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	)	**AMENDED ORDER**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of a letter ("Letter") and petition ("Petition"), both filed with the Director on January 14, 2005, from 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 referred to as the "Surface Water Coalition" or "Coalition"). The Letter and Petition seek the administration and curtailment of ground water rights within Water District No. 120, the American Falls Ground Water Management Area, and areas of the Eastern Snake Plain Aquifer not within an organized water district or ground water management area, that are junior in priority to water rights held by or for the benefit of members of the Surface Water Coalition. The Petition also seeks designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.

On February 14, 2005, the Director issued an Order in this matter, which provided an initial response to the Letter and Petition filed by the Coalition. Based upon the Director's initial and further consideration of the Letter and Petition, the Director issued an Order on April 19, 2005, superceding the interlocutory portions of the Order of February 14, 2005. Following a status conference conducted by the Director on April 27, 2005, the Director determined that Finding No. 127 should be clarified. The Director now enters the following Findings of Fact, Conclusions of Law, and Amended Order with revisions to Findings No. 124 through No. 127 and No. 129, three additional findings (Findings No. 128, No. 129, and No. 131), corrected numbering of Conclusions of Law No. 47 through No. 53, and revisions to paragraph no. 9 in the Amended Order.

FINDINGS OF FACT

Procedural History

1. On January 14, 2005, the Surface Water Coalition hand delivered to the Director its Letter regarding *Request for Water Right Administration in Water District 120 (portion of the Eastern Snake Plain Aquifer) / Request for Delivery of Water to Senior Surface Water Rights.*

2. On January 14, 2005, the Surface Water Coalition also filed its Petition captioned *Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.* The Petition was filed "pursuant to Rules 30 and 41 of the conjunctive management rules (IDAPA 37.03.11) and Rule 230 of the Department's rules of procedure (IDAPA 37.01.01) . . . ." *Petition* at p. 1.

3. Footnote 5 on page 4 of the Letter filed by the Surface Water Coalition on January 14, 2005, seeking the administration of ground water rights in Water District No. 120, contained the following statement: "In the event any entity administering water rights perceives the need for further information concerning 'material injury' other than is supplied either on the face of the Surface Water User's water rights or herein, the undersigned request notification of the same, and a timely and meaningful opportunity to provide such information."

4. On February 3, 2004, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed two petitions to intervene. The first was filed to intervene in the request for administration and curtailment of ground water rights within Water District No. 120, and the second was filed to intervene in the request for administration and curtailment of ground water rights in the American Falls Ground Water Management Area and designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.

5. On February 11, 2005, Idaho Power Company filed a letter in which Idaho Power requests that the letter be treated as a motion to intervene should a contested case be initiated in response to the Letter and Petition filed by the Coalition.

6. On February 14, 2005, the Director issued his initial Order in this matter responding to the Letter and Petition filed by the Coalition, designating the requested water right administration in Water District No. 120 and the American Falls Ground Water Management Area as contested cases, and granting the two petitions to intervene filed by IGWA. Pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, the Order of February 14, 2005, was an interlocutory order and was not subject to review by reconsideration or appeal, with the exception of the portions of the Order (1) determining certain water rights to be junior in priority for the purposes of distributing water to any decreed, licensed, or permitted water rights and (2) denying the portion of the Petition seeking designation of the Eastern Snake Plain Aquifer as a ground water management area. Those two portions of the February 14 Order were final on March 7, 2005, and the Coalition filed a petition seeking a hearing on the denial of designation of the Eastern Snake Plain Aquifer as a ground water management area.

7. To provide for the Director making a determination of the likely extent of injury to the water rights held by or for the benefit of the members of the Surface Water Coalition, the Order of February 14, 2005, included a provision (Conclusion of Law 38) for each member of the Coalition to submit the following information for the past fifteen (15) irrigation seasons, 1990 through 2004:

a. Total diversions of natural flow in acre feet by month;

b. Total diversions of water released from reservoir storage in acre feet by month;

c. Total diversions of ground water by the member entity in acre feet by month;

d. Number of the entity's members or shareholders holding individual ground water rights;

e. Average monthly headgate deliveries to the entity's members or shareholders (e.g., 5/8 inch);

f. Total amount of reservoir storage in acre feet carried over to the subsequent year;

g. Quantity of water in acre feet the member entity leased to other users through the water supply bank and the Water District 01 Rental Pool;

h. Quantity of water in acre feet the member entity made available to other users through means other than the water supply bank or the Water District 01 Rental Pool;

i. Total number of acres irrigated by flood irrigation and total number of acres irrigated by sprinkler irrigation; and

j. Specific types of crops planted on irrigated acres served by the member entity.

8. On March 15, 2005, members of the Surface Water Coalition jointly filed information in response to the Order of February 14, 2005, but objected to the "scope of the information request." An amendment to Exhibit A of the submittal (total monthly diversions of natural flow and total monthly diversions of water released from reservoir storage) was filed on March 18, 2004.

9. The response filed by the Surface Water Coalition relied heavily on data obtained from the Department (total monthly diversions of natural flow and total monthly diversions of water released from reservoir storage), failed to identify members or shareholders holding individual ground water rights (alleging that such information is "irrelevant for purposes of the request for water right administration of Petitioners' surface water rights"), referred the Director to his own staff or the watermaster for Water District 01 (total amount of reservoir storage carried over to the subsequent year, quantity of water leased to other users through the water supply bank and the Water District 01 Rental Pool, and quantity of water made available to other

users through means other than the water supply bank or the Water District 01 Rental Pool), provided data or estimates for the total number of acres irrigated by flood irrigation and the total number of acres irrigated by sprinkler irrigation for one year only (Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company), and a single list of crops for each member of the coalition (no acreage numbers and no history of crop rotation). The joint response submitted by the Coalition was subsequently supplemented as described in Finding 18.

10. On February 17 and March 7, 2005, respectively, the Idaho Dairymen's Association, and the U. S. Bureau of Reclamation each filed petitions to intervene in the request for administration and curtailment of ground water rights within Water District No. 120.

11. On February 18, 2005, IGWA filed *Idaho Ground Water Appropriators, Inc.'s Motion for Order Authorizing Discovery.*

12. On March 7, 2005, the Surface Water Coalition filed a letter requesting the Department's assistance in completing the identification of ground water rights from the Eastern Snake Plain Aquifer that are junior in priority to surface water rights held by members of the Coalition and that are not in an organized water district or ground water management area, together with the names and addresses for the holders of such rights. The letter of March 7, 2005, also requested a two-week extension from the date set in the Order of February 14, 2005, or until March 31, 2005, to serve the holders of such junior priority water rights with the *Petition for Water Right Administration* originally filed by the Coalition on January 14, 2005.

13. On March 9, 2005, the Director issued an Order denying IGWA's *Motion For Order Authorizing Discovery* without prejudice and granting the request of the Surface Water Coalition for a two-week extension, or until March 31, 2005, to serve the holders of junior priority water rights with the Coalition's *Petition for Water Right Administration.*

14. On March 15, 2004, the Surface Water Coalition filed *Petitioners' Joint Response to Director's February 14, 2005 Request for Information.*

15. On March 23, 2005, IGWA filed *Idaho Ground Water Appropriators' Motion for Summary Judgment and Memorandum in Support.*

16. On April 6, 2005, the Director issued an Order denying the February 11, 2005, motion of Idaho Power Company to intervene, granting the petitions to intervene filed by the Idaho Dairymen's Association and the U. S. Bureau of Reclamation and renewing the Director's request of the members of the Surface Water Coalition for submission of all information (see Finding 7) called for in the Order of February 14, 2005, and requesting simultaneous briefing on whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the holders of ground water rights were not parties.

17. On April 15, 2005, members of the Surface Water Coalition filed *Memorandum in Support of Surface Water Coalition's Request for Water Right Administration (Water District 120)*. The Director treated this filing the same as *Idaho Ground Water Appropriators' Motion for Summary Judgment and Memorandum in Support* and accompanying *Affidavit of Dr. Charles M. Brendecke* filed on March 23, 2005, and did not rely on either filing in preparing the present Order.

18. On April 18, 2005, the Director received a joint supplemental response to the renewed request for submission of information. The Director has not had sufficient time to evaluate the supplemental submittal.

Eastern Snake River Plain Aquifer and the Department's Ground Water Model

19. The Eastern Snake River Plain Aquifer ("ESPA") is defined as the aquifer underlying an area of the Eastern Snake River Plain that is about 170 miles long and 60 miles wide as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," U. S. Geological Survey ("USGS") Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply. *See* IDAPA 37.03.11.050.

20. The ESPA is predominately in fractured Quaternary basalt having an aggregate thickness that may, at some locations, exceed several thousand feet, decreasing to shallow depths in the Thousand Springs area. The ESPA fractured basalt is characterized by high hydraulic conductivities, typically 1,000 feet/day but ranging from 0.1 feet/day to 100,000 feet/day.

21. Based on averages for the time period from May of 1980 through April of 2002, the ESPA receives approximately 7.5 million acre-feet of recharge on an average annual basis from the following: incidental recharge associated with surface water irrigation on the plain (3.4 million acre-feet); precipitation (2.2 million acre-feet); underflow from tributary drainage basins (1.0 million acre-feet); and losses from the Snake River and tributaries (0.9 million acre-feet).

22. Based on averages for the time period from May of 1980 through April of 2002, the ESPA also discharges approximately 7.5 million acre-feet on an average annual basis through sources including the complex of springs in the Thousand Springs area, springs in and near American Falls Reservoir, and the discharge of nearly 2.0 million acre-feet annually in the form of depletions from ground water withdrawals.

23. The ground water in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and the Snake River and its tributaries is in the American Falls area.

24. Hydraulically-connected ground water sources and surface water sources are sources that within which, ground water can become surface water, or surface water can become ground water, and the amount that becomes one or the other is largely dependent on ground water elevations.

25. When water is pumped from a well in the ESPA, a conically-shaped zone that is drained of ground water, termed a cone of depression, is formed around the well. This causes surrounding ground water in the ESPA to flow to the cone of depression from all sides. These depletionary effects propagate away from the well, eventually reaching one or more hydraulically-connected reaches of the Snake River and its tributaries. When the depletionary effects reach a hydraulically-connected reach of the Snake River, reductions in river flow begin to occur in the form of losses from the river or reductions in reach gains to the river. The depletions to the Snake River and its tributaries increase over time, with seasonal variations corresponding to seasonal variations in ground water pumping, and then either recede over time, if ground water pumping from the well ceases, or reach a maximum over time beyond which no further significant depletions occur, if ground water pumping from the well continues from year to year. This latter condition is termed a steady-state condition.

26. Various factors determine the specific hydraulically-connected reach of the Snake River affected by the pumping of ground water from a well in the ESPA; the magnitude of the depletionary effects to a hydraulically-connected reach; the time required for those depletionary effects to first be expressed as reductions in river flow; the time required for those depletionary effects to reach maximum amounts; and the time required for those depletionary effects to either recede, if ground water pumping from the well ceases, or reach steady-state conditions, if ground water pumping continues. Those factors include the proximity of the well to the various hydraulically-connected reaches, the transmissivity of the aquifer (hydraulic conductivity multiplied by saturated thickness) between the well and the hydraulically-connected reach of the Snake River, the riverbed hydraulic conductivity, the specific yield of the aquifer (ratio of the volume of water yielded from a portion of the aquifer to the volume of that portion of the aquifer), the period of time over which ground water is pumped from the well, and the amount of ground water pumped that is consumptively used.

27. The time required for depletionary effects in a hydraulically-connected reach of the Snake River to first be expressed, the time required for those depletionary effects to reach maximum amounts, and the time required for those depletionary effects to either recede, if ground water pumping from the well ceases, or reach steady-state conditions, if ground water pumping continues, can range from days to years or even decades, depending on the factors described in Finding No. 26. Generally, the closer a well in the ESPA is located to a hydraulically-connected reach of the Snake River, the larger will be the portion of ground water depletions to the hydraulically-connected reach and the shorter will be the time periods for depletionary effects to first be expressed, for those depletionary effects to reach maximum amounts, and for those depletionary effects to either recede or reach steady-state conditions. However, essentially all depletions of ground water from the ESPA cause reductions in flows in the Snake River equal in quantity to the depletions over time.

28. The Department uses a calibrated ground water model to determine the effects on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries from pumping a single well in the ESPA, from pumping selected groups of wells, and from surface water uses on lands above the ESPA.

29. In 2004, in collaboration with the Idaho Water Resources Research Institute, University of Idaho, U. S. Bureau of Reclamation ("USBR"), USGS, Idaho Power Company, and consultants representing various entities, including certain members of the Surface Water Coalition and IGWA, the Department completed reformulation of the ground water model used by the Department to simulate effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. This effort was funded in part by the Idaho Legislature and included significant data collection and model calibration intended to reduce uncertainty in the results from model simulations.

30. The reformulated ground water model for the ESPA was calibrated to recorded ground water levels in the ESPA and reach gains or losses to Snake River flows, determined from stream gages together with other stream flow measurements, for the period May 1, 1980 to April 30, 2002. The calibration targets, consisting of measured ground water levels and reach gains/losses, including discharges from springs, have inherent uncertainty resulting from limitations on the accuracy of the measurements. The uncertainty in results predicted by the ESPA ground water model equals the maximum uncertainty of the calibration targets. The calibration targets having the maximum uncertainty are the reach gains or losses determined from stream gages, which although rated "good" by the USGS, have uncertainties of up to 10 percent.

31. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from certain portions of the ESPA for irrigation and other consumptive purposes cause depletions to the flow of the Snake River in the form of reduced reach gains or increased reach losses in various reaches of the Snake River including the reach extending from Shelley, Idaho to Minidoka Dam, which includes the American Falls Reservoir.

32. The Department is implementing full conjunctive administration of rights to the use of hydraulically-connected surface and ground waters within the Eastern Snake River Plain consistent with Idaho law and available information. The results of simulations from the Department's ground water model are suitable for making factual determinations on which to base conjunctive administration of surface water rights diverted from the Snake River and ground water rights diverted from the ESPA.

33. The Department's ground water model represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. There currently is no other technical basis as reliable as the simulations from the Department's ground water model for the ESPA that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically connected reaches of the Snake River and its tributaries.

Creation and Operation of Water Districts No. 120 and No. 130,
and Status of the American Falls Ground Water Management Area

34. On November 19, 2001, the State of Idaho sought authorization from the Snake River Basin Adjudication ("SRBA") District Court for the interim administration of water rights by the Director in all or parts of the Department's Administrative Basins 35 and 41 overlying the ESPA in the American Falls area and all or parts of Basins 36 and 43 overlying the ESPA in the Thousand Springs area. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued two orders on February 19, 2002, creating Water District No. 120 and Water District No. 130, pursuant to the provisions of Idaho Code § 42-604.

35. On August 30, 2002, the State of Idaho filed a second motion with the SRBA District Court seeking authorization for the interim administration of water rights by the Director in the portion of the Department's Administrative Basin 37 overlying the ESPA in the Thousand Springs area. On November 19, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on January 8, 2003, revising the boundaries of Water District No. 130 to include the portion of Administrative Basin 37 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604.

36. On July 10, 2003, the State of Idaho filed a third motion with the SRBA District Court seeking authorization for the interim administration of water rights by the Director in the portion of the Department's Administrative Basin 29 overlying the ESPA in the American Falls area. On October 29, 2003, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on January 22, 2004, revising the boundaries of Water District No. 120 to include the portion of Administrative Basin 29 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604.

37. Water Districts No. 120 and No. 130 were created, and the respective boundaries revised, to provide for the administration of water rights, pursuant to chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights. As a result, the watermasters for Water Districts No. 120 and No. 130 were given the following duties to be performed in accordance with guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of any stipulated agreement; and

d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

38. On August 29, 2003, the Director issued a final order reducing the area of the American Falls Ground Water Management Area. Even though reach gains to the Snake River between the USGS stream gage located about 10 miles southwest of Blackfoot, Idaho ("Near Blackfoot Gage") and the USGS stream gage located about 1 mile downstream of American Falls Dam ("Neeley Gage") have generally continued to decline since 2001 when the American Falls Ground Water Management Area was designated, the Director determined that preserving the original area of the American Falls Ground Water Management Area was no longer necessary to administer water rights for the protection of senior surface and ground water rights because administration of such rights is now accomplished through the operation of Water Districts No. 120 and No. 130.

39. On April 15, 2005, the State of Idaho filed three motions with the SRBA District Court seeking authorization for the interim administration of water rights by the Director in the Department's Administrative Basin 25; Basins 31, 32, and 33; and Basin 45. If the SRBA District Court authorizes interim administration in these administrative basins, nearly all ground water rights authorizing diversion of ground water from the ESPA will be subject to administration through water districts, when combined with the ground water rights already in Water Districts No. 120 and No. 130. At the time of filing Director's Reports in the SRBA later this year for the relatively few remaining ground water rights authorizing diversions from the ESPA, additional motions will be filed by the State of Idaho seeking authorization for interim administration of those remaining rights. While authorization for interim administration of the remaining ground water rights is subject to determinations to be made by the SRBA District Court, the Director anticipates that water districts covering all of the ESPA will be in place for the irrigation season of 2006, and all ground water rights authorizing diversions from the ESPA will be subject to administration through water districts established pursuant Idaho Code, Chapter 6, Title 42.

40. The general location and existing boundaries for Water Districts No. 120 and No. 130 as well as the location and existing boundaries for the remaining American Falls Ground Water Management Area are shown on Attachment A. Boundaries for a proposed addition to Water District No. 120 as well as areas for potential future water districts (Water Districts No. 110 and No. 140) are also shown on Attachment A.

Conjunctive Management Rules

41. Idaho Code § 42-603 authorizes the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." Promulgation of such rules and regulations must be in accordance with the procedures of chapter 52, title 67, Idaho Code.

42. On October 7, 1994, the Director issued *Order Adopting Final Rules*; the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) ("Conjunctive Management Rules"), promulgated pursuant to chapter 52, title 67, Idaho Code, and Idaho Code § 42-603.

43. Pursuant to Idaho Code § 67-5291, the Conjunctive Management Rules were submitted to the 1st Regular Session of the 53rd Idaho Legislature (1995 session). During no legislative session, beginning with the 1st Regular Session of the 53rd Idaho Legislature, have the Conjunctive Management Rules been rejected, amended, or modified by the Idaho Legislature. Therefore, the Conjunctive Management Rules are final and effective.

44. The Conjunctive Management Rules "apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply." IDAPA 37.03.11.020.01.

45. The Conjunctive Management Rules "acknowledge all elements of the prior appropriation doctrine as established by Idaho law." IDAPA 37.03.11.020.02.

Letter Filed by the Surface Water Coalition

46. On January 14, 2005, the Surface Water Coalition hand delivered to the Director its Letter regarding *Request for Water Right Administration in Water District 120 (portion of the Eastern Snake Plain Aquifer) / Request for Delivery of Water to Senior Surface Water Rights.*

47. The Letter states that: "Data collected by the United States Bureau of Reclamation (USBR) over the past six years indicates about a 30% reduction in reach gains to the Snake River between Blackfoot and Neeley, a loss of about 600,000 acre feet. The recently recalibrated ESPA ground water model identifies ground water pumping as a major contributor to declines in the source of water fulfilling senior surface water rights. The ground water model demonstrates that pumping under junior groundwater rights results in an approximate steady state annual depletion of 1.1 million acre-feet to the Snake River in the American Falls reach." *Letter* at p. 2.

48. The Letter claims that water diverted by junior ground water users can be put to beneficial use by the Surface Water Coalition: "The water that will accrue to these reaches (Neeley to Minidoka, near Blackfoot to Neeley, and Shelley to Blackfoot) is needed and can be put to beneficial use under the Coalition's senior surface water rights. Whenever natural flow rights are on, the Coalition can use that water under their natural flow rights, and whenever that water would accrue to fill storage rights, the water is likewise needed to satisfy those storage rights." *Id.* at p. 3.

49. The Letter states that reduced availability of water as a result of ground water diversions under junior priority rights has materially injured the Surface Water Coalition's senior rights. "The extent of injury equals the amount of water diminished and the cumulative shortages in natural flow and storage water which is the result of groundwater depletions." *Id.* Moreover, the letter asserts that: "Any and all water that is pumped under junior groundwater rights that would otherwise accrue to the Snake River to satisfy a senior surface water right, as

demonstrated by the model, results in a 'material injury' to the Surface Water Coalition's senior surface water rights." *Id.*

50. The Letter requests "administration of water rights in Water District No. 120 and delivery of water to their respective Snake River natural flow water rights and to the storage water rights held by the USBR in trust for these entities, pursuant to Idaho Code Chapter 6 Title 42 and the Rules for Conjunctive Management of Surface and Ground Water Resources (Idaho Administrative Code Section 37.01.01.)." *Id.* at p. 2.

Petition Filed by the Surface Water Coalition

51. On January 14, 2005, the Surface Water Coalition also filed its Petition captioned *Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.* The Petition was filed "pursuant to Rules 30 and 41 of the conjunctive management rules (IDAPA 37.03.11) and Rule 230 of the Department's rules of procedure (IDAPA 37.01.01) . . . ." *Petition* at p. 1.

52. In addition to the information presented in the Letter regarding reduction in reach gains, annual depletions to the Snake River, and material injury claimed to the natural flow and storage water rights of the members of the Surface Water Coalition based upon the diversions of ground water under junior rights, the Petition seeks designation of the Eastern Snake Plain as a Ground Water Management Area.

53. The Surface Water Coalition states in paragraph 24 of its Petition that: "Petitioners reserve the right to supplement this petition with additional information as necessary."

Water Rights Held by or for the Benefit of Members of the Surface Water Coalition

54. The disposition of all of the water rights listed in the Letter and Petition filed by the Surface Water Coalition is pending in the SRBA. Many of the water rights listed in the Letter and Petition are overlapping or redundant. The Department has completed its preliminary examination of the rights claimed by members of the Coalition, other than rights also claimed by the USBR, pursuant to Idaho Code § 42-1410 and has prepared preliminary recommendations for reporting these rights in the SRBA. The preliminary recommendations were mailed to the members of the Coalition on April 15, 2004. Over the coming weeks, the Department will consider any additional information provided by the members of the Coalition concerning the members' water rights and will prepare its final reporting of these rights for filing with the SRBA District Court. Upon filing of the Director's Report for water rights in Basin 01, including the rights held by members of the Coalition, the State of Idaho will file a motion with the SRBA District Court seeking authorization for the interim administration of rights in Basin 01 by the Director based on the Director's Report.

55. The A&B Irrigation District holds the following surface water right as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00014
Basis for Right:	Decree
Priority Date:	April 1, 1939
Diversion Rate:	267 cfs
Beneficial Use:	Irrigation
Place of Use:	See Attachment B

56. The Letter and Petition filed by the Surface Water Coalition referred to water rights nos. 01-02060A, 01-02064F, and 01-02068F claimed by the A&B Irrigation District in the SRBA. The current holder of record for these rights is the United States through the USBR. Determination of the interest held by the A&B Irrigation District in each of these rights is pending in the SRBA.

57. The American Falls Reservoir District #2 holds the following surface water right as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00006
Basis for Right:	Decree
Priority Date:	March 20, 1921
Diversion Rate:	1,700 cfs
Beneficial Use:	Irrigation
Place of Use:	See Attachment C

58. The Burley Irrigation District holds the following surface water rights as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00007	01-00211B	01-00214B
Basis for Right:	Decree	Decree	Decree
Priority Date:	April 1, 1939	March 26, 1903	August 6, 1908
Diversion Rate:	163.4 cfs	655.88 cfs	380 cfs
Beneficial Use:	Irrigation	Irrigation	Irrigation
Place of Use:	See Attachment D		

59. The Milner Irrigation District holds the following surface water rights as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00009	01-00017	01-02050
Basis for Right:	Decree	Decree	License
Priority Date:	April 1, 1939	April 30, 1931	October 25, 1939
Diversion Rate:	121 cfs	135 cfs	37 cfs
Beneficial Use:	Irrigation	Irrigation	Irrigation
Place of Use:	See Attachment E		

60. The Letter and Petition filed by the Surface Water Coalition referred to water right no. 01-02064B claimed by the Milner Irrigation District in the SRBA. The current holder of record for this right is the United States through the USBR. Determination of the interest held by the Milner Irrigation District in this right is pending in the SRBA.

61. The Minidoka Irrigation District holds the following surface water right as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00008
Basis for Right:	Decree
Priority Date:	April 1, 1939
Diversion Rate:	266.6 cfs
Beneficial Use:	Irrigation
Place of Use:	See Attachment F

62. The Letter and Petition filed by the Surface Water Coalition referred to water rights nos. 01-04045, 01-10187, 01-10188, 01-10189, 01-10190, 01-10191, 01-10192, 1-10193, 01-10194, 01-10195, and 01-10196 claimed by the Minidoka Irrigation District in the SRBA. The basis for water right no. 01-04045 is a beneficial use claim filed pursuant to Idaho Code § 42-243 for which the current holder of record is the Amalgamated Sugar Company. The remaining water rights are based on claims filed in the SRBA under Idaho Code § 42-1409 for which the current holder of record, except for 01-10192 and 01-10193, is the United States through the USBR. Determination of the interest held by the Minidoka Irrigation District in each of these rights is pending in the SRBA.

63. The North Side Canal Company holds the following surface water rights as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00005	01-00016	01-00210A
Basis for Right:	Decree	Decree	Decree
Priority Date:	December 23, 1915	August 6,1920	October 11, 1900
Diversion Rate:	300 cfs	1,260 cfs	54 cfs
Beneficial Use:	Irrigation	Irrigation	Irrigation

Water Right No.:	01-00210B	01-00212	01-00213
Basis for Right:	Decree	Decree	Decree
Priority Date:	October 11, 1900	October 7, 1905	June 16, 1908
Diversion Rate:	346 cfs	2,250 cfs	890 cfs
Beneficial Use:	Irrigation	Irrig., Irrig. from Storage, Irrig. storage	Irrigation

Water Right No.:	01-00215	01-00220
Basis for Right:	Decree	Decree

Priority Date:	June 2, 1909	June 29, 1910
Diversion Rate:	500 cfs	3,000 cfs
Beneficial Use:	Irrigation	Irrigation
Place of Use:	See Attachment G	

64. The Letter and Petition filed by the Surface Water Coalition referred to water rights nos. 01-02064C, 01-10042B, 01-10043A, 01-10045B, and 01-10053A claimed by the North Side Canal Company in the SRBA. The current holder of record for water right no. 01-02064C is the United States through the USBR. The remaining water rights are based on claims filed in the SRBA under Idaho Code § 42-1409 for which the current holder of record is also the United States through the USBR. Determination of the interest held by the North Side Canal Company in each of these rights is pending in the SRBA.

65. The Twin Falls Canal Company holds the following surface water rights as claimed in the SRBA for the diversion of water from the Snake River:

Water Right No.:	01-00004	01-00010	01-00209
Basis for Right:	Decree	Decree	Decree
Priority Date:	December 22, 1915	April 1, 1939	October 11, 1900
Diversion Rate:	600 cfs	180 cfs	3,000 cfs
Beneficial Use:	Irrigation	Irrigation	Irrigation
Place of Use:	See Attachment H		

66. The Letter and Petition filed by the Surface Water Coalition referred to water rights nos. 01-02064A, 01-10042A, 01-10043, and 01-10045A claimed by the Twin Falls Canal Company in the SRBA. The current holder of record for water right no. 01-02064A is the United States through the USBR. The remaining water rights are based on claims filed in the SRBA under Idaho Code § 42-1409 for which the current holder of record is also the United States through the USBR. Determination of the interest held by the Twin Falls Canal Company in each of these rights is pending in the SRBA.

67. Because sufficient water could not be obtained from the natural and unregulated flow of the Snake River for the full irrigation of lands authorized under the surface water rights held by the members of the Surface Water Coalition as well as surface water rights held by other entities in the Upper Snake River Basin of Idaho with points of diversion at and upstream of Milner Dam, the USBR constructed dams to provide reservoirs to capture and store water from the Snake River when water surplus to irrigation demands was available, generally during the non-irrigation season, for subsequent release to supplement existing water rights for natural flow to help meet irrigation shortages. Additionally, these reservoirs are used to generate power incidental to reservoir releases for irrigation and flood control. Storage reservoirs developed by the USBR include Jackson Lake, Ririe Reservoir, Lake Walcott, American Falls Reservoir, and Palisades Reservoir.

68. The USBR holds the following surface water rights as claimed in the SRBA for diversion of water from the Snake River for irrigation, reservoir storage for irrigation, and reservoir releases for irrigation and incidental power generation under some rights:

Water Right No.:	01-00284	01-02064	01-02068
Basis for Right:	Decree	License	License
Priority Date:	March 30, 1921	March 30, 1921	June 28, 1939
Reservoir:	American Falls	American Falls	Palisades
Storage Volume:	1.7 million acre-feet	1.8 million acre-feet	1.4 million acre-feet

69. The Letter and Petition filed by the Surface Water Coalition referred to water rights nos. 01-04052, 01-04055, 01-04056, 01-04057, 01-10042, 01-10043, 01-10044, 01-10045, and 01-10053 claimed by the USBR in the SRBA. The basis for water rights nos. 01-04052, 01-04055, 01-04056, 01-04057, 01-10042, 01-10043, 01-10044, 01-10045, and 01-10053 are beneficial use claims filed pursuant to Idaho Code § 42-243 or claims filed pursuant to Idaho Code § 42-1409. Determination of each of these rights is pending in the SRBA.

70. The members of the Surface Water Coalition entered into contracts with the USBR for the use of water yielded from storage space in the reservoirs described in Finding No. 67 under the water rights described in Findings Nos. 68 and 69 as follows:

a. A&B Irrigation District –
46,826 acre-feet of storage space in American Falls Reservoir
90,800 acre-feet of storage space in Palisades Reservoir
Total: 137,626 acre-feet of storage space

b. American Falls Reservoir District #2 –
393,550 acre-feet of storage space in American Falls Reservoir

c. Burley Irrigation District –
31,892 acre-feet of storage space in Lake Walcott
155,395 acre-feet of storage space in American Falls Reservoir
39,200 acre-feet of storage space in Palisades Reservoir
Total: 226,487 acre-feet of storage space

d. Milner Irrigation District –
44,951 acre-feet of storage space in American Falls Reservoir
45,640 acre-feet of storage space in Palisades Reservoir
Total: 90,591 acre-feet of storage space

e. Minidoka Irrigation District –
186,030 acre-feet of storage space in Jackson Lake
63,308 acre-feet of storage space in Lake Walcott
82,216 acre-feet of storage space in American Falls Reservoir
35,000 acre-feet of storage space in Palisades Reservoir
Total: 366,554 acre-feet of storage space

f. North Side Canal Company –
312,007 acre-feet of storage space in Jackson Lake
431,291 acre-feet of storage space in American Falls Reservoir
116,600 acre-feet of storage space in Palisades Reservoir
Total: 859,898 acre-feet of storage space

g. Twin Falls Canal Company –
97,183 acre-feet of storage space in Jackson Lake
148,747 acre-feet of storage space in American Falls Reservoir
Total: 245,930 acre-feet of storage space

71. Legal title to the water rights described in Findings Nos. 68and 69 is held by the USBR. The beneficial use of the water provided under the storage water contracts described in Finding No. 70 is made by the landowners within the respective service areas of the members of the Surface Water Coalition.

72. Water that is supplied through the storage contracts described in Finding No. 70 is supplemental to the water rights held by the members of the Surface Water Coalition authorizing the diversion and beneficial use of the natural flow of the Snake River. Members of the Surface Water Coalition rely on their natural flow water rights together with the supplemental water supply resulting from their rights under storage contracts with the USBR, and in some instances supplemental ground water rights, to provide a full water supply for their respective irrigation needs. The actual amount of storage used for irrigation during any given irrigation season varies based upon climatic conditions.

General Findings in Response to Letter and Petition Filed by the Surface Water Coalition

73. The Petition filed by the Surface Water Coalition did not include the names, addresses, and description of the water rights outside of water districts held by ground water users who are alleged by the Coalition to be causing material injury to the surface water rights held by or for the benefit of members of the Coalition, in so far as such information is known by the members of the Coalition or can be reasonably determined by a search of public records, as required by Rule 30.01.b. of the Conjunctive Management Rules.

74. The Surface Water Coalition has since preliminarily identified the names and addresses of approximately 3,000 persons and other entities holding ground water rights that the Coalition allege to be causing material injury to the surface water rights held by or for the benefit of members of the Coalition. On or about April 1, 2005, the Coalition began serving the holders of such ground water rights with its *Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area* as required by Rule 30.02 of the Conjunctive Management Rules (IDAPA 37.03.11.030.02) and Rule 230 of the Department's rules of procedure (IDAPA 37.01.01.230).

75. Resolution of the Petition and the associated contested case pursuant to Rule 30 of the Conjunctive Management Rules (IDAPA 37.03.11.030) are pending. Resolution of the Petition as it regards the administration of water rights in the American Falls Ground Water Management Area pursuant to Rule 41 of the Conjunctive Management Rules (IDAPA 37.03.11.041) is also pending.

76. The Letter filed by the Surface Water Coalition limited the administration and curtailment of junior priority ground water rights sought by the Coalition to Water District No. 120. The Letter did not seek the administration and curtailment of junior priority ground water rights in Water District No. 130, which includes ground water rights held by members of the North Snake Ground Water District (including some also holding shares in the North Side Canal Company), members of the Magic Valley Ground Water District, and the United States for the benefit of members of the A&B Irrigation District.

77. Using the Department's ground water model for the ESPA, Department staff simulated the curtailment of all ground water rights in Water District No. 120 separately and in Water District No. 130 separately using the average annual consumptive use for irrigation beginning in 1980 through 2001. The results of these simulations showed that at steady-state conditions, the reach gain to the Snake River between the Near Blackfoot Gage and the USGS stream gage located 1 mile downstream from Minidoka Dam ("Minidoka Gage") would be greater by 429,300 acre-feet annually, an amount equal to 66 percent of the total average annual ground water depletions in Water District No. 120, from curtailment of all ground water rights in Water District No. 120. For curtailment of all ground water rights in Water District No. 130, the reach gain between the Near Blackfoot Gage and the Minidoka Gage would be greater by 195,500 acre-feet annually, an amount equal to 35 percent of the total average annual ground water depletions in Water District No. 130.

78. Based on the 2-year, 3-year, 4-year, and 5-year moving averages of unregulated (corrected for reservoir storage) natural flow in the Snake River at the USGS stream gage located 2.4 miles upstream of Heise, Idaho ("Heise Gage"), since the year 2000 the Upper Snake River Basin has experienced the worst consecutive period of drought years on record.

79. The Department has records of reach gains to the Snake River between the Near Blackfoot Gage and the Neeley Gage for every year since and including 1928. The total reach gains for each of these years are shown on Attachment I. Based on these records, there is no significant trend, up or down, for the 72 years of record from 1928 through 1999. Since 1999, there has been a significant decrease in the reach gains, reaching record lows in 2003, which correspond to the consecutive years of drought in the Upper Snake River Basin since 2000.

80. Using the Department's ground water model and under contract with the Department, the Idaho Water Resources Research Institute ("IWRRI") simulated the effects of continuing ground water diversions, with no other changes, (the "Base Case Scenario") by repeatedly using the input for the time period used to calibrate the ground water model (May 1, 1980 through April 30, 2002). The results from this simulation, as well as from a companion water budget analysis, indicate that "... as of May 2002, the Snake River Plain aquifer [sic] is close to dynamic equilibrium." IWRRI Technical Report 04-001. Based on these results,

reductions of flows in hydraulically-connected reaches of the Snake River and its tributaries resulting from ground water depletions were essentially the same in 2004 as in 1999. Therefore, ground water depletions are not the cause of the declines in measured reach gains between the Near Blackfoot Gage and the Neeley Gage since 1999.

81. Using the Department's ground water model, IWRRI also simulated the effects of curtailing ground water diversion and use across the ESPA under ground water rights junior to January 1, 1870; January 1, 1949; January 1, 1961; January 1, 1973; and January 1, 1985; with no other changes using separate model simulations (the "Curtailment Scenario"). IWRRI Technical Report 04-023. The simulated reach gain accruals from the Near Blackfoot Gage and the Neeley Gage and from the Neeley Gage to the Minidoka Gage represent the additional flows that would be present in the Snake River in those river reaches if ground water diversion and use junior to one of the selected priority dates were curtailed and no other changes occurred.

82. The effect of ground water depletions described in Findings 25, 26, 27, and 81 reduces the amount of natural flow, over time. As a result, members of the Coalition may use more storage in some years than would otherwise be used but for ground water depletions, which in those years reduces the amount of carry-over storage at the end of the irrigation season for a particular year that would otherwise be available for the following year. At steady-state conditions, this has essentially the same effect as if the holders of ground water rights replaced the diversion and use of ground water instead with diversion and use of storage releases.

83. If American Falls Reservoir does not fill in a particular year, the effect of ground water depletions described in Findings 25, 26, 27, and 81 can also reduce the amount of water in the Snake River that would otherwise be available for diversion to storage in American Falls Reservoir under the rights held by the United States through the USBR, described in Finding 68, for the benefit of the members of the Coalition.

84. Another significant action affecting the amount of storage available for release and diversion by some members of the Surface Water Coalition, most notably the A&B Irrigation District, the North Side Canal Company, and the Twin Falls Canal Company, is the use of the Water District 01 Rental Pool, which is operated pursuant to Idaho Code § 42-1765 and the "Water Supply Bank Rules" of the Idaho Water Resource Board (IDAPA 37.02.03).

85. The A&B Irrigation District supplied some of its storage water to the rental pool, 20,000 acre-feet in 2000 and 3,000 acre-feet in 2002, for rental and use by others at the beginning of and prior to the current sequence of drought years, thereby reducing the subsequent carryover storage available to the A&B Irrigation District. The A&B Irrigation District has also entered into exchange agreements that have reduced the storage supplies available to the District.

86. The Minidoka Irrigation District has also supplied some of its storage water to the rental pool, 10,000 acre-feet in 2000 and 23,800 acre-feet in 2003, for rental and use by others. Under the ongoing drought conditions persisting since 2000, water from the relatively senior priority bottom storage space in Jackson Lake under the contract held by the Minidoka Irrigation District has been heavily drafted. Although the bottom storage space in Jackson Lake has refilled every year during the ongoing drought conditions persisting since 2000, the relatively junior

priority top storage space in Jackson Lake under the contracts held by the North Side Canal Company and the Twin Falls Canal Company has not filled. Under these conditions, because the bottom space in Jackson Lake refills, the effects of the water supplied to the rental pool by the Minidoka Irrigation District, and subsequently used by others, reduced the fill of the top storage space in Jackson Lake in an amount equal to the water supplied to the rental pool by the Minidoka Irrigation District, thereby reducing the subsequent carryover storage available to the North Side and Twin Falls Canal Companies. The current Rental Pool Procedures for the Water District 01 Rental Pool have been revised to address these effects in 2005 and future years.

87. To the extent entities holding contracts to use water from relatively senior priority storage space in USBR reservoirs use more storage, as described in Finding 82, and that storage space refills, under the drought conditions persisting since 2000 the increased use of storage further reduces the fill of junior priority storage space, thereby further reducing the subsequent carryover storage available to the North Side and Twin Falls Canal Companies.

Water Supply Historically Available and Predicted to be Available in 2005

88. Whether effects of ground water depletions result in material injury to the senior priority surface water rights held by the members of the Surface Water Coalition in a particular year depends in large part on the total water supply, under natural flow water rights and from reservoir storage, and in some instances supplemental ground water rights, otherwise available to each member of the Coalition in that year. For example, for the irrigation year beginning November 1, 1996, and ending October 31, 1997, the total unregulated natural flow in the Snake River at the Heise Gage was 8.4 million acre-feet, which was the maximum total unregulated flow of record. In 1997, the water supply available to each member of the Surface Water Coalition under each member's natural flow water rights (described in Findings Nos. 55, 57, 58, 59, 61, 63, and 65) supplemented by stored water (described in Findings No. 67 and 68) constituted a full supply of water for the beneficial uses authorized under each member's water rights. On October 31, 1997, the amount of carry-over storage in the Upper Snake River Basin reservoirs was nearly 3 million acre-feet, or about 140 percent of the 30-year average (1970 through 2000) for carry-over storage. In 1997, ground water depletions caused reductions of flows from what would otherwise be available in the Snake River between the Near Blackfoot Gage and the Neeley Gage. Because each member of the Surface Water Coalition had a full supply of water for the beneficial uses authorized under each member's rights, ground water depletions did not cause material injury to the members of the Surface Water Coalition in 1997.

89. Based on the information submitted by the Surface Water Coalition in response to the Order of February 14, 2004, the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company, were each able to divert sufficient supplies of water, under each entity's natural flow water rights and storage releases combined, to make "full" deliveries of water to the headgates of their shareholders in the irrigation years 1990-1991 and 1995-2000. Based on the information submitted for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company, full headgate deliveries are defined by these members of the Coalition as average rates of diversion at the shareholder-

headgates during each month of the irrigation season of 5/8-inch, 5/8-inch, and 3/4-inch, respectively. The Twin Falls Canal Company was able to divert a sufficient supply of natural flow and storage releases to make full headgate deliveries in 1993 as well.

90. Beginning in about the 1960 to 1970 time period through the most recent years, the total combined diversions of natural flow and storage releases above Milner Dam for irrigation using surface water supplies have declined from an average of nearly 9 million acre-feet annually to less than 8 million acre-feet annually, notwithstanding years of drought, because of conversions from gravity flood/furrow irrigation to sprinkler irrigation in surface water irrigation systems and other efficiencies implemented by surface water delivery entities such as the members of the Surface Water Coalition. The measured decrease in cumulative surface water diversions above Milner for irrigation reflects the fact that less water is generally needed in the present time to fully irrigate lands authorized for irrigation with a certain crop mix under certain climatic growing conditions than was needed in the 1960 to 1970 time frame for the same lands, crop mix, and climatic growing conditions.

91. A full supply of water for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company is not the maximum amount of combined natural flow and storage releases diverted that yielded full headgate deliveries, based on those entities' definition of full supply, but the minimum amount of combined natural flow and storage releases diverted recently that provided for full headgate deliveries, recognizing that climatic growing conditions do affect the minimum amount of water needed and such effects can be significant.

92. For the American Falls Reservoir District #2 and the North Side Canal Company, the total diversions of natural flow and storage releases were the lowest while maintaining full headgate deliveries most recently in 1995. The total quantity of water diverted during the irrigation year ending October 31, 1995, by the American Falls Reservoir District #2 was 405,600 acre-feet and by the North Side Canal Company was 988,200 acre-feet.

93. For the Twin Falls Canal Company, the total diversions of natural flow and storage releases were the lowest while maintaining full headgate deliveries in 1993, although the 1993 diversions were only 19,300 acre-feet less than the total diversions of 1,075,900 acre-feet diverted by the Twin Falls Canal Company during the irrigation year ending October 31, 1995.

94. What might constitute a full supply of water for the A&B, Burley, and Milner irrigation districts, can not be determined from the headgate delivery information submitted by these entities in response to the Order of February 14, 2005. That response also states that the "Minidoka Irrigation District does not deliver by measurement to the headgate."

95. For the irrigation year ending on October 31, 1995, the A&B, Burley, Milner, and Minidoka irrigation districts diverted the following amounts of water under their respective natural flow water rights and entitlements to storage water releases and had the following amounts of storage carried over for 1996:

	1995 Diversions (acre-feet)	1995 Carryover (acre-feet)	Average Carryover 1990-2004 (acre-feet)
A&B Irrigation District:	50,000	103,300	64,900
Burley Irrigation District:	254,300	159,200	95,900
Milner Irrigation District:	50,800	75,500	44,000
Minidoka Irrigation District:	280,200	258,000	150,300

96. For the irrigation year ending on October 31, 1995, the amount of carryover storage for the A&B, Burley, Milner, and Minidoka irrigation districts was substantially above the 1990-2004 average by 59 percent, 66 percent, 72 percent, and 72 percent, respectively. The A&B, Burley, Milner, and Minidoka irrigation districts each had ample storage remaining after the 1995 irrigation season, which could have been released and diverted during the 1995 irrigation season had it been needed. Therefore, it is reasonable to conclude that as for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company, the A&B, Burley, Milner, and Minidoka irrigation districts each had a full supply of water in 1995 considering both natural flow and storage releases.

97. The USBR and the U. S. Army Corps of Engineers ("USACE") jointly prepare operating forecasts for unregulated inflow from the Upper Snake River Basin projected for the Heise Gage beginning soon after January 1 of each year. The Heise Gage location is the most representative location for overall surface water supply conditions in the Upper Snake River Basin.

98. The USBR and USACE jointly issue forecasts each year for unregulated inflow at the Heise Gage after February 1, for the period February 1 through July 31; after March 1, for the period March 1 through July 31; after April 1, for the period April 1 through July 31; and after May 1, for the period May 1 through July 31. Because the snowpack in the Upper Snake River Basin generally peaks in April, with most of the melting of the snowpack and resulting inflow occurring thereafter, the later forecasts are generally more accurate than the earlier forecasts, based on comparisons of predicted inflow versus observed inflow, although at times the later forecasts are less accurate. The forecast issued soon after April 1 is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.

99. The U. S. Natural Resources and Conservation Service ("NRCS") operates and maintains Snotel sites that measure and record snowpack conditions throughout the western United States that are used to develop forecasts for inflow to various river systems and for other purposes. The USBR and USACE use the NRCS Snotel sites in the Upper Snake River Basin to develop the inflow forecasts described in Findings Nos. 97 and 98.

100. The joint operating forecast prepared by the USBR and the USACE for unregulated inflow from the Upper Snake River Basin predicted for the Heise Gage for the period April 1 through July 31 became available on April 7, 2005, and predicts an unregulated inflow of 2,340,000 acre-feet. While the actual, measured inflow from April 1, 2005, through July 31, 2005, will undoubtedly be different than the predicted inflow of 2,340,000 acre-feet, the predicted inflow is similar to the measured, unregulated inflows at the Heise Gage for two recent

years in the present sequence of drought years, 2002 and 2004. In 2002, the unregulated inflow for the period April 1 through July 31 was 2,362,600 acre-feet, and in 2004 the unregulated inflow for the same period was 2,386,800 acre-feet.

101. The amount of unregulated inflow that may be divertible under the water rights held by members of the Surface Water Coalition and the amount of water that may be divertible to storage in the reservoirs operated by the USBR for the benefit of the members of the Coalition can be highly variable and depends on climatic conditions and when water rights authorizing diversions from the Snake River are in priority. For example, even though the unregulated inflow at the Heise Gage from April 1 though July 31 was 24,200 acre-feet greater in 2004, than for the comparable period in 2002, the amount of water diverted into storage in the reservoirs operated by the USBR was greater in 2002 than in 2004 by 381,300 acre-feet. And in 2004, the amount of natural flow diverted under the rights held by the Twin Falls Canal Company was 28,400 acre-feet greater than the amount it diverted in 2002, while the amount of natural flow diverted under the rights held by the American Falls Reservoir District #2 in 2004 was 17,700 acre-feet less than in 2002.

102. Attachments J through P show correlations between measured, unregulated inflows at the Heise Gage for the period April 1 through July 31 and the amounts of natural flow historically diverted by each of the members of the Surface Water Coalition for the years 1990 through 2004.

103. Predicting the amount of unregulated inflow that may be divertible in 2005 under the water rights held by individual members of the Surface Water Coalition based on what was historically divertible in a specific year is uncertain because it is unlikely that the climatic conditions and the resulting portion of the inflow divertible by individual members of the Coalition will be exactly the same in 2005 as in any prior particular year. While acknowledging the uncertainty in predicting the amount of unregulated inflow that may be divertible in 2005 under the water rights held by individual members of the Coalition, the average of the inflow diverted in 2002 and 2004 for each member of the Coalition provides a reasonable lower-bound estimate of the natural flow that may be divertible in 2005 by each member of the Coalition.

104. For each member of the Surface Water Coalition, the average of the inflow diverted in 2002 and 2004 is near or less than, in varying amounts, the divertible natural flow derived from the correlations in Attachments J through P for an inflow at Heise of 2,340,000 acre-feet, less one standard error of estimate. The average of the inflow diverted in 2002 and 2004 for each member of the Coalition is considered to be a reasonably likely projection of the total amount of water that may be available to each member of the Coalition in 2005 under their respective rights, subject to variations caused by climatic conditions. The average of the inflow diverted in 2002 and 2004 for each member of the Coalition is as follows:

	2002 Diversion (acre-feet)	2004 Diversion (acre-feet)	Average Diversion (acre-feet)
A&B Irrigation District:	900	0	500
American Falls Res. Dist. #2:	17,800	100	9,000
Burley Irrigation District:	129,900	139,000	134,500
Milner Irrigation District:	5,100	3,600	4,400
Minidoka Irrigation District:	107,600	104,700	106,200
North Side Canal Company:	357,000	309,500	333,300
Twin Falls Canal Company:	855,100	883,500	869,300

105. Similar to predicting the amount of natural flow that may be divertible in 2005, predicting the volume of water that may be storable in the reservoirs operated by the USBR for the benefit of the members of the Surface Water Coalition based on what was historically storable in a specific year is uncertain because as for divertible natural flow, it is unlikely that the climatic conditions and the resulting portion of the inflow divertible to storage will be the same in 2005 as in any prior particular year. While acknowledging the uncertainty in predicting the amount of unregulated inflow that may be storable in 2005 under the water rights held by the USBR, averaging (1) the actual storage as of April 1, 2005, added to the inflow stored after April 1 in 2002 and (2) the actual storage as of April 1, 2005, added to the inflow stored after April 1 in 2004, and reducing the average by the estimated evaporation in 2005, provides a reasonable estimate of the storage that may be available in 2005 for the benefit of each member of the Coalition. This results in the following maximum storage predicted for 2005, adjusted for estimated evaporation:

	2005 Max. Storage (acre-feet)	2005 Evap. (acre-feet)	2005 Net Storage (acre-feet)
Jackson Lake:	718,800	20,800	698,000
Palisades Winter Water Savings:	259,600	7,500	252,100
Other Palisades Reservoir:	76,700	2,200	74,500
Henrys Lake:	24,900	700	24,200
Island Park Reservoir:	63,500	1,800	61,700
Grassy Lake:	0	0	0
Ririe Reservoir:	0	0	0
Amer. Falls Winter Water Sav.:	156,800	4,500	152,300
Other American Falls:	1,472,500	42,600	1,429,900
Lake Walcott:	95,200	2,800	92,400
Totals:	2,868,000	82,900	2,785,100

106. Using the Department's accounting program for storage, the maximum predicted storage less evaporation for 2005 was allocated among all reservoir storage spaceholders in the Upper Snake River Basin, which resulted in the following predicted storage allocations for the Surface Water Coalition. When added to the amount of natural flow predicted to be available in 2005, as set forth in Finding 104, the predicted total supply for each member of the Coalition is

considered to be a reasonably likely projection of the total amount of water that may be available to each member of the Coalition in 2005, subject to variations caused by climatic conditions, for the limited purpose of assessing reasonably likely material injury caused by the diversion and use of ground water under junior priority rights. The reasonably likely predicted total supply for the purpose of predicting material injury for each member of the Coalition is as follows:

	2005 Natural Flow (acre-feet)	2005 Storage (acre-feet)	Total 2005 Supply (acre-feet)
A&B Irrigation District:	500	44,600	45,100
American Falls Res. Dist. #2:	9,000	379,100	388,100
Burley Irrigation District:	134,500	217,300	351,800
Milner Irrigation District:	4,400	50,500	54,900
Minidoka Irrigation District:	106,200	323,300	429,500
North Side Canal Company:	333,300	733,700	1,067,000
Twin Falls Canal Company:	869,300	201,300	1,070,600

107. In addition to the water rights authorizing the diversion and use of water from the Snake River held by the Surface Water Coalition and the contract entitlements to divert storage releases as supplemental supplies to the Coalition member's rights, an unknown number of landowners in the member irrigation districts and shareholders in the member canal companies hold supplemental ground water rights. Because the members of the Coalition did not identify landowners and shareholders, or the places of use within their boundaries, that receive water from the Coalition members and that also can be supplied ground water under supplemental rights in a timely manner, prior to the submittal of April 18, 2005, the use of supplemental ground water rights can not be presently assessed. The Director will review and consider all of the additional information submitted on April 18, 2005, and if warranted, issue an amended order in this matter.

Material Injury Predicted in 2005

108. In its Letter, the Surface Water Coalition states that: "Impacts have been occurring as a result of ground water depletions and reduced reach accruals for several years, resulting in material injury to the water rights of the Surface Water Coalition. ... Any and all water that is pumped under junior groundwater rights that would otherwise accrue to the Snake River to satisfy a senior surface water right, as demonstrated by the Model, results in a 'material injury' to the Surface Water Coalition's senior surface water rights."

109. None of the members of the Surface Water Coalition have identified lands that are entitled to receive surface water but have not been irrigated or where crops could not be harvested because of shortages in the surface water supplies available to members of the Coalition under the members' various rights. The Coalition simply alleges that material injury is occurring because in recent years members of the Coalition have been unable to divert natural flow at the diversion rates authorized under the members' rights for as long a period of time as the members otherwise could, and that members have been unable to accrue as much storage in

USBR reservoirs as the members otherwise could, but for depletions caused by diversions of ground water under junior priority water rights.

110. The members of the Surface Water Coalition supply water to lands located in the counties of Lincoln, Gooding, Jerome, Twin Falls, and several other counties. Department staff contacted individuals employed by the University of Idaho as Agricultural Extension Agents and by the U. S. Department of Agriculture Farm Service Agency as County Directors (each referred to as "FSA Director") in these four counties to glean information about shortages in the amounts of water available for irrigation in recent years.

111. Among the counties of Lincoln, Gooding, Jerome, and Twin Falls, shortages in the surface water supplies for irrigation in Lincoln County have been the most problematic where the FSA Director estimates losses in crop production to be 35 percent because of shortages in surface water supplies, although the losses were not primarily the result of shortages in supplies from the Snake River.

112. In Gooding County, the FSA Director reported that the North Side Canal Company has carefully managed water diverted to minimize waste, shareholders have reduced nozzle sizes on sprinkler systems, and that estimated losses in crop production because of shortages in surface water supplies were about 5 percent in 2004. For lands served by the American Falls Reservoir District #2, the FSA Director reported that the 10-day shut off at the end of May in 2004 significantly impacted some growers, corn crops were stressed but overall yields were near normal, the fourth cutting of hay was foregone in 2004 so that available water could be used to finish corn crops, and overall losses in crop production were estimated to be 15 percent in 2004.

113. In Jerome County, the FSA Director reported that shortages in surface water supplies have caused only slight declines in crop production.

114. In Twin Falls County, the FSA Director and University of Idaho Extension Agent reported that shortages in surface water supplies in 2004 caused significant impacts on lands served by the Salmon Falls Canal Company, but impacts were not as significant on lands served by the Twin Falls Canal Company. In 2004, lands served by the Twin Falls Canal Company experienced some loss in crop production, the last cutting of hay was reduced, and yields from corn crops were reduced largely because of delayed harvest, not shortages of water.

115. To predict the shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition in 2005, the amounts of water diverted in 1995 are deemed to be the minimum amounts needed for full deliveries to land owners and shareholders. If crop evapotranspiration is greater in 2005 than in 1995, the amounts of water diverted in 1995 may be less than what is needed for a full supply in 2005. If crop evapotranspiration is less in 2005 than in 1995, the amounts of water diverted in 1995 may be more than what is needed for a full supply in 2005.

116. The shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition in 2005 are estimated by subtracting the reasonably likely total

supplies of natural flow and storage set forth in Finding 106 from the minimum amounts needed for full deliveries based on 1995 diversions as follows:

	Minimum Full Supply Needed (acre-feet)	Predicted 2005 Supply (acre-feet)	Predicted Shortages in 2005 (- is surplus) (acre-feet)
A&B Irrigation District:	50,000	45,100	4,900
American Falls Res. Dist. #2:	405,600	388,100	17,500
Burley Irrigation District:	254,300	351,800	-97,500
Milner Irrigation District:	50,800	54,900	-4,100
Minidoka Irrigation District:	280,200	429,500	-149,300
North Side Canal Company:	988,200	1,067,000	-78,800
Twin Falls Canal Company:	1,075,900	1,070,600	5,300

117. The reasonably likely shortages set forth in Finding 116 total 27,700 acre-feet and assume that the members of the Surface Water Coalition that are expected to have shortages (A&B Irrigation District, American Falls Reservoir District #2, and Twin Falls Canal Company) use all of their carryover storage from 2004. The predicted surpluses (Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, and North Side Canal Company) are the amounts of estimated carryover storage at the end of the 2005 irrigation season.

118. Members of the Surface Water Coalition are entitled to maintain a reasonable amount of carryover storage to minimize shortages in future dry years pursuant to Rule 42.01.g of the Conjunctive Management Rules (IDAPA 37.03.11.042.01.g).

119. The reasonable amount of carryover storage to which members of the Surface Water Coalition are entitled is determined by averaging (1) the amounts of carryover storage required for Coalition members to have full supplies of water in 2006 if the divertible natural flow and storage accruals in 2006 are the same as in 2002 and (2) the amounts of carryover storage required for Coalition members to have full supplies of water in 2006 if the divertible natural flow and storage accruals in 2006 are the same as in 2004. This results in the following amounts of reasonable carryover storage for Coalition members:

	2005 Carryover Based on 2002 (acre-feet)	2005 Carryover Based on 2004 (acre-feet)	Reasonable Carryover Based on Average (acre-feet)
A&B Irrigation District:	3,500	13,500	8,500
American Falls Res. Dist. #2:	6,300	96,100	51,200
Burley Irrigation District:	-50,000	-36,200	0
Milner Irrigation District:	2,300	12,100	7,200
Minidoka Irrigation District:	-83,800	-52,900	0
North Side Canal Company:	-36,600	203,100	83,300
Twin Falls Canal Company:	34,600	42,200	38,400

120. The reasonably likely material injury predicted for 2005 is the sum of the shortages set forth in Finding 116, if any, and the shortfalls in predicted carryover as compared to the reasonable amounts of carryover storage set forth in Finding 119, if any. If the material injury predicted for 2005 is mitigated with replacement water, the following are the predicted amounts of injury and ending carryover storage for 2005 for the members of the Surface Water Coalition:

	Predicted 2005 Material Injury Shortages + Carryover Shortfalls (acre-feet)	Predicted 2005 Carryover (acre-feet)
A&B Irrigation District:	13,400	8,500
American Falls Res. Dist. #2:	68,700	51,200
Burley Irrigation District:	0	97,500
Milner Irrigation District:	3,100	7,200
Minidoka Irrigation District:	0	149,300
North Side Canal Company:	4,500	83,300
Twin Falls Canal Company:	43,700	38,400
Totals:	133,400	435,400

If the material injury predicted for 2005 is resolved through curtailment, the predicted amounts of carryover storage for 2005 for the Coalition members can not presently be determined, but will be less than shown above, except for the Burley and Minidoka Irrigation Districts.

121. The material injury predicted for 2005 is reasonably likely. However, climatic conditions for the remainder of 2005 can not be precisely predicted, meaning that the predicted material injury and the carryover storage, assuming the predicted material injury is mitigated with replacement water, are both likely to be greater or smaller.

122. A mechanism can be devised whereby additional mitigation will be required if the predicted material injury is less than what is later determined to be the actual material injury, and credits against future mitigation requirements can be recognized if the predicted material injury is more than what is later determined to be the actual material injury.

Simulated Curtailment of Junior Priority Ground Water Rights

123. Nearly all ground water rights authorizing the diversion and use of ground water from the ESPA are junior in priority to the surface water rights held by or for the benefit of the Surface Water Coalition described in Findings 55, 57, 58, 59, 61, 63, 65, and 68. Based on simulations using the Department's ground water model for the ESPA described in Findings 29 and 30, using the average annual consumptive use for irrigation beginning in 1980 through 2001, curtailing all ground water diversions in Water District No. 120 would, over time, increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total

amount of 429,300 acre-feet, which equals 66 percent of the total average annual ground water depletions in Water District No. 120, for each year of curtailment. Curtailing all ground water rights in Water District No. 130 would, over time, increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 195,500 acre-feet, which equals 35 percent of the total average annual ground water depletions in Water District No. 130, for each year of curtailment. Curtailing all ground water diversions in Water Districts No. 120 and No. 130 for one year would, over time, increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 624,800 acre-feet, which is nearly five times the amount of the reasonably likely material injury predicted to occur in 2005 to the water rights held by or for the benefit of the Surface Water Coalition members.

124. Based on the Department's water rights data base and ground water model for the ESPA, curtailing all ground water diversions, which at steady-state conditions reduce reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is the uncertainty in model simulations, see Finding 30), within the modeled area for one year under water rights having priority dates of February 27, 1979, and later will increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 133,900 acre-feet, over time.

125. Based on the Department's water rights data base and ground water model for the ESPA, curtailing the subset of ground water diversions for one year under water rights described in Finding 124 within the area defined as the area of common ground water supply for the ESPA in Rule 50 of the Conjunctive Management Rules (IDAPA 37.03.11.050.01) would increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by a total amount of 125,600 acre-feet, over time.

126. Based on the Department's water rights data base and ground water model for the ESPA, curtailing the subset of ground water diversions for one year under water rights described in Finding 124 within Water Districts No. 120 and No. 130, which are wholly within the area of common ground water supply for the ESPA defined in Rule 50 of the Conjunctive Management Rules (IDAPA 37.03.11.050.01) would result in the curtailment of irrigation of 22,660 acres and 58,150 acres, respectively, and would increase reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage by 79,800 acre-feet and 21,200 acre-feet, respectively, over time. The number of acres on which irrigation would be curtailed in Water Districts No. 120 and No. 130 total 80,810 acres, and the total amount of the simulated increase in reach gains over time between the Near Blackfoot Gage and the Minidoka Gage from curtailment in Water Districts No. 120 and No. 130 is 101,000 acre-feet.

127. Based on the Department's water rights data base and ground water model for the ESPA, curtailing the subset of ground water diversions for one year under water rights described in Finding 124 within the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, using the most recent boundaries of the districts provided to the Department, within the area of common ground water supply for the ESPA defined in Rule 50 of the Conjunctive Management Rules (IDAPA 37.03.11.050.01) would result in the curtailment of irrigation on the following acreages and increase reach gains in the Snake

River between the Near Blackfoot Gage and the Minidoka Gage over time by the following amounts:

	Acres Curtailed	Total Accruals (acre-feet)	1st 6-month Accruals (acre-feet)	2nd 6-month Accruals (acre-feet)	3rd 6-month Accruals (acre-feet)
North Snake District:	4,230	2,400	0	0	10
Magic Valley District:	17,200	17,800	10	110	280
Aberdeen-Amer. Falls District:	34,590	52,000	6,850	9,790	6,120
Bingham District:	11,460	14,900	1,760	2,830	1,790
Bonneville-Jefferson District:	8,280	7,200	100	510	660
Totals:	75,760	94,300	8,720	13,240	8,860

	4th 6-month Accruals (acre-feet)	5th 6-month Accruals (acre-feet)	6th 6-month Accruals (acre-feet)	7th 6-month Accruals (acre-feet)	8th 6-month Accruals (acre-feet)
North Snake District:	20	30	40	50	60
Magic Valley District:	440	530	590	600	610
Aberdeen-Amer. Falls District:	4,280	3,180	2,510	2,030	1,700
Bingham District:	1,260	940	750	610	510
Bonneville-Jefferson District:	640	560	490	430	370
Totals:	6,640	5,240	4,380	3,720	3,250

128. The total reach gain accruals set forth in Finding 127 are the total accruals that are simulated to occur over a time period of about 20 years or more from the curtailment of the diversion and use of ground water under the water rights and for the irrigation of the lands described in Finding 127 for a single year. The 6-month accruals set forth in Finding 127 are the simulated incremental additions to the reach gains for the first 4 years following curtailment for a single year. By the end of the fourth year, approximately 60 percent of the total reach gain accruals will have occurred. Additional reach gains would continue to accrue until the effects of the single year of curtailment have been fully realized.

129. If curtailment of the diversion and use of ground water under these same rights occurred within the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts during each and every year of a four-year period, the following 6-month accruals to the reach gains are simulated to occur using the Department's ground water model:

	Acres Curtailed	Total Accruals (acre-feet)	1st 6-month Accruals (acre-feet)	2nd 6-month Accruals (acre-feet)	3rd 6-month Accruals (acre-feet)
North Snake District:	4,230	9,600	0	0	10
Magic Valley District:	17,200	71,200	10	110	290
Aberdeen-Amer. Falls District:	34,590	208,000	6,850	9,790	12,970
Bingham District:	11,460	59,600	1,760	2,830	3,550
Bonneville-Jefferson District:	8,280	28,800	100	510	760
Totals:	75,760	377,200	8,720	13,240	17,580

	4th 6-month Accruals (acre-feet)	5th 6-month Accruals (acre-feet)	6th 6-month Accruals (acre-feet)	7th 6-month Accruals (acre-feet)	8th 6-month Accruals (acre-feet)
North Snake District:	20	40	70	90	120
Magic Valley District:	540	830	1,130	1,430	1,740
Aberdeen-Amer. Falls District:	14,080	16,150	16,580	18,170	18,280
Bingham District:	4,080	4,490	4,830	5,090	5,340
Bonneville-Jefferson District:	1,150	1,320	1,640	1,750	2,010
Totals:	19,870	22,830	24,250	26,530	27,490

130. The total increase in reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage from curtailment for a single year within ground water districts is less than the total increase in reach gains from curtailment within Water Districts No. 120 and No. 130 by 6,700 acre-feet because not all ground water rights having priority dates of February 27, 1979, and later that are within Water Districts No. 120 and No. 130 are also within ground water districts. Nearly all such rights are located east of American Falls Reservoir in an area adjacent to the Aberdeen-American Falls Ground Water District. The amount 6,700 acre-feet is 12.9 percent of the 52,000 acre-feet increase in reach gains that would occur over time from curtailment for a single year in the Aberdeen-American Falls Ground Water District.

131. The predicted reach gains from curtailment of the diversion and use of ground water for irrigation described in Findings 123 through 129 is limited to the reach of the Snake River between the Near Blackfoot Gage and the Minidoka Gage. In its Letter the Surface Water Coalition alleges that water that would also accrue from curtailment of the diversion and use of ground water to the reach of the Snake River between the USGS stream gage located 2.5 miles north of Shelley, Idaho ("Shelley Gage"), and the Near Blackfoot Gage "... is needed and can be put to beneficial use under the Coalition's senior surface water rights." *Letter* at p. 3. Accruals to the reach of the Snake River between the Shelley Gage and the Near Blackfoot Gage that would occur from curtailment of the diversion and use of ground water are not considered because such accruals would be divertible by members of the Surface Water Coalition on a limited basis, particularly during years of low natural flow, since there are other surface water

rights under which diversions from that reach are made that are senior in priority to the rights held by members of the Coalition.

CONCLUSIONS OF LAW

1. The Director issues this Order subsequent to his Order of February 14, 2005, which provided that: "The Director will make a determination of the extent of likely injury after April 1, 2005, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 1, 2005." This Order is issued by the Director prior to an opportunity for a hearing being provided to the parties. Any person aggrieved by the Order shall be entitled to a hearing before the Director to contest the action pursuant to Idaho Code § 42-1701A(3). Judicial review of any final order of the Director issued following the hearing shall be had pursuant to Idaho Code § 42-1701A(4).

2. On April 6, 2005, the Director requested the parties to brief the issue of whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party. The Director requested that the parties review the cases of *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921); *Scott v. Nampa Meridian Irr. Dist.*, 55 Idaho 672, 45 P.2d 1062 (1934); *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997); and any other Idaho Supreme Court decisions that may be relevant to the issue raised.

3. IGWA, on behalf of the holders of potentially affected ground water rights answered the question in the negative. *Idaho Ground Water Appropriators' Brief in Response to Director's April 6, 2005 Order* ("IGWA Br."). Based upon its analysis of the cases for which the Director sought review, IGWA asserted: "Idaho courts have precluded administration as between water rights whose elements are established in separate, unrelated decrees, even where the respective rights have been incorporated within their own water districts under their separate decrees." IGWA Br. at 2.

4. IGWA relies principally upon language in the Idaho Supreme Court's decision in *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921) that a water rights decree "is not, and cannot be made, conclusive, as to parties who are strangers to it," and it would be "repugnant to a fundamental principle of our jurisprudence" to conclude that "one's rights can be affected by a decree to which he was a stranger." IGWA Br. at 3. IGWA notes that the Idaho Supreme Court recently restated this principle in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997) holding that "[a] decree entered in a private water adjudication binds only those parties to the decree." IGWA Br. at 3-4.

5. IGWA points out that the Idaho Supreme Court reversed the efforts of the Department to combine the operation of two water districts on Upper and Lower Reynolds Creek without first conducting a hearing to determine whether there are sufficient uncontested rights to develop a workable plan for water distribution. *Id.* at 4. "If not, then the [Department] should

proceed with an adjudication pursuant to I.C. § 42-1406 before combining these two districts into one." *Nettleton v. Higginson*, 98 Idaho 87, 94, 558 P.2d 1048, 1055 (1977). Finally, IGWA cites to an Idaho Supreme Court holding that where rights were decreed in separate adjudications, their relationships need to be determined in a single adjudication such as the SRBA before the rights can be administered together because, depending on the facts of the case, "priority-in-time might not necessarily result in priority of right." *Devil Creek Ranch v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994).

6. The Surface Water Coalition and the Bureau of Reclamation answered the question of whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party in the positive. *Surface Water Coalition's Joint Memorandum in Response to Director's April 6, 2005 Legal Question* ("Coalition Br.") and *Reclamation's Brief in Response to Director's April 6, 2005 Request* ("USBR Br.").

7. The Surface Water Coalition argues that the Director's February 18, 2002, *Final Order Creating Water District 120* requires the Department and the watermaster of Water District 120 to administer by priority the rights of the surface water rights of the Coalition members and the ground water right holders represented by IGWA. Coalition Br. at 2-8. The Coalition also argues that Idaho law requires watermasters to administer all water rights within an organized water district by priority, regardless of the status of a general stream adjudication. Coalition Br. at 8-20. In support of this argument, the Coalition relies principally upon the decision of the Idaho Supreme Court in *Nettleton v. Higginson*. The Coalition summarizes the status of Idaho law on the issue raised as follows:

> [W]ater users not party to a former decree are subject to administrative enforcement of the decree by the Director, whether such administration arises from a call or from the Director's initiative; but, water users not party to a decree are not bound by the decree as *res judicata* in a subsequent adjudication by a court of competent jurisdiction.

Coalition Br. at 9.

8. The USBR argues that the rights of the ground water users represented by IGWA are presently subject to curtailment in favor of the senior surface water rights of the Surface Water Coalition members because of the provisions of the 1968 *Eagle Decree* (*Burley Irrigation Dist. v. Eagle*, No. 21406 (5th Jud. Dist. Twin Falls Cty., Idaho July 10, 1968)) which confirmed the water rights and contracts of the Coalition members and ordered that together they "constitute a scheme or plan for the administration of the Snake River and as such, are binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries above Milner Dam." USBR Br. at 11. The USBR argues that this result is consistent with the holdings of the Idaho Supreme Court in *Higginson*, 98 Idaho at 94, 558 P.2d at 1055.

9. Following review of the briefs of the parties on the issue of whether Idaho law permits the members of the Surface Water Coalition to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party, the Director remains troubled by the conflicting court decisions and recognizes that the issue is not free from doubt. The Director is persuaded, however, that under the circumstances of the

present case it is appropriate to recognize the right of the Coalition members to pursue their delivery call against the holders of junior priority ground water rights within established water districts who were not parties to nor bound by the prior decrees that adjudicated the surface water rights of the Coalition members.

10. The Director reaches this conclusion to recognize the Surface Water Coalition delivery call based upon the holding of the majority of the Idaho Supreme Court in *Higginson*, 98 Idaho at 94, 558 P.2d at 1055, that the Department may rely upon a decree for the orderly distribution of water rights among the right holders within adjoining water districts on connected sources until such time as a court action is brought to challenge the rights established in the decree. In this instance, while water rights of the members of the Coalition have not been adjudicated in the SRBA simply because of the timing of the Director's Report for Basin 01, they possess rights that have long been administered by the watermaster of Water District 01.

11. The Director also reaches this conclusion based upon the fact that a junior water right is established subject to all existing water rights. If a junior water right holder has concerns regarding the validity of the senior water right making the delivery call, the junior right holder has the opportunity and right to challenge the senior water right in an adjudication proceeding. Thus, there is an avenue for addressing any due process concerns.

12. Finally, a contrary holding would de-stabilize the priority system and frustrate the conjunctive administration of water rights diverting from a common water supply. The Director must be cognizant of the importance under Idaho law of protecting the interests of a senior priority water right holder against interference by a junior priority right holder from a tributary or interconnected water source. Art. XV, § 3, Idaho Const.; Idaho Code §§ 42-106, 42-237a(g), and 42-607. Under the circumstances of the present case, the Director concludes that recognizing the pending deliver call of the members of the Surface Water Coalition is the proper result.

13. Idaho Code § 42-607 provides that the following shall apply during times of scarcity of water when it is necessary to distribute water between water rights in a water district created and operating pursuant to chapter 6, title 42, Idaho Code, in accordance with the priority of those rights:

> [A]ny person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such stream or water supply . . . .

14. Water rights nos. 01-04045, 01-04052, 01-04055, 01-04056, and 01-04057 listed in the Letter as being held by or for the benefit of members of the Surface Water Coalition are beneficial use rights claimed pursuant to Idaho Code § 42-243 and shall be treated as junior in priority for the purposes of distributing water to any decreed, licensed, or permitted water rights. Only those water rights held by or for the benefit of the members of the Surface Water Coalition that are decreed, licensed, or permitted, taking into account overlapping and redundant rights,

shall have their priorities recognized in determining the extent of injury from the exercise of other decreed, licensed, or permitted water rights.

15. According to the Letter, members of the Surface Water Coalition hold entitlements to water in storage projects owned and operated by the United States through the USBR. While legal title to the water in those projects is held by the United States through the USBR, the SRBA District Court has recognized that delivery organizations, such as the members of the Surface Water Coalition, have beneficial or equitable title to storage water described in their contracts with the USBR. *Final Order on Cross-Motions for Summary Judgment*, Consolidated Subcase 91-63 (SRBA Dist. Ct., Idaho, January 7, 2005) (*appeal filed*). Therefore, the Surface Water Coalition has standing to assert rights to storage water in USBR reservoirs on the Snake River upstream of Milner Dam. Moreover, any concern regarding the standing of the members of the Coalition are resolved by the intervention of the USBR in this proceeding.

16. Surface water rights held by the United States through the USBR for the benefit of members of the Surface Water Coalition to divert water from the Snake River to storage for subsequent release for irrigation uses are supplemental to the natural flow water rights held by the members of the Surface Water Coalition. *See* Michael W. Straus, Commissioner, *Substantiating Report: Water Supply for Palisades Reservoir Project, Idaho*, 1946 U.S. Bur. Rec. 162; *see, e.g., Burley Irrigation Dist. v. Eagle*, No. 21406, Findings of Fact ¶ VIII (5th Jud. Dist. Twin Falls Cty., Idaho July 10, 1968), supplemented by *Aberdeen-Springfield Canal Co. v. Eagle*, No. 6117. Supplemental Decree (7th Jud. Dist., Fremont Cty., Idaho Mar. 12, 1969).

17. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

18. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

> The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

19. The issue of how to integrate the administration of surface and ground water rights diverting from a common water source in the Eastern Snake Plain area has been a continuing point of debate for more than two decades. To date, no court has directly and fully addressed the issue of how to integrate the administration of the surface and ground water rights that were historically administered as separate sources. The progress made in adjudicating the ground water rights in the Snake River Basin Adjudication and the development of the reformulated ground water model for the ESPA used by the Department to simulate the effects of ground water depletions on hydraulically-connected tributaries and reaches of the Snake River now allow for the State to address this issue during this period of unprecedented drought.

20. Resolution of the conjunctive administration issue lies in the application of two well established principles of the prior appropriation doctrine: (1) the principle of "first in time is first in right" and (2) the principle of optimum use of Idaho's water. Both of these principles are subject to the requirement of reasonable use.

21. "Priority of appropriations shall give the better right as between those using the water" of the state. Art. XV, § 3, Idaho Const. "As between appropriators, the first in time is first in right." Idaho Code § 42-106.

22. "[W]hile the doctrine of 'first in time is first in right' [applies to ground water rights] a reasonable exercise of this right shall not block full economic development of underground water resources." Idaho Code § 42-226.

23. It is the policy of this state to integrate the appropriation, use, and administration of ground water tributary to a stream with the use of surface water from the stream in such a way as to optimize the beneficial use of all of the water of this state. "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water . . .." IDAPA 37.03.11.020.03; *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 119 (1912).

24. It is the duty of a watermaster, acting under the supervision of the Director, to distribute water from the public water supplies within a water district among those holding rights to the use of the water in accordance with the prior appropriation doctrine as implemented in Idaho law, including applicable rules promulgated pursuant to the Idaho Administrative Procedure Act. *See* Idaho Code § 42-607.

25. Water Districts No. 120 and No. 130 were created to provide for the administration of ground water rights in areas overlying the ESPA in the American Falls area and other areas, pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights.

26. Additionally, watermasters for Water Districts No. 120 and No. 130 were appointed by the Director to perform the statutory duties of a watermaster in accordance with guidelines, direction, and supervision provided by the Director. The Director has given specific directions to the watermasters for Water Districts No. 120 and No. 130 to curtail illegal

diversions, measure and report diversions, and curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

27. In seeking the administration and curtailment of junior priority ground water rights in Water District No. 120, the Surface Water Coalition cannot preclude the administration and curtailment of junior priority ground water rights in Water District No. 130 that are determined to be causing injury to senior priority water rights held by members of the Surface Water Coalition.

28. In accordance with chapter 52, title 65, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. IDAPA 37.03.11. The Conjunctive Management Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. IDAPA 37.03.11.001.

29. Rule 10 of the Conjunctive Management Rules, IDAPA 37.03.11.010, contains the following pertinent definitions:

> **01. Area Having A Common Ground Water Supply**. A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.
>
> **03. Conjunctive Management**. Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply.
>
> **04. Delivery Call**. A request from the holder of a water right for administration of water rights under the prior appropriation doctrine.
>
> **07. Full Economic Development Of Underground Water Resources**. The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42.
>
> **08. Futile Call**. A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.
>
> **14. Material Injury**. Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42.

16. Person. Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character.

17. Petitioner. Person who asks the Department to initiate a contested case or to otherwise take action that will result in the issuance of an order or rule.

19. Reasonably Anticipated Average Rate Of Future Natural Recharge. The estimated average annual volume of water recharged to an area having a common ground water supply from precipitation, underflow from tributary sources, and stream losses and also water incidentally recharged to an area having a common ground water supply as a result of the diversion and use of water for irrigation and other purposes. The estimate will be based on available data regarding conditions of diversion and use of water existing at the time the estimate is made and may vary as these conditions and available information change.

20. Respondent. Persons against whom complaints or petitions are filed or about whom investigations are initiated.

30. As used herein, the term "injury" means "material injury" as defined by Rule 10.14 of the Conjunctive Management Rules.

31. The diversion and use of ground water under existing rights results in an average annual depletion of ground water from the ESPA of nearly 2.0 million acre-feet and does not exceed the "Reasonably Anticipated Average Rate of Future Natural Recharge," consistent with Rule 10.07 of the Conjunctive Management Rules.

32. Rule 20 of the Conjunctive Management Rules, IDAPA 37.03.11.020, contains the following pertinent statements of purpose and policies for conjunctive management of surface and ground water resources:

01. Distribution Of Water Among The Holders Of Senior And Junior-Priority Rights. The rules apply to all situations in the State where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply.

02. Prior Appropriation Doctrine. These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law.

03. Reasonable Use Of Surface And Ground Water. These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

05. Exercise Of Water Rights. These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made.

33. Rule 40 of the Conjunctive Management Rules, IDAPA 37.03.11.040, sets forth the following procedures to be followed for responses to calls for water delivery made by the holders of senior priority surface or ground water rights against the holders of junior priority ground water rights from areas having a common ground water supply in an organized water district:

01. Responding To A Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year period to lessen the economic impact of immediate and complete curtailment; or

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

02. Regulation Of Uses Of Water By Watermaster. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in section 42-604, Idaho Code, and under the following procedures:

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source.

b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director.

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority.

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by section 42-606, Idaho Code.

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated.

03. Reasonable Exercise Of Rights. In determining whether diversion and use of water under rights will be regulated under Rules 40.01.a., or 40.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

04. Actions Of The Watermaster Under A Mitigation Plan. Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan.

34. The Letter filed on January 14, 2005, with the Director by the Surface Water Coalition will be treated pursuant to Conjunctive Management Rule, 40. Rule 40 applies only to areas within Water Districts No. 120 and No. 130.

35. In accordance with Rule 40 of the Conjunctive Management Rules, curtailment of junior priority ground water rights may only occur if the use of water under senior priority rights is consistent with Rule 20.03 of the Conjunctive Management Rules and injury is determined to be caused by the exercise of the junior priority rights. Factors that will be considered in determining whether junior priority ground water rights are causing injury to the senior priority water rights held by or for the benefit of the members of the Surface Water Coalition are set forth in Rule 42 of the Conjunctive Management Rules as follows:

01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

a. The amount of water available in the source from which the water right is diverted.

b. The effort or expense of the holder of the water right to divert water from the source.

c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.

e. The amount of water being diverted and used compared to the water rights.

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

02. Delivery Call For Curtailment Of Pumping. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

36. There currently is no approved and effectively operating mitigation in place to mitigate for injury, if any, to the water rights held by or for the benefit of the members of the Surface Water Coalition.

37. In Idaho, water rights are real property, Idaho Code § 55-101(1). However, water rights are unique because they are usufructuary, *Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935). "[T]he right of property in water is usufructuary, and

consists not so much of the fluid itself as the advantage of its use. . . . [R]unning water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property of the water itself." SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 18 (1911). Being usufructuary, water rights do not stand on their own. Instead, water rights "are the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied . . . ." Idaho Code § 42-101. The usufructuary nature of a water right is found in Article XV, § 1 of the Idaho Constitution, which states in full:

> The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, *is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.*

Emphasis added.

38. In addition, Article XV, § 3 of the Idaho Constitution provides that "[t]he right to divert and appropriate the unappropriated waters of any natural stream *to beneficial uses*, shall never be denied. . . ." Emphasis added. According to the Idaho Supreme Court, "it is against the public policy of the state, as well as against express enactments, for a water user to take from an irrigation canal more water, of that to which he is entitled, than is necessary for the irrigation of his land and for domestic purposes. *The waters of this state belong to the state, and the right to the beneficial use thereof is all that can be acquired.*" *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-324, 227 P. 29, 30 (1924) (emphasis added).

39. Even if an appropriator possesses a right to use up to a certain quantity of water, that right is tempered by the concept of beneficial use. *Schodde*, 224 U.S. 107; *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912).

40. "A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes." *Washington State Sugar v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915).

41. Again, the Idaho Supreme Court "has declared that 'it is against the public policy of the state . . . for a water user to take from an irrigation canal more water, of that to which he is entitled, than is necessary for the irrigation of his land. . . . . That policy logically applies also to a stream supplying several farms, and prohibits appellant from diverting more water than necessary for the beneficial purpose regardless of alleged seniority in right through priority in time." *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029, 1032 (1972).

42. Even when an appropriator has control of public water, the appropriator cannot prevent the state from regulating its use. Idaho Const. Art. XV, § 1; Idaho Code § 42-101. For

example, appropriators are prohibited from committing waste or applying water in a non-beneficial manner:

> It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources. *Reynolds Irrigation District v. Sproat*, 69 Idaho 315, 206 P.2d 774; Constitution, Art. 15; §§ 42-104, 42-222 I.C. To effectuate this policy, the legislature has made it a misdemeanor to waste water from a stream, the waters of which are used for irrigation. § 18-4302 I.C. Under this section and the constitutional policy cited, it is the duty of a prior appropriator to allow the water, which he has the right to use, to flow down the channel for the benefit of junior appropriators at times when he has no immediate need for the use thereof.

Mountain Home Irrigation Dist. v. Duffy, 79 Idaho 435, 442, 319 P.2d 965, 968 (1957). *See Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900) ("It is the policy of the law to prevent wasting of water.").

43. In Idaho, ground water is treated similarly to surface water in terms of appropriation, priority, and the requirement that the water be put to a beneficial use:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.

Idaho Code § 42-226.

Because Idaho Code § 42-226 seeks to promote "*optimum development* of water resources . . . [,]" it is consistent with the Idaho Constitution. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (emphasis added).

44. In *Fellhauer v. People*, the Colorado Supreme Court, in interpreting a portion of Colorado's constitution, which the drafters of the Idaho Constitution considered in crafting Article XV, § 3, reached the same conclusions regarding full or optimal economic development of underground water resources:

> It is implicit in these constitutional provisions that, along with Vested rights, there shall be Maximum utilization of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of Maximum utilization and how constitutionally that doctrine can be integrated into the law of Vested rights. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it.

Fellhauer v. People, 447 P.2d 986, 994 (Colo. 1968).

45. Based upon the Idaho Constitution, Idaho Code, the Conjunctive Management Rules, and decisions by Idaho courts, in conjunction with the reasoning established by the

Colorado Supreme Court in *Fellhauer*, it is clear that injury to senior priority surface water rights by diversion and use of junior priority ground water rights occurs when diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior primary and supplemental water rights for the authorized beneficial use. Because the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. Thus, senior surface water right holders cannot demand that junior ground water right holders diverting water from a hydraulically-connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use.

46. In its Letter, the Surface Water Coalition asserts that:

> The extent of injury equals the amount of water diminished and the cumulative shortages in natural flow and storage water which is the result of groundwater depletions. Impacts have been occurring as a result of ground water depletions and reduced reach accruals for several years, resulting in material injury to the water rights of the Surface Water Coalition.
>
> Any and all water that is pumped under junior groundwater rights that would otherwise accrue to the Snake River to satisfy a senior surface water right, as demonstrated by the model, results in a 'material injury' to the Surface Water Coalition's senior surface water rights.

Letter at p. 3.

47. Contrary to the assertion of the Surface Water Coalition, depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42. The Surface Water Coalition has no legal basis to seek the future curtailment of junior priority ground water rights based on injury alleged by the Coalition to have occurred in prior years.

48. Whether the senior priority water rights held by or for the benefit of members of the Surface Water Coalition are injured depends in large part on the total supply of water needed for the beneficial uses authorized under the water rights held by members of the Surface Water Coalition and available from both natural flow and reservoir storage combined. To administer junior priority ground water rights while treating the natural flow rights and storage rights of the members of the Surface Water Coalition separately would either: (1) lead to the curtailment of junior priority ground water rights, absent mitigation, when there is insufficient natural flow for the senior water rights held by the members of the Surface Water Coalition even though the reservoir space allocated to members of the Surface Water Coalition is full; or (2) lead to the curtailment of junior priority ground water rights, absent mitigation, anytime when the reservoir space allocated to the members of the Surface Water Coalition is not full even though the natural flow water rights held by members of the Surface Water Coalition were completely satisfied. Either outcome is wholly inconsistent with the provision for "full economic development of underground water resources" in Idaho Code § 42-226 articulated as "optim[al] development" in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513, P.2d 627, 636 (1973).

49. The Director has determined that the average of the inflow diverted in 2002 and 2004 for each member of the Coalition provides a reasonable lower-bound estimate of the natural flow that may be divertible in 2005 by each member of the Coalition. *See* Findings 103 and 104.

50. The amounts of water diverted in 1995 are deemed to be the minimum amounts needed for full deliveries to land owners and shareholders served by the members of the Surface Water Coalition. The Director has used the 1995 diversions to predict the shortages in surface water supplies that are reasonably likely for Coalition members in 2005. *See* Findings of Fact 115 and 116.

51. The members of the Surface Water Coalition should not be required to exhaust their available storage water prior to being able to make a delivery call against the holders of junior priority ground water rights. The members of the Coalition are entitled to maintain a reasonable amount of carryover storage water to minimize shortages in future dry years pursuant to Rule 42.01.g of the Conjunctive Management Rules (IDAPA 37.03.11.042.01.g). *See* Findings 118 and 119.

52. The reasonably likely material injury predicted for 2005 is the sum of the shortages set forth in Finding 116, if any, and the shortfalls in predicted carryover as compared to the reasonable amounts of carryover storage set forth in Finding 119, if any. The material injury predicted for 2005 to the members of the Surface Water Coalition is 133,400 acre-feet of water. *See* Finding of Fact 120.

53. Based upon the foregoing Findings of Fact and Conclusions of Law, the Director concludes that members of the Surface Water Coalition will be materially injured in 2005 by ground water depletions in Water Districts No. 120 and No. 130. Holders of certain ground water rights having priorities of February 27, 1979, and later within Water Districts No. 120 and No. 130 are required to either curtail the diversion and use of ground water for the remainder of 2005, provide replacement water to the members of the Surface Water Coalition as mitigation, or a combination of both. The required curtailment or mitigation shall be governed by the following order.

ORDER

The Director enters the following Order in response to the Letter for the reasons stated in the foregoing Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED as follows:

1. The watermasters for Water Districts No. 120 and No. 130 are directed to issue written notices by April 22, 2005, or as soon thereafter as practicable, to the holders of consumptive ground water rights in Water Districts No. 120 and No. 130 having priority dates of February 27, 1979, and later and identified to the watermasters by the Department, including consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, excluding in-house culinary uses. The written notices are to advise the holders of such consumptive ground water rights of this Order and to instruct the holders of such rights that they are required to provide replacement water to the members of the Surface Water Coalition as mitigation for out-of-priority depletions, as provided herein, in amounts equal to the annual depletions to the reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage under their rights as determined using the Department's ground water model for the ESPA. The notices are to also advise such right holders that failure to provide sufficient replacement water will result in their diversions being curtailed for the remainder of 2005 or in future years, as provided herein, in accordance with the provisions of Idaho Code §§ 42-602 and 42-607 and the directions and orders of the Director.

2. Holders of ground water rights affected by this Order where the purpose of use is irrigation shall provide the required replacement water through the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, or Bonneville-Jefferson ground water districts. Holders of ground water rights for irrigation that are not members of one of these ground water districts shall be deemed a nonmember participant for mitigation purposes pursuant to H.B. No. 848 (Act *Relating to the Administration of Ground Water Rights within the Eastern Snake River Plain*, ch. 352, 2004 *Idaho Sess. Laws 1052*) and shall be required to pay the ground water district nearest the lands to which the water right is appurtenant for replacement water as mitigation pursuant to Idaho Code § 42-5259.

3. Holders of ground water rights affected by this Order where the purpose of use is commercial, industrial, or municipal may provide the required replacement water through a ground water district as a nonmember participant for mitigation or may separately or jointly provide the required replacement water.

4. The Department shall allocate the amounts of replacement water required as mitigation to members of the Surface Water Coalition. The amount of replacement water required to mitigate diversions of ground water for irrigation shall be provided by the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, or Bonneville-Jefferson ground water districts as follows:

North Snake Ground Water District:	2,400 acre-feet
Magic Valley Ground Water District:	17,800 acre-feet
Aberdeen-American Falls Ground Water District:	58,700 acre-feet
Bingham Ground Water District:	14,900 acre-feet
Bonneville-Jefferson Ground Water District:	7,200 acre-feet

These amounts equal the increase in reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage that would occur over time based on the ground water model simulations described in Finding 127, except for the Aberdeen-American Falls Ground Water District. The required amount of replacement water for the Aberdeen-American Falls Ground Water District is 12.9 percent more than described in Finding 127 to provide replacement water as mitigation for ground water rights for irrigation that are within Water Districts No. 120 and No. 130 but that are not within any of the ground water districts. Nearly all such rights are located east of American Falls Reservoir in an area adjacent to the Aberdeen-American Falls Ground Water District. *See* Finding 130.

5. The required replacement water can be provided over time on an annual basis in amounts at least equal to the increase in reach gains in the Snake River between the Near Black Foot Gage and Minidoka Gage that would result from curtailment of the affected ground water rights based on simulations using the Department's ground water model for the ESPA. The simulated increase in reach gains in the Snake River from curtailment of affected ground water rights for irrigation in 2005 for the first four years is set forth in Finding 127. The total amount of replacement water provided for mitigation in 2005 shall not be less than 27,700 acre-feet, which equals the amount of the predicted shortage in 2005 set forth in Findings 115 and 116.

6. If all of the replacement water required for mitigation is not provided in 2005, the amount remaining to be provided shall be an obligation for future years and additive to future mitigation requirements, if any, should material injury continue. The amount remaining as a future obligation shall not be cancelled unless the storage space held by the members of the Surface Water Coalition under contract with the USBR fills.

7. The amount of replacement water required, both for 2005 and in future years, can be reduced by foregoing (curtailing) consumptive uses authorized under the affected water rights or other water rights so long as full beneficial use was made under the forgone rights in the prior year.

8. If at any time the mitigation for out-of-priority depletions is not provided as required herein, the associated water rights are subject to immediate curtailment, based on the priorities of the rights, to the extent mitigation has not been provided.

9. As required herein, the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, and other entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water with the Director, to be received in his offices no later than 5:00 pm on April 29, 2005. Requests for extensions to file a plan for good cause will be considered on a case-by-case basis and granted or denied based on the merits of any such individual request for extension.

The plan will be disallowed, approved, or approved with conditions by May 6, 2005, or as soon thereafter as practicable in the event an extension is granted as provided in the order granting the extension. A plan that is approved or approved with conditions will be enforced by the Department and the watermasters for Water Districts No. 120 and No. 130 through curtailment of the associated rights in the event the plan is not fully implemented.

10. The Director will monitor water supply requirements and the water supplies available throughout the irrigation season and may issue additional orders or instructions to the watermasters as conditions warrant.

11. The Director will make a final determination of the amounts of mitigation required and actually provided after the final accounting for surface water diversions from the Snake River for 2005 is complete. To the extent less mitigation is provided than was actually required, a mitigation obligation will carry forward to 2006 and be added to any new mitigation determined to be required for 2006. To the extent more mitigation is provided than was actually required, a mitigation credit will carry forward to 2006 and be subtracted from any new mitigation determined to be required for 2006.

12. The Director will make a determination of the extent of injury reasonably likely to occur to members of the Surface Water Coalition from out-of-priority ground water depletions under water rights within water districts annually after April 1, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 31, and require mitigation or curtailment as warranted without further demand by members of the Coalition until such time that a permanent mitigation plan may be approved.

13. 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 the members of the Surface Water Coalition under contract with the USBR fills. At that time, any remaining debits and credits will cancel.

14. Mitigation requirements resulting from orders of the Director in response to other pending requests for water rights administration of junior priority ground water rights may be in addition to the mitigation requirements set forth herein.

IT IS FURTHER ORDERED that pursuant to Idaho Code § 67-5247 this Order is made effective upon issuance due to the immediate danger to the public welfare posed by the lack of certainty existing among holders of water rights for the diversion and use of ground water for irrigation from the Eastern Snake Plain Aquifer as to whether water will be available under the priorities of their respective rights during the 2005 irrigation season.

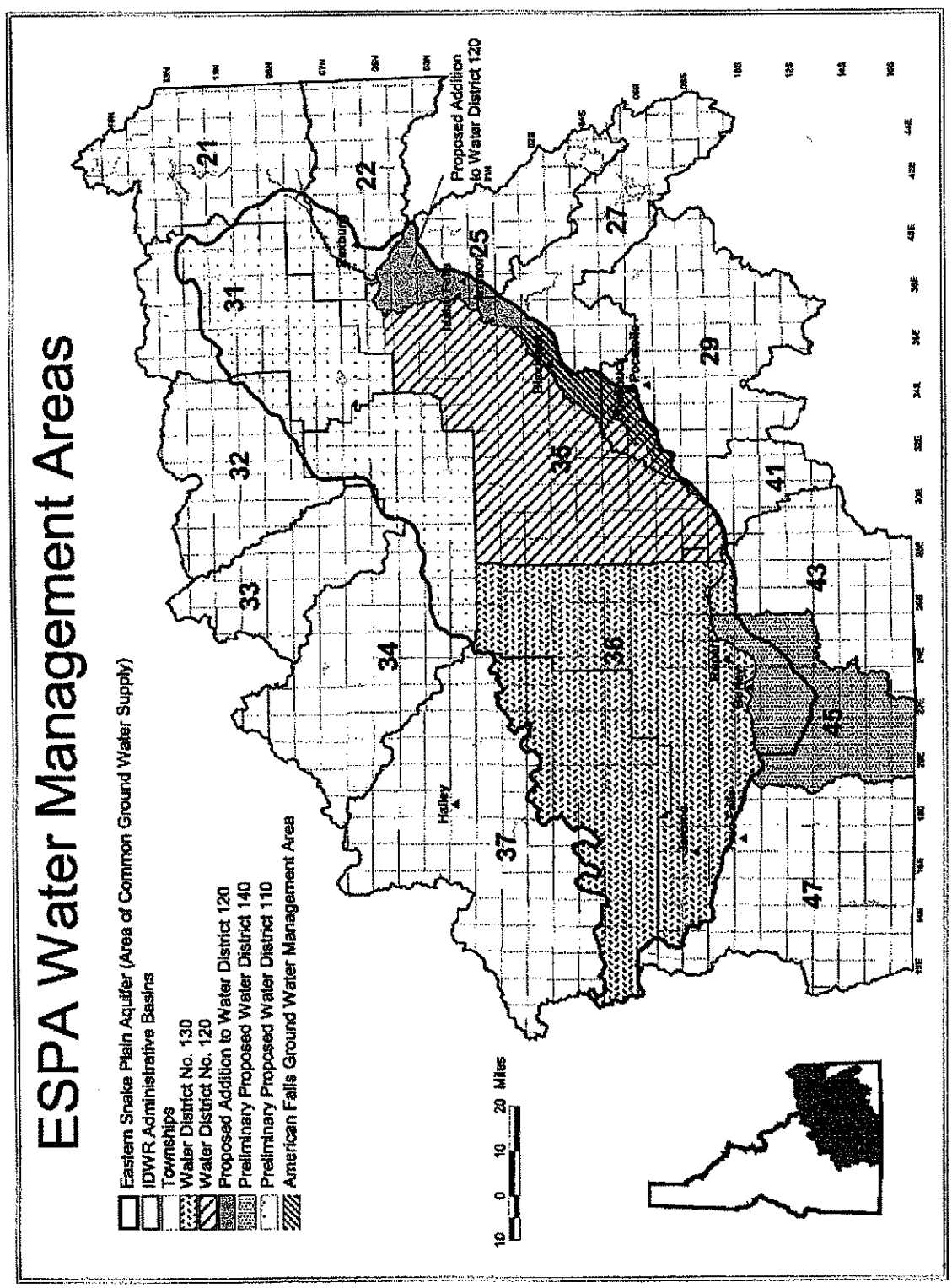
IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

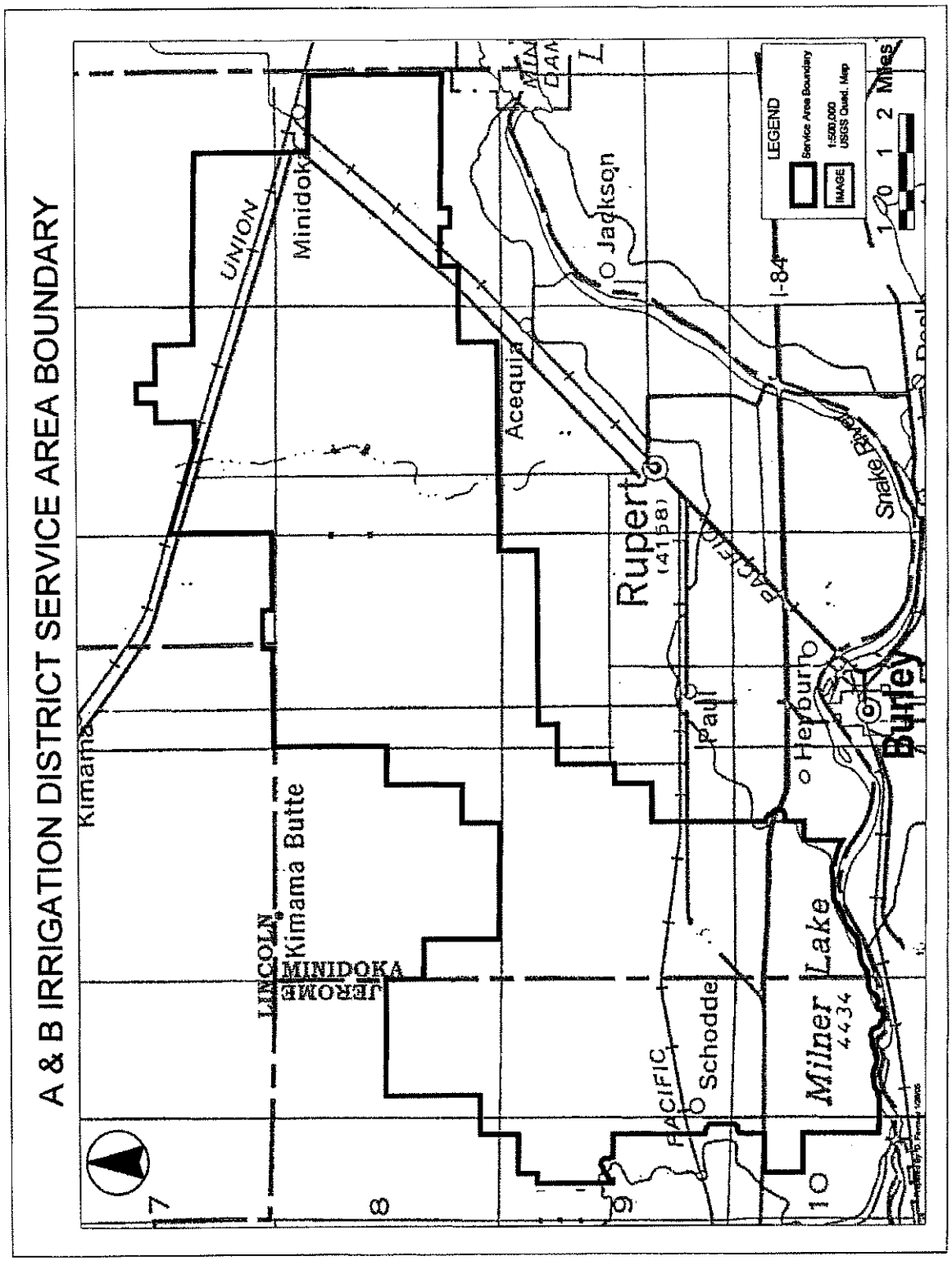
DATED this 2nd day of May 2005.

KARL J. DREHER
Director

ATTACHMENT A



ATTACHMENT B



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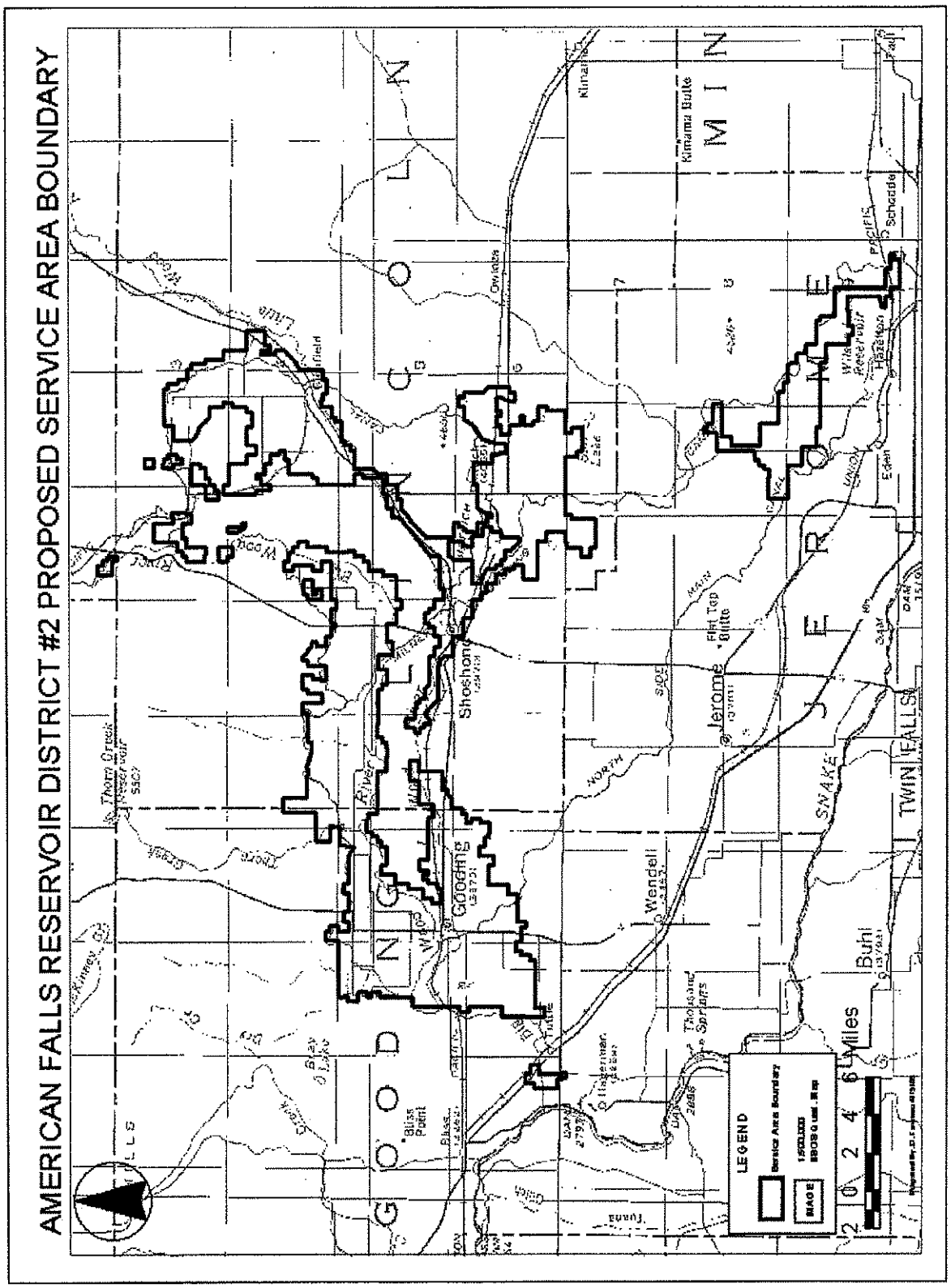
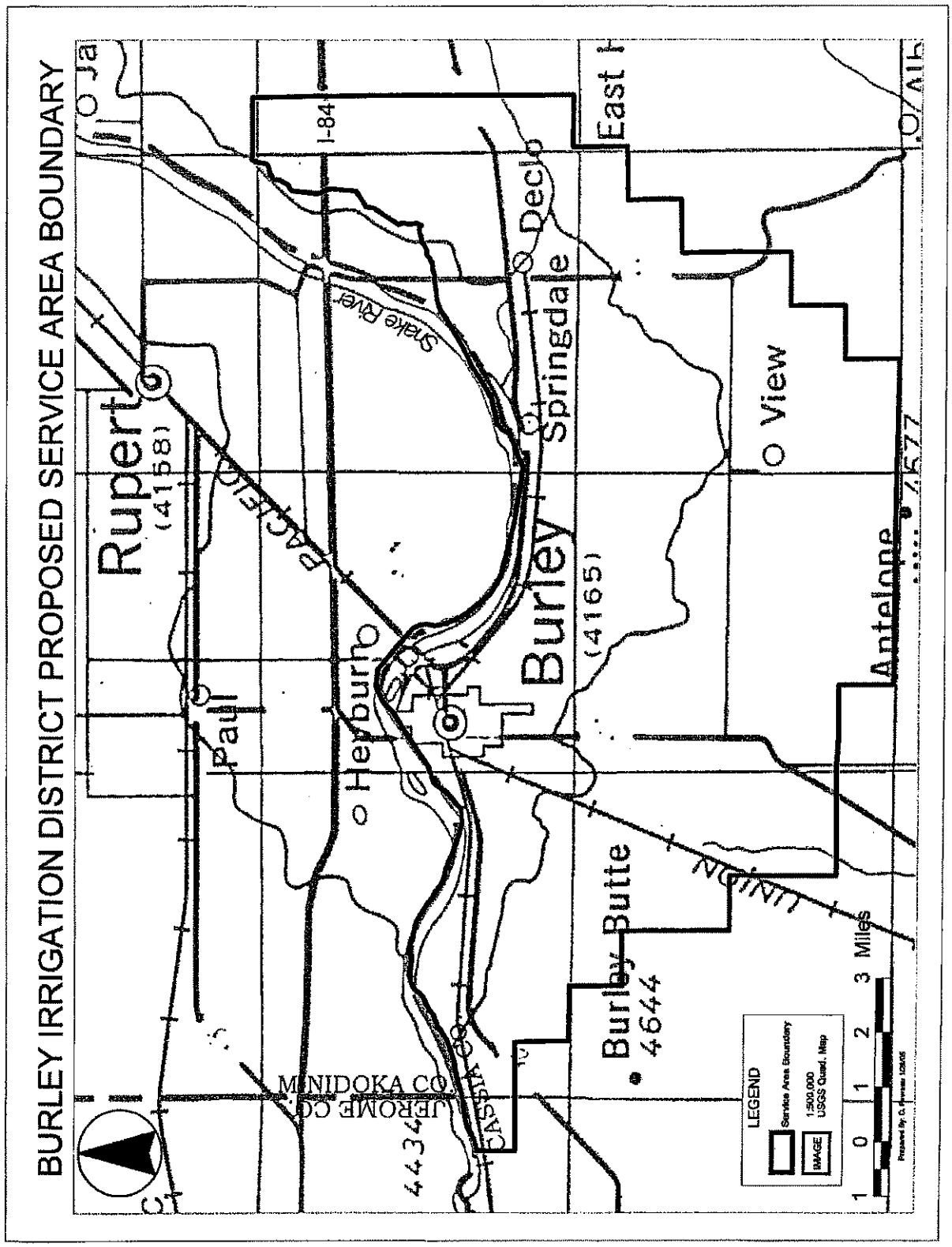
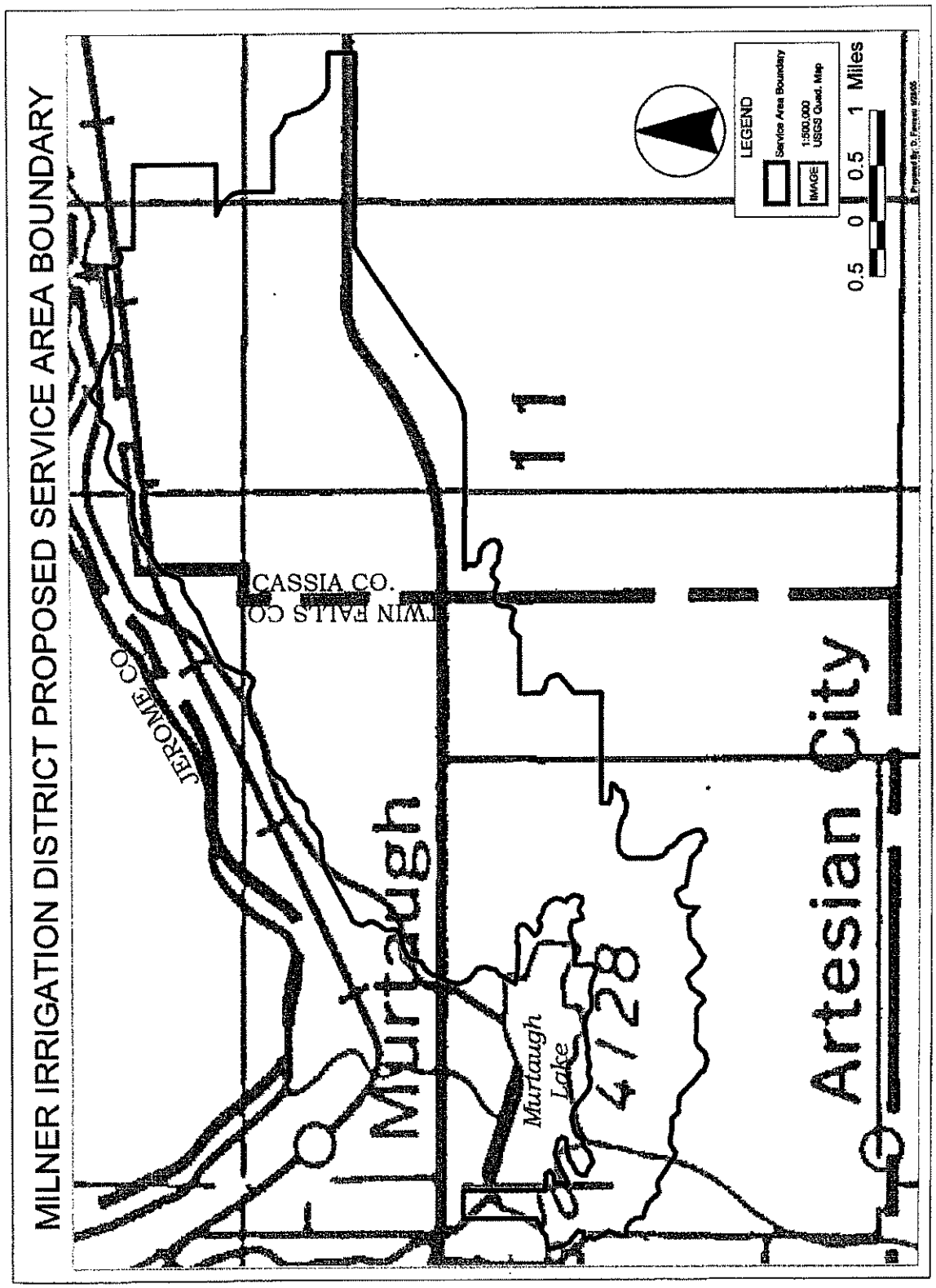


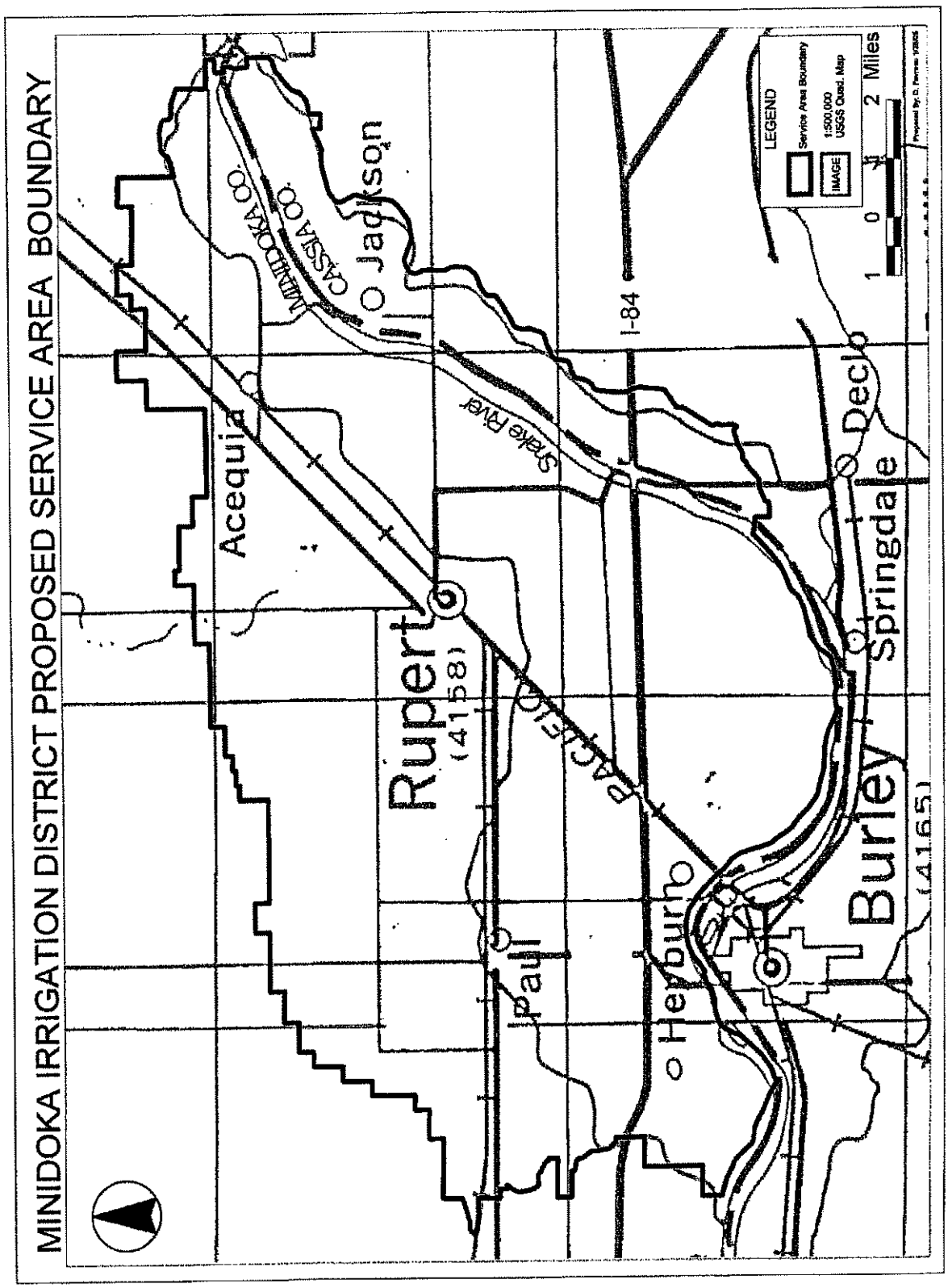
ATTACHMENT D



ATTACHMENT E



ATTACHMENT F



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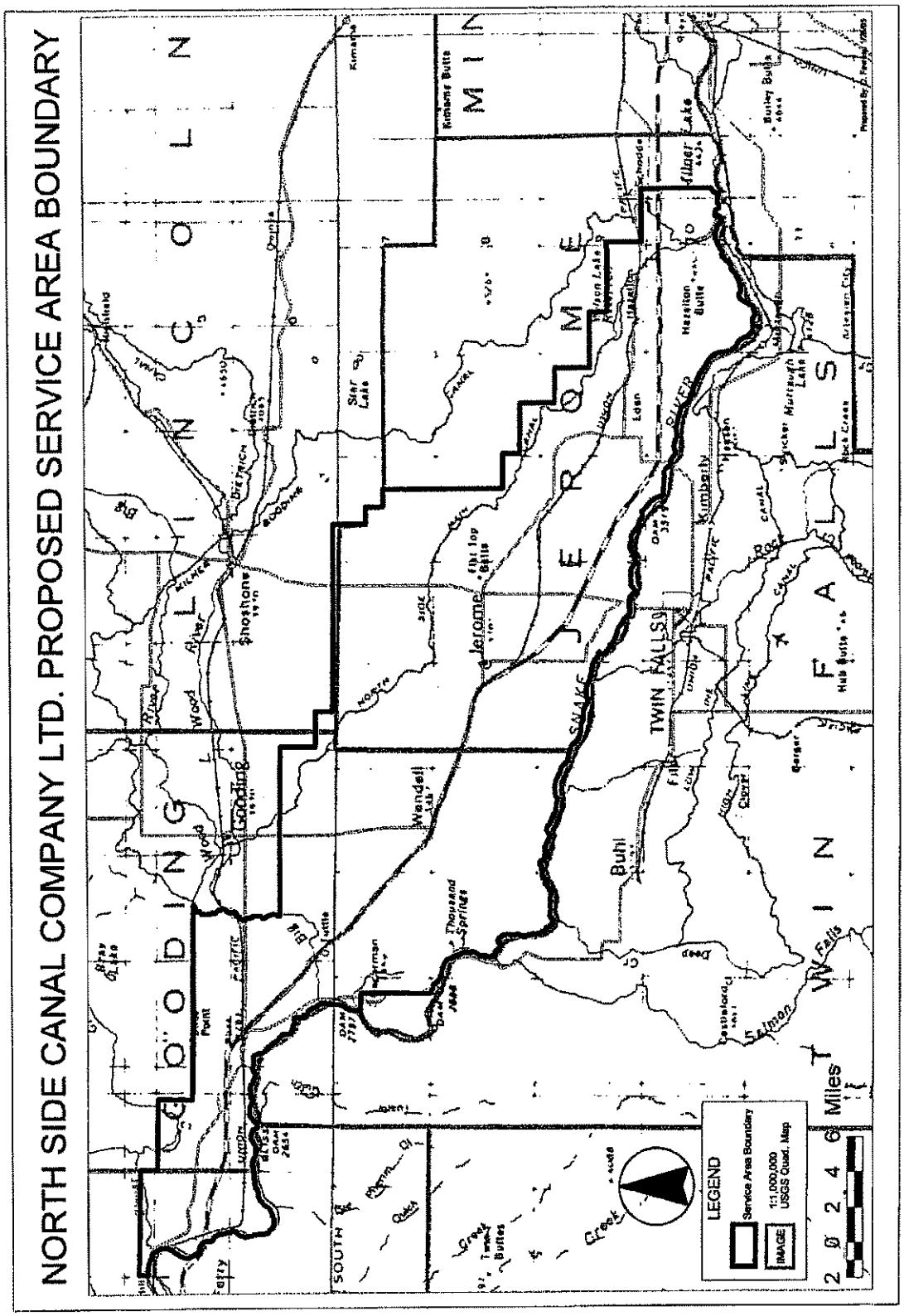

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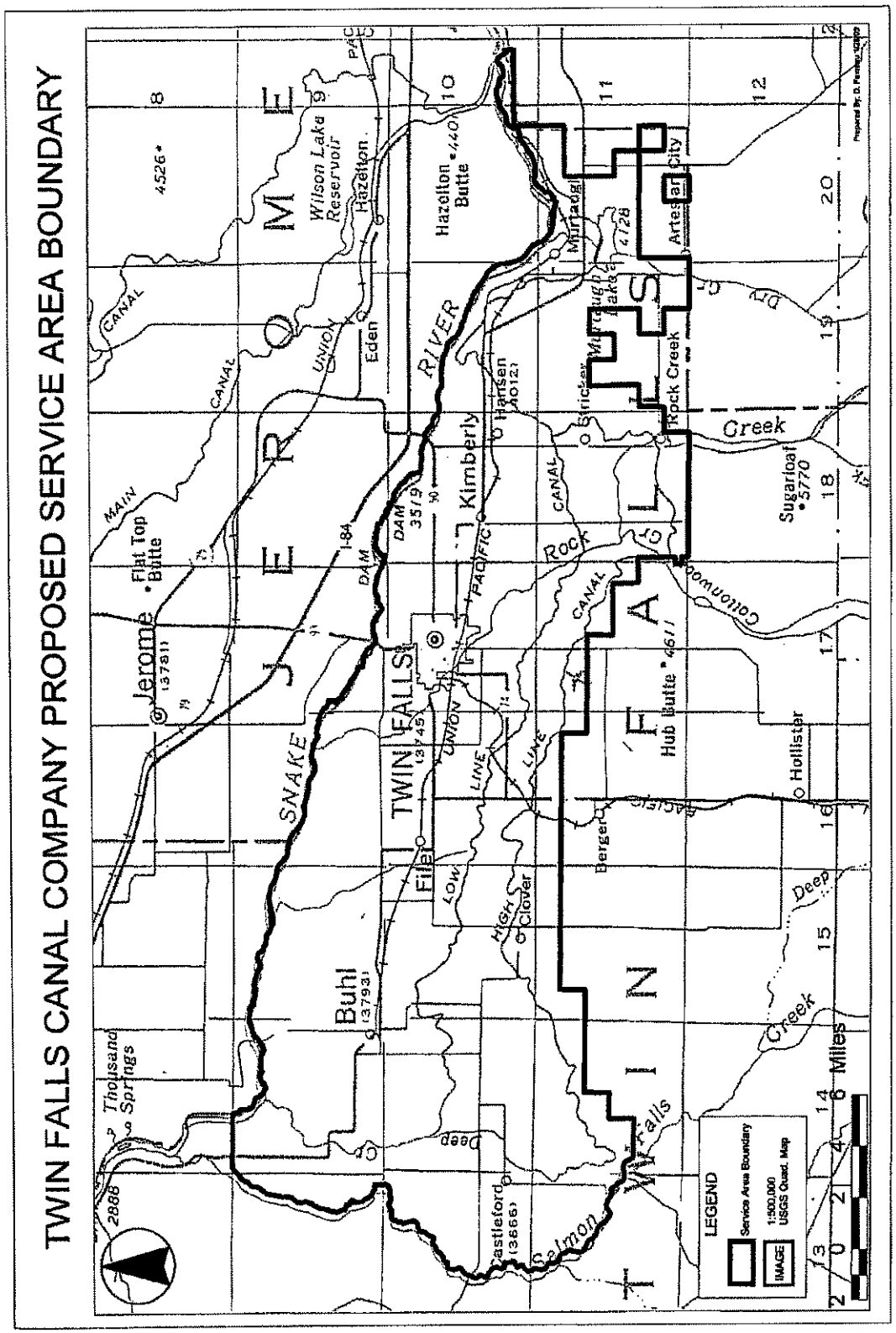

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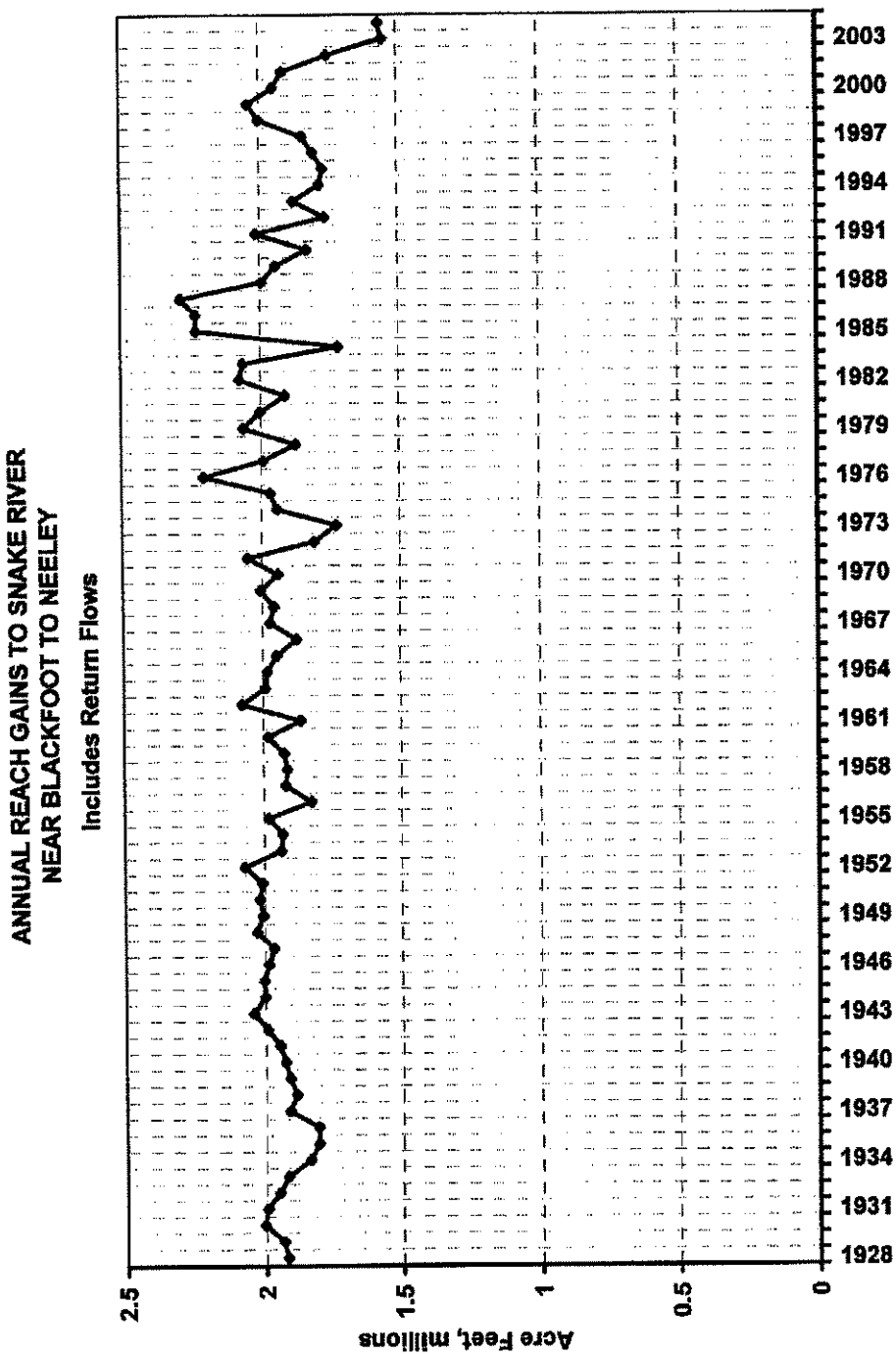

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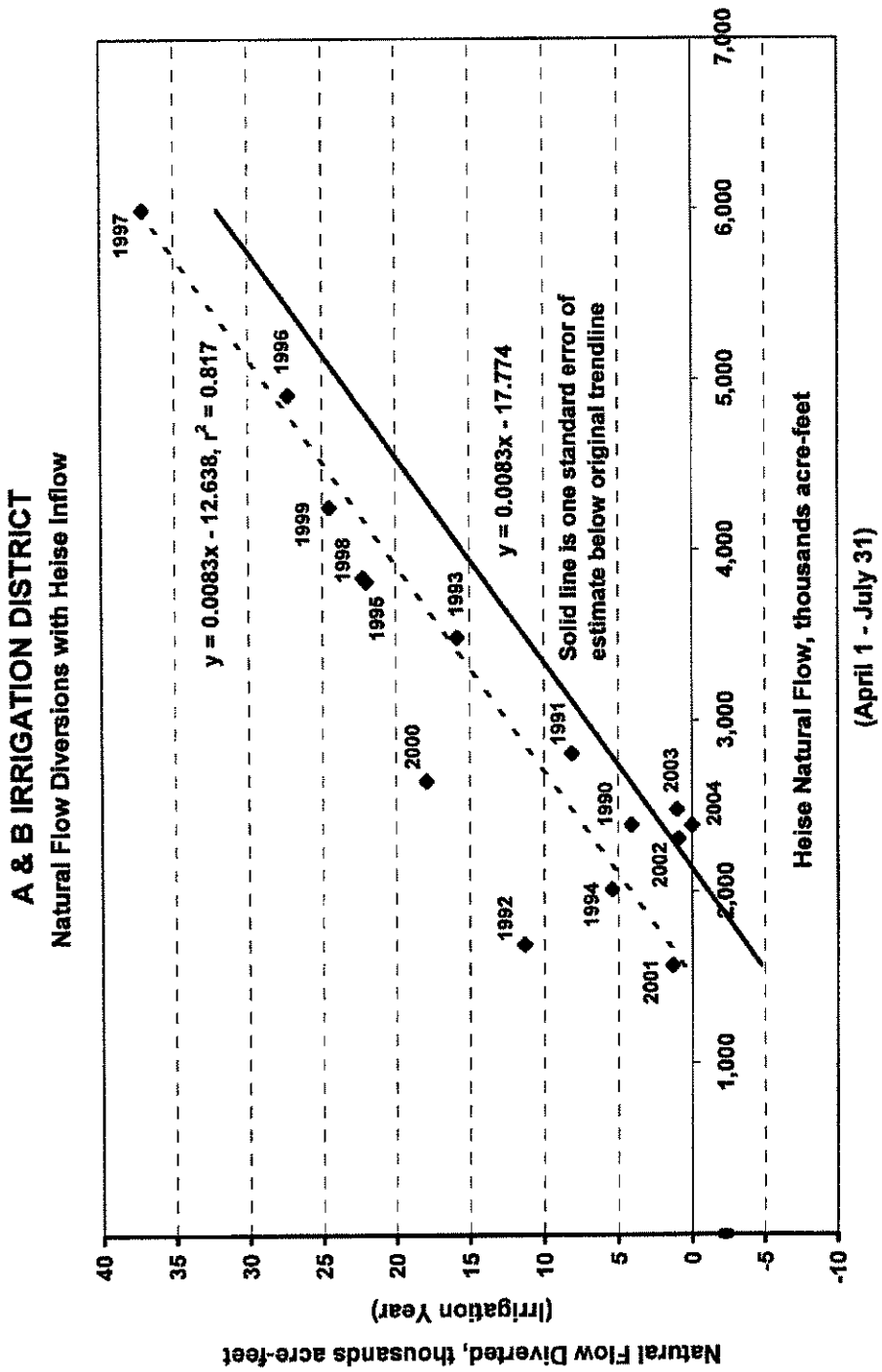

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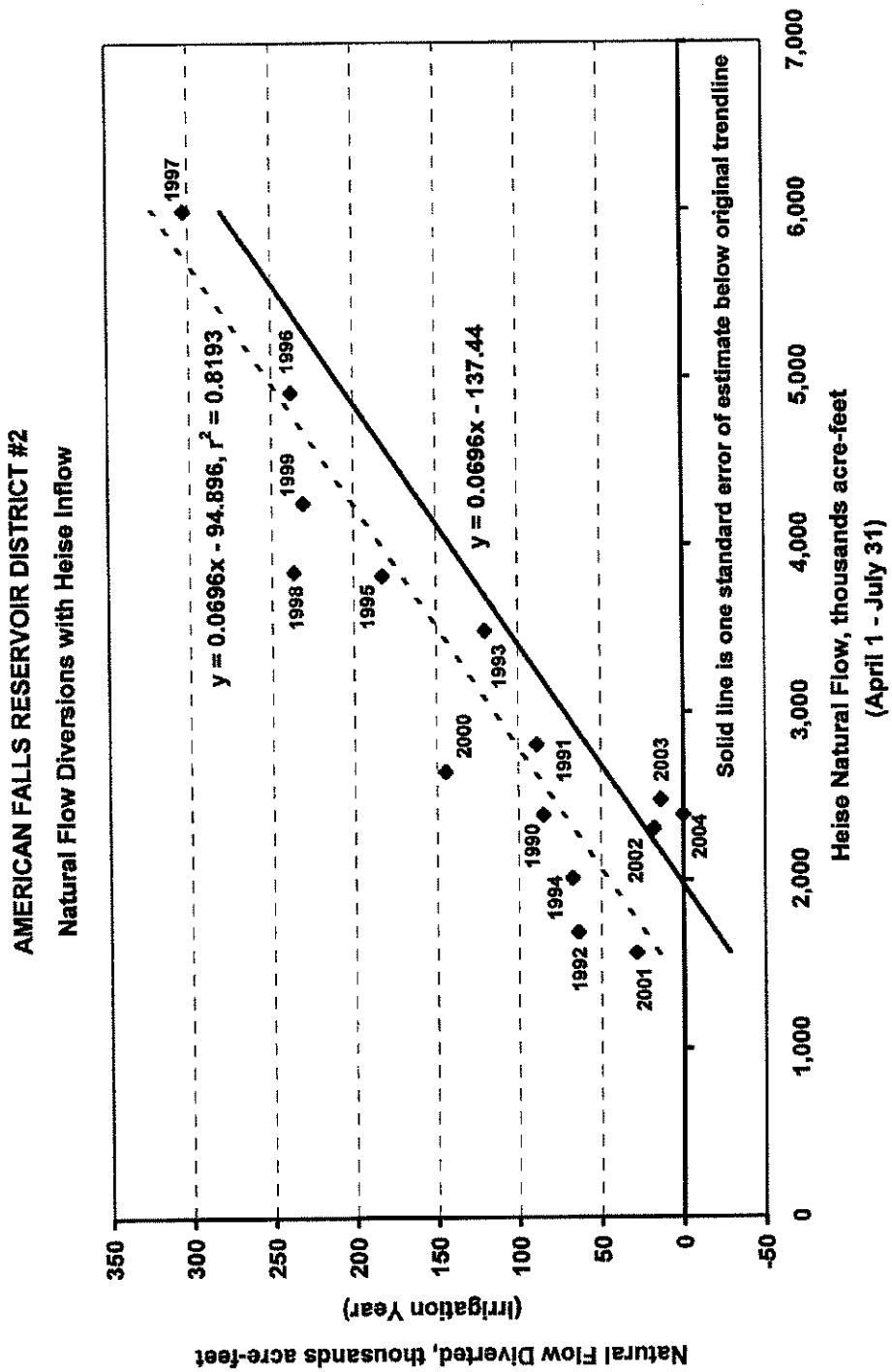

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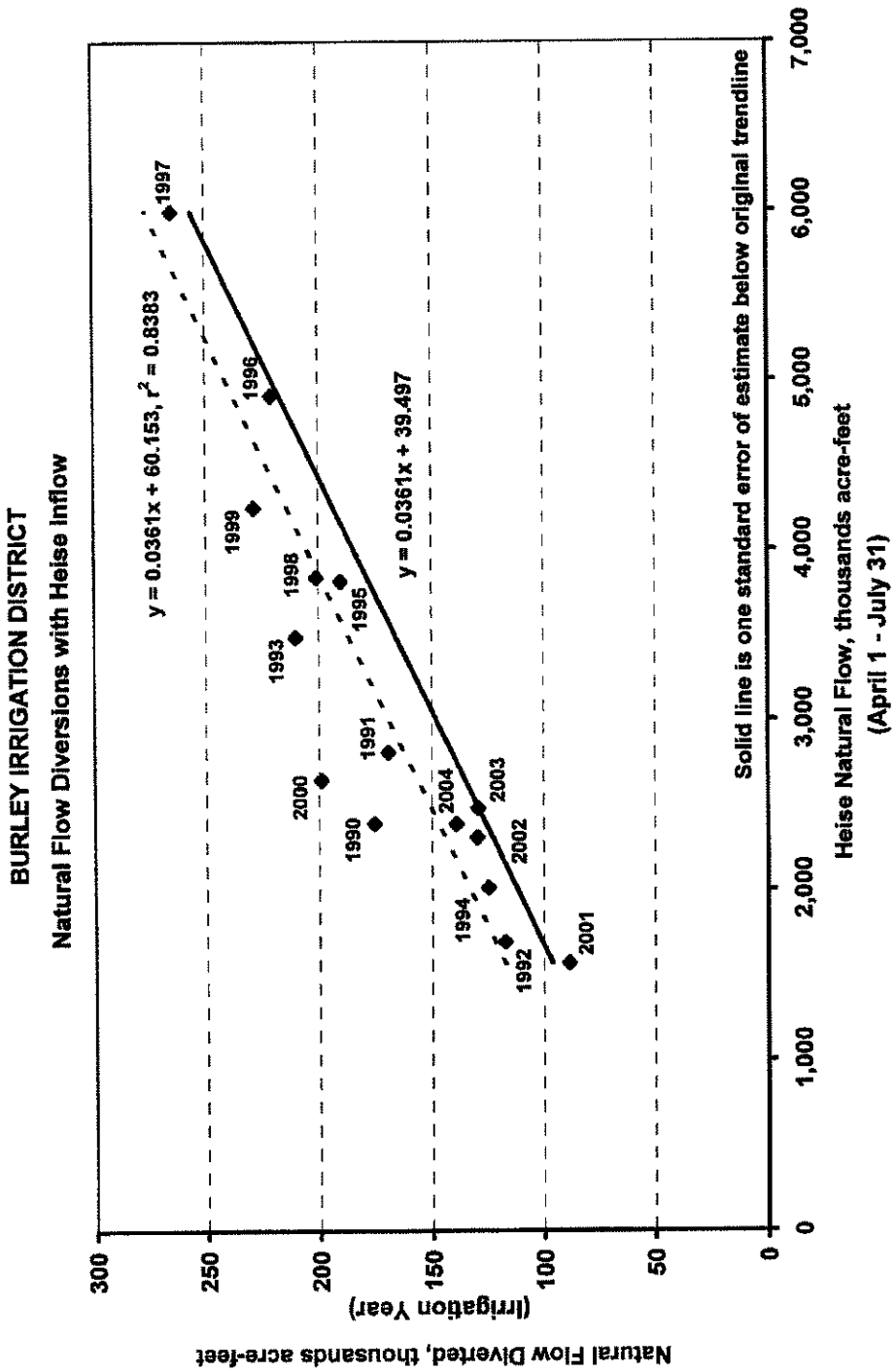

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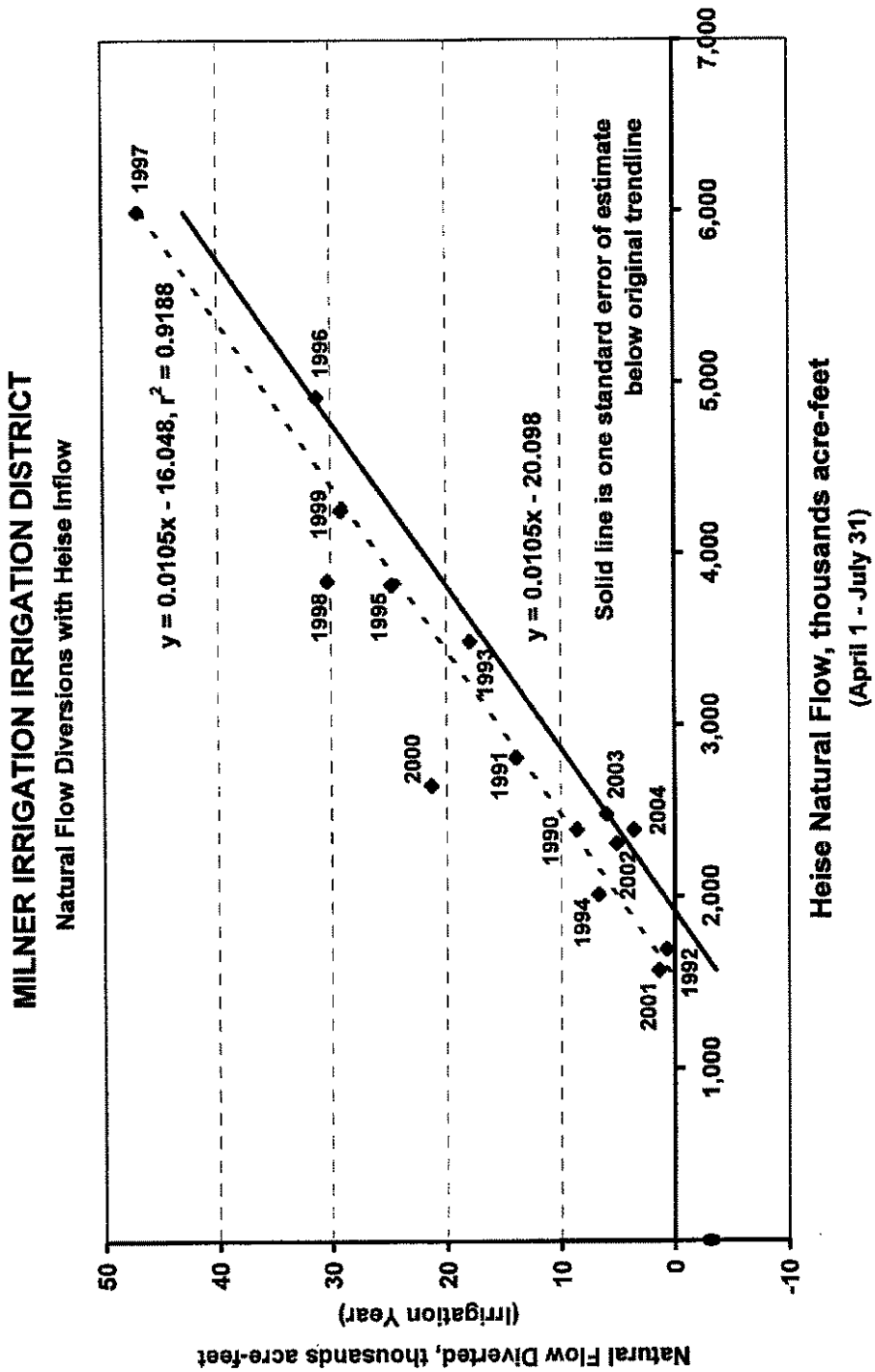

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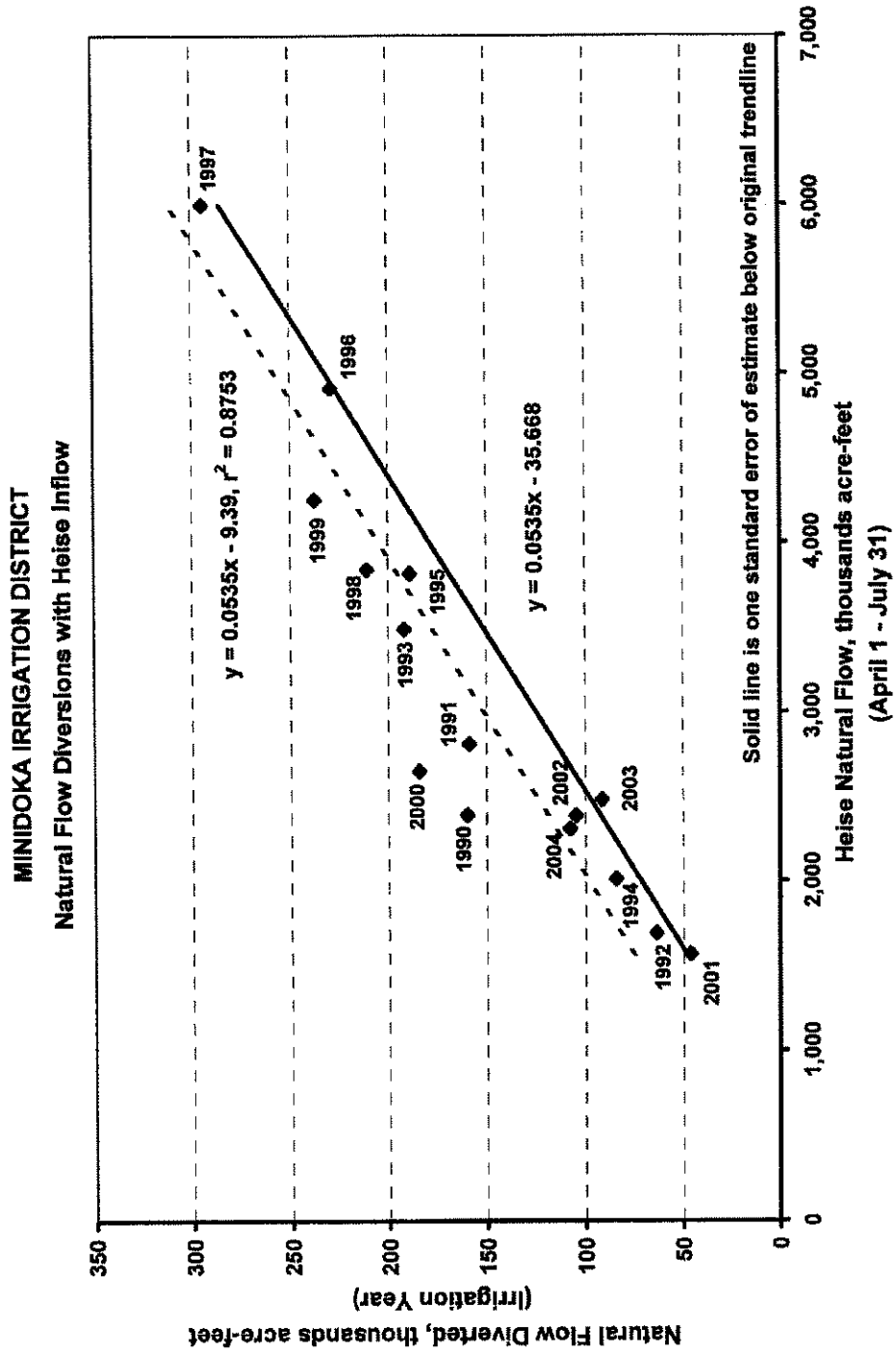

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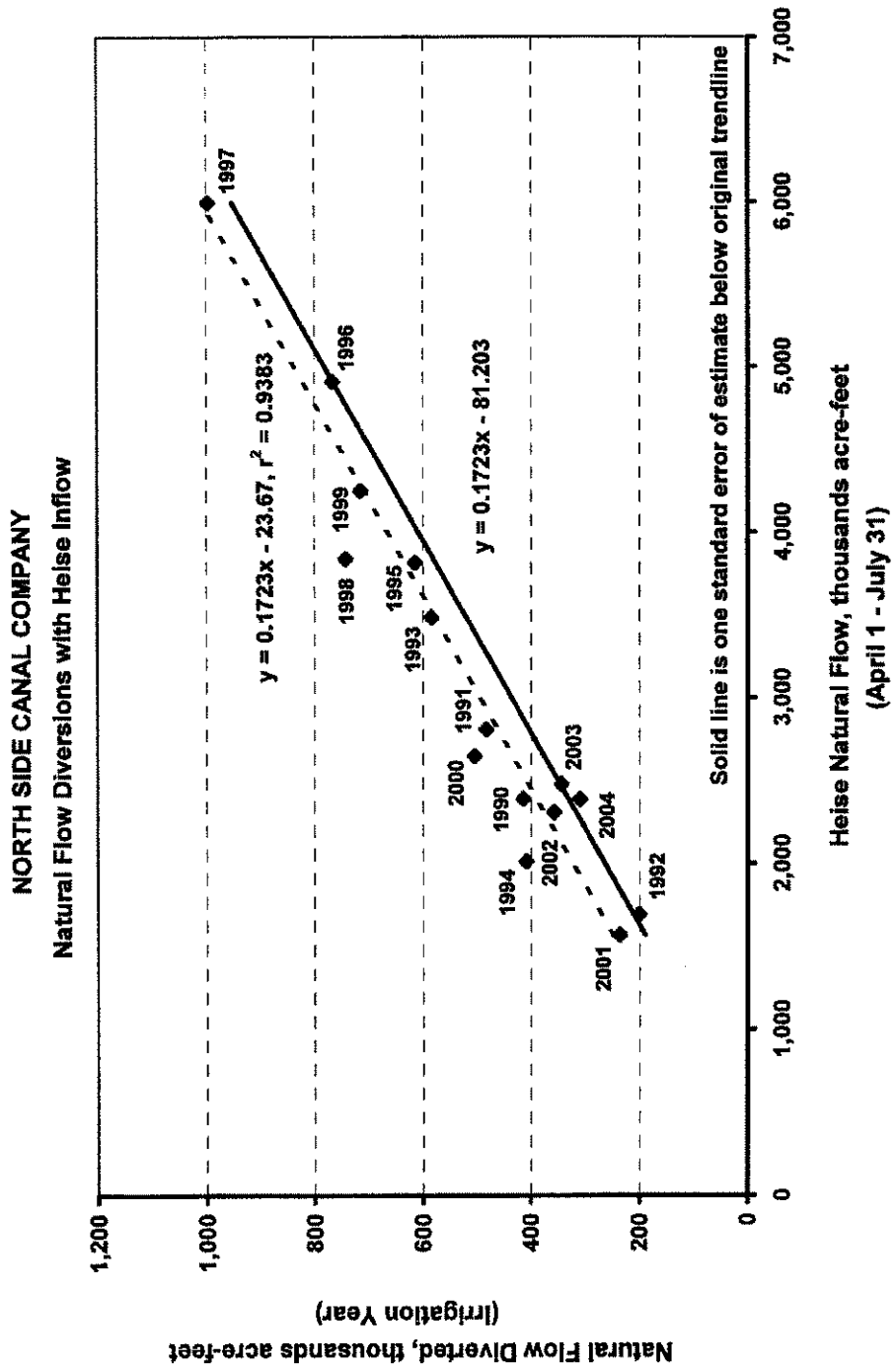

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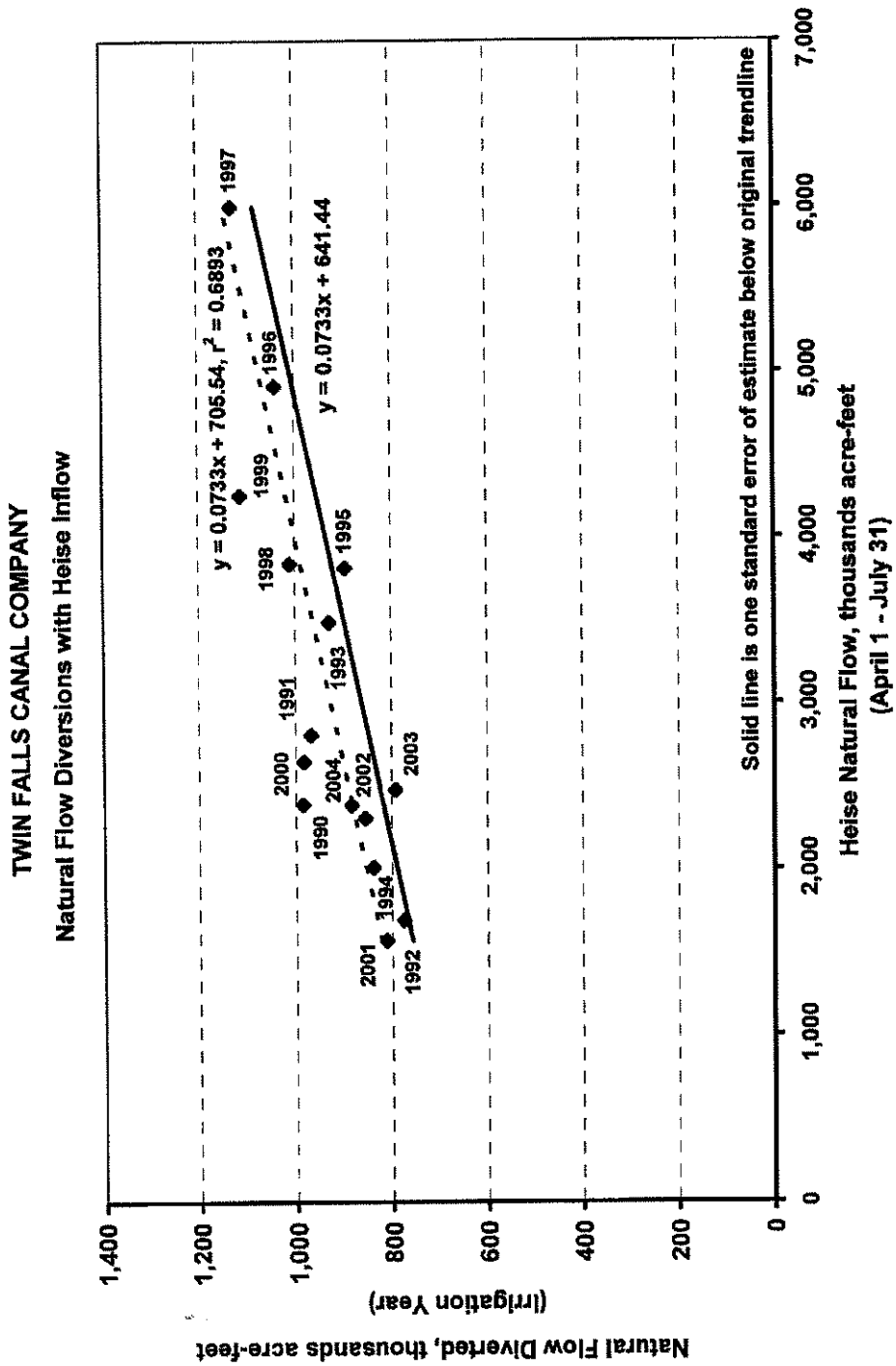

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May, 2005, the above and foregoing was served by the method indicated below and addressed to the following:

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