upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of §42-222, Idaho Code, in the same manner as applications to transfer water rights. It is assumed that the replacement water plan set forth by the Director in his Amended Order of May 2, 2005 constituted a described mitigation plan contemplated by Rule 43. Although the Replacement Water Plan of IGWA has not been approved by the Director, IGWA now seeks to reduce its obligation, which Motion to Reduce Replacement Water Obligation will be addressed by the SWC. It would appear that this is a motion to amend the Director's Amended Order of May 2, 2005.

On February 8, 2005 the American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville County-Jefferson Ground Water District, Madison Ground Water District, South West Irrigation District, North Snake Ground Water District, and Magic Valley Ground Water District, collectively referred to as the "Applicant", applied for the approval of a Mitigation Plan, which application was filed with the Director under the heading of "In the Matter of Ground Water Districts' Application for Approval of Mitigation Plan for the American Falls Reach of the Snake River." In filing this Application, the Applicant ground water districts and irrigation district clearly understood that the approval of a Mitigation Plan under Rule 43 of the Conjunctive Management Rules required a notice and hearing, as determined necessary, under Rule 43.02 and it would be necessary to consider the plan under the

procedural provisions of §42-222, Idaho Code, in the same manner as applications to transfer water rights. Procedural provisions include notice that shall advise that anyone who desires to protest the proposed mitigation plan shall file Notice of Protest with the Department within ten (10) days after the last date of publication and, in the event a Protest is filed, for the Director to conduct a hearing thereon. The Director must also determine that no other water rights are injured and any change, if any, does not constitute an enlargement in use of the original right, that the change is consistent with the conservation of water resources within the State of Idaho, is in the local public interest, and will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates.

Motions were filed by the SWC, BOR and Idaho Power Company to dismiss the application for approval of the mitigation plan filed by the ground water districts and an irrigation district. Protests to the application were also filed by those entities, and requests for a hearing were made. Although numerous and various grounds were given to support a dismissal, the prevailing basis of such motions was that the ground water districts were seeking to have a "Mitigation Plan" approved for essentially all ground water diversions in the ESPA, while failing to identify the water rights for which benefit the Mitigation Plan was proposed, the depletions in consumptive use components of the relevant ground water rights for which the Mitigation Plan was sought to be approved, a failure to demonstrate that senior surface water rights will not be injured, and a failure to describe the effects of existing wells, all as required by Rule 43.03 of the Conjunctive Management Rules. It is also significant that the factors to be considered under Rule 43.03 require a determination as to the time and place replacement water is required by the

senior-priority water rights, the amount of replacement water necessary to offset the depleted effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source, and the extent to which replacement water supplies or other appropriate compensation to a senior-priority water right 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. Until the extent of material injury to senior surface water rights has been established, it is impossible to determine the sufficiency of any particular mitigation plan. As there is no basis upon which the Mitigation Plan can be analyzed under Rule 43 of the Conjunctive Management Rules until an Order for the administration of the entire ESPA has been entered, consideration of the proposed mitigation plan is premature. This is especially so when no hearing has been set for the formal petition filed by the SWC for administration of the entire ESPA.

On June 14, 2005 IGWA, allegedly on behalf of the ground water districts initially filing the application for approval of their Mitigation Plan, but without a substitution of parties, filed a motion to amend the ground water districts' Mitigation Plan, and to consolidate the hearing on the Amended Mitigation Plan and A & B Irrigation District's Mitigation Plan with the hearing to be held on the Order issued on the SWC's letter request for administration in Water Districts 120, and later deemed to include Water District 130. Consolidation of a hearing for approval of a mitigation plan for ground water diversions from the ESPA with a hearing on administration of ground water in Water Districts 120 and 130 is not consistent with Rule 556 of

the Rules of Procedure of the Idaho Department of Water Resources, IDAPA 37.01.01556. This rule requires a finding that the issues are related and that the rights of the parties will not be prejudiced. A & B Irrigation District would be prejudiced if it was required to proceed with a hearing for approval of its mitigation plan in regard to the curtailment order of May 2, 2005, when there has been no protest to the same. The amendment to the Mitigation Plan of IGWA, and its approval has been proposed to mitigate ground water diversions within the entire ESPA, and not merely Water Districts 120 and 130. A consolidation with any hearing that may be required to approve A & B Irrigation District's Mitigation Plan or with the hearing on the letter delivery call and May 2, 2005 Order will prejudice the rights of the different parties involved in each proceeding involving unrelated issues. As previously noted, it is also clear that no hearing would be appropriate on the mitigation plan of the ground water districts at this time, whether alone or in consolidation with other issues. It should also be pointed out that the Mitigation Plan sought to be approved by IGWA is a mitigation plan filed for and on behalf of certain named ground water districts, many of which are not within Water Districts 120 and 130, and are not presently bound by any delivery call, and are not affected by the Amended Order of May 2, 2005. It would also be inappropriate to consolidate a hearing on any application for approval of the Mitigation Plan when there are pending Motions and Protests for Dismissal of the Plan based upon procedural deficiencies and the inadequacy of the Mitigation Plan, on its face. Only after these preliminary matters have been resolved, and the Application for Approval of the Mitigation Plan is still pending, should a hearing be held and that hearing should stand alone as a separate and distinct contested case involving parties that received notice and elected to participate in the

hearing required by the Conjunctive Management Rules.

The application for approval of A & B's Mitigation Plan should also stand on its own, as there have been no protests to said Mitigation Plan and the determinations in regard to approval of the A & B Irrigation District Mitigation Plan will not affect IGWA nor the ground water districts that have applied for approval of a Mitigation Plan to address issues that do not exist in the A & B Irrigation District Mitigation Plan.

WHEREFORE, A & B Irrigation District respectfully submits that IGWA's Motion to Consolidate a hearing on the Application for Approval of A & B's Mitigation Plan which may not require a hearing with a hearing to be held to approve a Mitigation Plan of several ground water districts and an irrigation district that is required and a hearing on a delivery call proceedings should be in all respects denied.

Respectfully submitted this 27th day of June 2005.

LING, ROBINSON & WALKER

By: /s/ Roger D. Ling .
Roger D. Ling
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CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of June, 2005, served copies of the foregoing *Objection to Motion to Consolidate Formal Proceedings on Amended Order of May 2, 2005 with Proceedings for Approval of Mitigation Plans* upon the following parties by the method indicated below:

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