State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov.

JAMES E. RISCH
Governor

KARL J. DREHER
Director

June 30, 2006

Parties and Others Identified
On the Attached Service List

Re: In the Matter of the Surface Water Coalition Delivery Call

Dear Parties and Others:

On June 14, 2006, I received the enclosed letter from Counsel for 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" or "Coalition"). In that letter the Surface Water Coalition "reaffirms its prior request that the Department Director and watermasters perform their legal duties to administer hydraulically connected ground water rights according to priority." *Letter* at p. 3. The letter also asks that "the Director take steps to manage the ESPA in a comprehensive manner that looks beyond a single irrigation season." *Id.*

Since the letter of June 14, 2006, seeks the administration of ground water rights that was originally requested by the Surface Water Coalition's letter dated January 14, 2005, which has resulted in the above referenced contested case currently before the Director, it will be treated as a filing in that contested case. While on June, 2, 2006, Judge Barry Wood of the Fifth Judicial District of the State of Idaho issued his *Order on Plaintiffs' Motion for Summary Judgment* (American Falls Reservoir District #2 et al. v. The Idaho Department of Water Resources and Karl J. Dreher in his official capacity as Director, Case No. CV-2005-0000600), no judgment has been issued in that proceeding. In the absence of a judgment in Case No. CV-2005-0000600, it is not possible at this time to anticipate whether and how such judgment may affect this contested case.

In the context of the remainder of the Coalition's letter of June 14, 2006, the request that the Director "take steps to manage the ESPA in a comprehensive manner that looks beyond a single irrigation season" seems to be a renewed request to designate all of the Eastern Snake Plain Aquifer ("ESPA") as a Ground Water Management Area as provided in Idaho Code § 42-

233b. Since all areas of the ESPA either have been or within the next nine months are expected to be included in water districts pursuant to Idaho Code, Chapter 6, Title 42, and since the Idaho Water Resource Board is acting to develop a management plan for the ESPA pursuant to Senate Current Resolution 136 from the 2005 legislative session, designation of the ESPA as a Ground Water Management Area is not necessary.

Sincerely,

Karl J. Dreher
Director

Enclosure

Attached Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2006, the above and foregoing, was served by the method indicated below, and addressed to the following:

TOM ARKOOSH ARKOOSH LAW OFFICES PO BOX 32 GOODING ID 83330 (208) 934-8873 alo@cableone.net	(x) U.S Mail, Postage Prepaid ( ) Facsimile (x) E-mail
W. KENT FLETCHER FLETCHER LAW OFFICE PO BOX 248 BURLEY ID 83318-0248 (208) 878-2548 wkf@pmt.org	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
ROGER D. LING LING ROBINSON PO BOX 396 RUPERT ID 83350-0396 (208) 436-6804 lnrlaw@pmt.org	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOHN ROSHOLT TRAVIS THOMPSON BARKER ROSHOLT 113 MAIN AVE WEST STE 303 TWIN FALLS ID 83301-6167 (208) 735-2444 jar@idahowaters.com tlt@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOHN SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 (208) 344-6034 jks@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JEFFREY C. FEREDAY MICHAEL C. CREAMER GIVENS PURSLEY LLP PO BOX 2720 BOISE ID 83701-2720 (208) 1300 cf@givenspursley.com mcc@givenspursley.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail

SCOTT CAMPBELL
MOFFATT THOMAS
PO BOX 829
BOISE ID 83701
(208) 385-5384
slc@moffatt.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

KATHLEEN CARR
U.S. DEPT INTERIOR
960 BROADWAY STE 400
BOISE ID 83706
(208) 334-1378

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

MATT HOWARD
US BUREAU OF RECLAMATION
1150 N CURTIS ROAD
BOISE ID 83706-1234
(208) 378-5003
mhoward@pn.usbr.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

JOSEPHINE BEEMAN
BEEMAN & ASSOC.
409 W JEFFERSON
BOISE ID 83702
(208) 331-0954
jo.beeman@beemanlaw.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

SARAH KLAHN
WILLIAM A HILLHOUSE II
AMY W BEATIE
WHITE JANKOWSKI
511 16TH ST STE 500
DENVER CO 80202
sarahk@white-jankowski.com
billh@white-jankowski.com
amyb@white-jankowski.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

MICHAEL GILMORE
ATTORNEY GENERAL'S OFFC
PO BOX 83720
BOISE ID 83720-0010
(208) 334-2830
mike.gilmore@ag.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

TERRY UHLING
JR SIMPLOT CO
999 MAIN STREET
BOISE ID 83702
tuhling@simplot.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

JAMES TUCKER
IDAHO POWER CO
1221 W IDAHO ST
BOISE ID 83702
jamestucker@idahopower.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

JAMES LOCHHEAD
ADAM DEVOE
BROWNSTEIN HYATT
410 17TH ST 22ND FLOOR
DENVER CO 80202
jlochhead@bhf-law.com
adevoe@bhf-law.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

LYLE SWANK
IDWR
900 N SKYLINE DR
IDAHO FALLS ID 83402-6105
(208) 525-7177
lyle.swank@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

ALLEN MERRITT
CINDY YENTER
IDWR
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3033
(208) 736-3037
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

Roger D. Ling, ISB #1018
LING ROBINSON & WALKER
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

Attorneys for A & B Irrigation District and
Burley Irrigation District

C. Tom Arkoosh, ISB #2253
ARKOOSH LAW OFFICES, CHTD.
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for American Falls
Reservoir District #2

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
Twin Falls, Idaho 83303-485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Milner Irrigation District,
North Side Canal Company, and
Twin Falls Canal Company

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

June 14, 2006

VIA EMAIL & U.S. MAIL

Director Karl J. Dreher
Idaho Department of Water Resources
322 E. Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Management of Eastern Snake Plain Aquifer / Request for Water Right Administration

Dear Director Dreher:

This letter is being sent on behalf of our clients, 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 (hereinafter collectively referred to as the "Surface Water Coalition" or "Coalition").

The Coalition requested administration of hydraulically connected junior priority ground water rights over a year ago in January 2005. *See* Exhibit A.[1] That request was made pursuant to Chapter 6, Title 42, Idaho Code, as well as the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) ("Rules"). The Coalition highlighted the history of the Department's management actions on the Eastern Snake Plain Aquifer ("ESPA") that dated back to 1992, including the designation of two groundwater management areas in 2001. The Coalition also filed a formal petition requesting administration of ground water rights that were not located within organized water districts and requested a groundwater management area designation for the entire ESPA. *See* Exhibit B.

The Coalition reaffirmed its request for water right administration pursuant to Idaho's Constitution and water distribution statutes again in April 2005. *See* Exhibit C. In that memorandum the Coalition specifically noted that "the Department is mandated with a clear legal duty to administer the State's water resources, including ground water, pursuant to the Idaho Constitution, Idaho statutes, governing case law, and the Director's prior orders . . ." *See id.* at 2, 3.

Finally, on May 9, 2006, Twin Falls Canal Company (TFCC) requested that water for injury calculated in 2005 be distributed immediately. *See* Exhibit D. In addition, TFCC also notified you of the likely injury in 2006 based upon observances of historical spring flow declines. TFCC's request was based upon the expectations of the company's shareholders, including water demand in 2005 and what was anticipated for 2006.[2] As of today, TFCC has yet to receive any indication of a response to its request. TFCC's letter was sent in response to your prior statements regarding the preliminary injury analysis for 2006 water right administration to satisfy the Coalition members' water rights. *See* Exhibits E, F.[3] Despite the statements in the December 27, 2005 Order and the April 25, 2006 letter, the Coalition has yet to receive any indication that you have completed your analysis for purposes of administering junior priority ground water rights in 2006.

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[1] Exhibits A to the January 14, 2005 letter and the January 15, 2005 *Petition* are voluminous and have not been attached, but can be found at http://www.idwr.idaho.gov/Calls/Surface%20Coalition%20Call/default.htm.

[2] While the Director's determination of injury in 2005 has been subject to finalization since December 27, 2005, and the method for calculation of such injury is now subject to review, in our view the Director's injury calculation of 152,200 acre-feet represents a minimum injury determination for 2005 and perhaps for 2006 based upon spring flow data and reach gains for each year. *See* Exhibit E.

[3] December 27, 2005 Order stating "The remainder of such replacement water that was due in 2005 for 2005 material injury shall be in addition to the water supplies otherwise available to the Twin Falls Canal Company in 2006 . . .and curtailment or replacement water required to mitigate for material injury determined to be reasonably likely in 2006, if any." (emphasis added). April 25, 2006 Letter to Randy Budge stating "Absent an agreement between IGWA and the Surface Water Coalition and unless IGWA successfully completes agreements for leasing additional storage water in 2006, the 37,140 acre-feet you represent as being available from Mitigation, Inc. will not be sufficient to meet the remaining 2005 obligation to the Twin Falls Canal Company, supply ground-water-to-surface-water conversions, make deliveries to Billingsley Creek via the Sandy Pipeline, and meet additional replacement water requirements for 2006, if any. . . . [I]f the obligation . . . remaining from 2005 is not met in 2006 together with additional replacement water obligations for 2006, if any, it will be necessary to curtail some amount of ground water diversions by priority in 2006." (emphasis added).

While early season precipitation and snowpack levels have improved over the last two years compared to that witnessed from 2001 to 2004, aquifer levels and resulting reach gains and spring flows have not demonstrated significant changes. In addition, while reservoir storage rights have filled to a greater extent the last two years, including a projected complete fill this year, natural flow rights have continued to be unfulfilled due to depletions caused by junior priority ground water rights. In other words, a full storage system in any given year does not necessarily mean that natural flow rights will be entirely satisfied, or that the aquifer levels, spring flows, reach gains, and storage rights will not subsequently suffer the impacts from junior priority ground water diversions. The Coalition members are still concerned about water supplies for their senior surface water rights and the Department's failure to comprehensively manage the ESPA consistent with Idaho law. Proper aquifer management must account for impacts from present ground water diversions that may not be fully realized within one year.

Accordingly, the Coalition hereby reaffirms its prior request that the Department, Director and watermasters perform their legal duties to administer hydraulically connected ground water rights according to priority. The Coalition further requests that the Director take steps to manage the ESPA in a comprehensive manner that looks beyond a single irrigation season. Any administrative action must be analyzed in conformance with recent judicial action voiding the Department's Rules.

With respect to the Rules, the Coalition's January 14, 2005 request for administration duly noted that the constitutionality of the Department's Rules was at issue in a then pending lawsuit, *Rim View Trout Company et al. v. Karl J. Dreher et al.* (Case No. CV-03-07551D, 4th Jud. Dist, Ada County Dist. Ct.). Since that time, the Rim View litigation was dismissed without prejudice, and members of the Coalition filed their own challenge to the Department's Rules in district court, *AFRD #2 et al. v. IDWR et al.* (Case No. CV-2005-600, 5th Jud. Dist. Gooding County Dist. Ct.). In the June 2, 2006 *Order on Plaintiffs' Motion for Summary Judgment*, the Gooding County District Court struck down the Department's Rules for violating Idaho's Constitution (Art. XV, § 3) and water distribution statutes (I.C. §§ 42-602, 603, and 607). Importantly, the Court highlighted the requirement for timely administration to be completed "consistent with the exigencies of a growing crop during an irrigation season." Any delay in administration impermissibly burdens and diminishes senior water rights, such as those held by the Coalition's members. Moreover, continued delay exacerbates future injury and impacts from groundwater pumping that are not necessarily realized within an irrigation season or a calendar year.

Pursuant to the Court's June 2, 2006 Order, the Coalition represents that you have the necessary information from prior submissions, prior decrees and licenses, and from the Director's Reports for the Coalition members' water rights that were recently filed with the SRBA District Court to administer water rights by priority pursuant to the Idaho Constitution and water distribution statutes as well as begin comprehensive management of the ESPA.[4]

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[4] *See Petitioners' Joint Response to Director's February 14, 2005 Information Request* filed on March 15, 2005; *Supplemental Response to Director's Information Request* filed on April 15, 2005; and *Part I Director's Report Irrigation & Other Uses IDWR Lower Basin 01 (Part I)* issued on May 15, 2006. This material has not been

As you are aware from prior requests, timing is critical for purposes of properly distributing water to the Coalition members' senior water rights and for planning to meet landowners' and shareholders' summer irrigation demands. Any additional delay in administering water rights in 2006 stands to leave the Coalition members' senior water rights unfulfilled, as happened in 2005. Finally, failing to address reduced aquifer levels, spring flows, and reach gains in a lawful and thorough manner stands to leave the ESPA's problem unaddressed for yet another year.

We look forward to your prompt response.

DATED this 14th day of June, 2006.

LING ROBINSON & WALKER

Roger D. Ling

Attorneys for A & B Irrigation District and Burley Irrigation District

ARKOOSH LAW OFFICES CHTD.

C. Tom Arkoosh

Attorneys for American Falls Reservoir District #2

FLETCHER LAW OFFICES

W. Kent Fletcher

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP

John A. Rosholt
John K. Simpson
Travis L. Thompson

Attorneys for Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company

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attached but can be found at http://www.idwr.idaho.gov/Calls/Surface%20Coalition%20Call/default.htm and on file with IDWR.