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	)	**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"). 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 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.

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 Surface Water Coalition. Under Department Rule of Procedure 354, IDAPA 37.01.01.354, action on a petition to intervene can not be taken sooner than seven days after the filing of such petition. Therefore, Idaho Power's request will be addressed separately from the filings of the Surface Water Coalition and IGWA.

Based upon the Director's initial consideration of the Letter, Petition, and IGWA's petitions to intervene, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

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

1. 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.

2. 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.

3. 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).

4. 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.

5. 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.

6. 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.

7. 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.

8. 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 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.

9. 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. 8. 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.

10. 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.

11. 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, 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.

12. 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.

13. 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.

14. 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,
<u>and Status of the American Falls Ground Water Management Area</u>

15. 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.

16. 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.

17. 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.

18. 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.

19. 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 District No. 120.

20. 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. The Director has stated publicly on numerous occasions his intent to add to or create new water districts covering the entire ESPA. The Director expects that petitions seeking authorization for interim administration of water rights in these areas by the Director will be filed with the SRBA District Court by the State of Idaho by December 30, 2005, and that water districts covering all of the ESPA will be in place for the irrigation season of 2006.

Conjunctive Management Rules

21. 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.

22. 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.

23. 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.

24. 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.

25. 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

26. 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."

27. 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.

28. 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.

29. 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.*

30. According to footnote 5, on page 4 of the Letter: "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."

31. 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

32. 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.

33. 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.

34. 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."

Request for Information Filed by the Surface Water Coalition

35. On February 2, 2004, the Surface Water Coalition filed "Request for Information" seeking to have the Department "provide a list of all ground water rights, by administrative basin, including the names and addresses of the holders of those rights, that are located within the Eastern Snake Plain Aquifer but not within an organized water district" including "those ground water rights located within the American Falls Ground Water Management Area." The Request for Information was contingent on the Director not proceeding with the Petition under informal resolution pursuant to Rule 30.03 of the Conjunctive Management Rules and the provisions of Idaho Code § 67-5241.

Petitions to Intervene Filed by the Idaho Ground Water Appropriators

36. On February 3, 2004, IGWA filed two petitions to intervene. The first was filed to intervene in the matter of the Surface Water Coalition Letter requesting administration and curtailment of ground water rights within Water District No. 120, and the second was filed to intervene in those portions of the Surface Water Coalition Petition seeking the 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.

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

37. 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.

38. The A&B Irrigation District holds the following surface water right 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

39. 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.

40. The American Falls Reservoir District #2 holds the following surface water right 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

41. The Burley Irrigation District holds the following surface water rights 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		

42. The Milner Irrigation District holds the following surface water rights 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		

43. 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.

44. The Minidoka Irrigation District holds the following surface water right 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

45. 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.

46. The North Side Canal Company holds the following surface water rights 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	

47. 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.

48. The Twin Falls Canal Company holds the following surface water rights 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		

49. 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.

50. 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. To firm the supply of water for irrigation in the Upper Snake River Basin, 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 help meet irrigation shortages and 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.

51. The USBR holds the following surface water rights 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

52. 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.

53. 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. 50 under the water rights described in Findings Nos. 51 and 52 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

54. Legal title to the water rights described in Findings Nos. 51and 52 is held by the USBR. The beneficial use of the water provided under the storage water contracts described in Finding No. 53 is made by the landowners within the respective service areas of the members of the Service Water Coalition.

55. Water that is supplied through the storage contracts described in Finding No. 53 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 to provide a full water supply for their respective irrigation needs.

Initial Findings in Response to Letter, Petition, and Request for Information Filed by the Surface Water Coalition

56. The Petition filed by the Surface Water Coalition did not include the names, addresses, and description of the water rights held by ground water users who are alleged by the Coalition to be causing material injury to the surface water rights held by 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. In its Request for Information, the Surface Water Coalition claims that the Coalition does not possess the required information and that the required information cannot be reasonably determined by a search of public records.

57. The Department maintains complete records for all claimed, permitted, licensed, and decreed water rights authorizing the diversion and use of ground water from the ESPA. These records are fully accessible to members of the Surface Water Coalition. In addition, the

Department provides a water right search tool at its web site www.idwr.idaho.gov under "On-Line Data." This tool allows anyone with internet access to identify the names, addresses, priority dates, authorized diversion rates, authorized diversion volumes, location of points of diversion, location of places of use, and other information regarding any recorded water right for the diversion of ground water from the ESPA.

58. 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.

59. 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 436,000 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 190,000 acre-feet annually, an amount equal to 34 percent of the total average annual ground water depletions in Water District No. 130.

60. 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.

61. 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 (April 1980 through April 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 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.

62. 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"), the Upper Snake River Basin has experienced the worst consecutive period of drought years on record.

63. Whether ground water depletions result in 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, otherwise available to each member of the Coalition in that year. For example, in 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. 38, 40, 41, 42, 44, 46, and 48) supplemented by stored water (described in Finding No. 53) 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 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 injury to the members of the Surface Water Coalition in 1997.

64. Using the Department's ground water model and under contract with the Department, IWRRI simulated the effects of curtailing all ground water rights excluding ground water rights held by or for the benefit of the Fort Hall Indian Tribe. The simulated curtailment included ground water rights held by the United States for the benefit of members of the A&B Irrigation District. The results from this simulation showed that at steady-state conditions following curtailment there would be nearly 788,000 acre-feet of additional water annually than there otherwise would be in the reach of the Snake River from the Near Blackfoot Gage to the Neeley Gage. The simulations also showed that curtailment would need to occur for 36 consecutive years for 90 percent of this increase in reach gain accruals to the Snake River to occur. IWWRI Technical Report 04-023.

65. Other than ground water diversions from the ESPA for domestic, commercial, municipal, and industrial uses, which account for 5 percent of the ground water diverted from the ESPA and significantly less than 5 percent of ground water depletions, ground water is not being diverted from the ESPA for consumptive uses on the date of this Order.

66. Because the irrigation season has not yet started, the members of the Surface Water Coalition are not authorized to divert natural flow or storage water under their rights for irrigation on the date of this Order.

67. On the date of this Order, the United States through the USBR is authorized to divert water from the Snake River for reservoir storage under the water rights described in Findings Nos. 51 and 52 for the benefit of the members of the Surface Water Coalition. Historic ground water depletions are causing reductions in the flows of the Snake River and its tributaries

and reductions in the amount of water that could otherwise be diverted by the United States for the benefit of the Surface Water Coalition.

68. 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 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.

69. The USBR and USACE jointly issue forecasts each year for unregulated inflow at the Heise Gage on February 1, for the period February 1 through July 31; on March 1, for the period March 1 through July 31; on April 1, for the period April 1 through July 31; and on 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 on April 1 is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.

70. 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. 68 and 69.

71. The forecast procedures of the USBR and USACE use snow and precipitation data from many locations. However, the most representative Snotel site for overall snowpack conditions for the Upper Snake River Basin is located at the Lewis Lake Divide in the headwaters of the Snake River in Wyoming. As of February 14, the snow water equivalent measured at the Lewis Lake Divide site was 16.9 inches, or 65 percent of the 30-year average snow water equivalent for February 14.

72. Although snowpack conditions in the Upper Snake River Basin are substantially below normal, a reasonably likely projection of the amount of fill in the reservoirs operated by the USBR for the benefit of the members of the Surface Water Coalition and a reasonably likely projection of the total amount of water that may be available to the members of the Surface Water Coalition under their respective rights can not be determined with reasonable certainty until at least April 1.

CONCLUSIONS OF LAW

1. The authority for the Director to issue this interlocutory order is contained in IDAPA 37.01.01.710:

> Interlocutory orders are orders that do not decide all previously undecided issues presented in a proceeding, except the agency may by order decide some of the issues presented in a proceeding and provide in that order that its decision on those issues is final and subject to review by reconsideration or appeal, but is not final on other issues.

2. 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 . . . .

3. Water rights nos. 01-04045, 01-04052, 01-04055, 01-04056, and 01-04057 listed in the Letter and Petition 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.

4. According to the Letter and Petition, 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) (motion for *reconsideration pending)*. Therefore, the Surface Water Coalition has standing to assert rights to storage water in USBR reservoirs on the Snake River upstream of Milner Dam.

5. 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.

6. According to its Petition, the Surface Water Coalition seeks designation of the Eastern Snake Plain as a Ground Water Management Area. Idaho Code § 42-233b provides the Director with the authority to create ground water management areas:

> "Ground water management area" is defined as any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area. Upon designation of a ground water management area the director shall publish notice in two (2) consecutive weekly issues of a newspaper of general circulation in the area.
>
> When a ground water management area is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.
>
> Applications for permits made within a ground water management area shall be approved by the director only after he has determined on an individual basis that sufficient water is available and that other prior water rights will not be injured.
>
> The director may require all water right holders within a designated water management area to report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.
>
> The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given.

7. To the extent members of the Surface Water Coalition may be entitled to relief through the curtailment of junior priority ground water rights diverting from the ESPA that are not within an organized water district, such relief could occur no sooner than the irrigation season of 2006 after an order for such curtailment issued before September 1, 2005.

8. Since water districts created pursuant to chapter 6, title 42, Idaho Code, operating as described in subsequent Conclusions of Law herein, are expected to be in place across all of the ESPA prior to the irrigation season of 2006, within which junior priority water rights can be curtailed as necessary to supply the prior rights of others, no additional relief to the members of the Surface Water Coalition would be provided for through the creation of a ground water management area encompassing all of the ESPA.

9. 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.

10. 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."

11. 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.

12. 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.

13. 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.

14. In addition to seeking designation of the ESPA as a ground water management area, the Surface Water Coalition seeks administration and curtailment of junior priority ground water rights in Water District No. 120, in portions of the ESPA not within a water district created pursuant to chapter 6, title 42, Idaho Code, and in the American Falls Ground Water Management Area.

15. In seeking the administration and curtailment of junior priority ground water rights, 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.

16. In accordance with chapter 52, title 65, Idaho Code, rules regarding the conjunctive management of surface and ground water were adopted by the Department, 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.

17. 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.

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

19. 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.

20. 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.

21. Rule 30 of the Conjunctive Management Rules, IDAPA 37.03.11.030, sets forth procedures for responding to calls for water delivery made by senior water right holders against junior water right holders within areas of the State that are not within organized water districts:

01. Delivery Call (Petition) When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at least, the following in addition to the information required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 230: (10-7-94).

a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water.

b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records.

c. All information, measurements, data or study results available to the petitioner to support the claim of material injury.

d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated.

02. Contested Case. The Department will consider the matter as a petition for contested case under the Department's Rules of Procedure, IDAPA 37.01.01. The petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 203. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter.

03. Informal Resolution. The Department may initially consider the contested case for informal resolution under the provisions of Section 67-5241, Idaho Code, if doing so will expedite the case without prejudicing the interests of any party.

04. Petition For Modification Of An Existing Water District. In the event the petition proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, and the water rights have been adjudicated, the Department may consider such to be a petition for modification of the organized water district and notice of

proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure.

05. Petition For Creation Of A New Water District. In the event the petition proposes regulation of ground water rights from a ground water source or conjunctively with surface water rights within an area having a common ground water supply which is not in an existing water district, and the water rights have been adjudicated, the Department may consider such to be a petition for creation of a new water district and notice of proposed creation of a water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure.

06. Petition For Designation Of A Ground Water Management Area. In the event the petition proposes regulation of ground water rights from an area having a common ground water supply within which the water rights have not been adjudicated, the Department may consider such to be a petition for designation of a ground water management area pursuant to Section 42-233(b), Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure.

07. Order. Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions:

a. Deny the petition in whole or in part;

b. Grant the petition in whole or in part or upon conditions;

c. Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district;

d. Incorporate an area having a common ground water supply into an organized water district following the procedures of Section 42-604, Idaho Code, provided that the ground water rights that would be incorporated into the water district have been adjudicated relative to the rights already encompassed within the district;

e. Create a new water district following the procedures of Section 42-604, Idaho Code, provided that the water rights to be included in the new water district have been adjudicated;

f. Determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and respondents and initiate such adjudication pursuant to Section 42-1406, Idaho Code;

g. By summary order as provided in Section 42-237 a.g., Idaho Code, prohibit or limit the withdrawal of water from any well during any period it is determined that water to fill any water right is not there available without causing ground water levels to be drawn below the reasonable ground water pumping level, or would affect the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. The Director will take into consideration the existence of any approved mitigation plan before issuing any order prohibiting or limiting withdrawal of water from any well;

h. Designate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights.

08. Orders For Interim Administration. For the purposes of Rule Subsections 030.07.d. and 030.07.e., an outstanding order for interim administration of water rights issued by the court pursuant to Section 42-1417, Idaho Code, in a general adjudication proceeding shall be considered as an adjudication of the water rights involved.

09. Administration Pursuant To Rule 40. Upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.

10. Administration Pursuant To Rule 41. Upon the designation of a ground water management area, the diversion and use of water within such area shall be administered in accordance with the priorities of the various water rights as provided in Rule 41.

22. 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.

23. Rule 41 of the Conjunctive Management Rules, IDAPA 37.03.11.041, sets forth the following procedures for administration of diversion and use of water within a ground water management area:

01. Responding To A Delivery Call. When a delivery call is made by the holder of a senior-priority ground water right against holders of junior-priority ground water rights in a designated ground water management area alleging that the ground water supply is

insufficient to meet the demands of water rights within all or portions of the ground water management area and requesting the Director to order water right holders, on a time priority basis, to cease or reduce withdrawal of water, the Director shall proceed as follows:

a. The petitioner shall be required to submit all information available to petitioner on which the claim is based that the water supply is insufficient.

b. The Director shall conduct a fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area.

02. Order Following the hearing, the Director may take any or all of the following actions:

a. Deny the petition in whole or in part;

b. Grant the petition in whole or in part or upon conditions;

c. Find that the water supply of the ground water management area is insufficient to meet the demands of water rights within all or portions of the ground water management area and order water right holders on a time priority basis to cease or reduce withdrawal of water, provided that the Director shall consider the expected benefits of an approved mitigation plan in making such finding;

d. Require the installation of measuring devices and the reporting of water diversions pursuant to Section 42-701, Idaho Code.

03. Date And Effect Of Order. Any order to cease or reduce withdrawal of water will be issued prior to September 1 and shall be effective for the growing season during the year following the date the order is given and until such order is revoked or modified by further order of the Director.

04. Preparation Of Water Right Priority Schedule For the purposes of the Order provided in Rule Subsections 041.02 and 041.03, the Director will utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule.

24. The Letter and Petition filed on January 14, 2005, with the Director by the Surface Water Coalition will be treated pursuant to Conjunctive Management Rules 30, 40, and 41. Rule 30 applies only to areas of the ESPA that are not within Water Districts No. 120 and No. 130 or within the American Falls Ground Water Management Area. Rule 40 applies only to areas within Water Districts No. 120 and No. 130. Rule 41 applies only to areas within the American Falls Ground Water Management Area.

25. In accordance with Rules 30, 40, and 41 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.

26. 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.

27. 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.

28. 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. Therefore, even if an appropriator possesses a right to use a certain quantity of water, that right is tempered by the concept of beneficial use. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912); *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912).

29. 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).

30. 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.

31. 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).

32. 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.

33. In its Letter and Petition, 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; *see also Petition* at ¶ 18

> Similarly, Petitioners' senior storage water rights, including carry-over supplies, have also been interfered with and reduced by diversions under junior ground water rights.

Petition at ¶19.

34. 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.

35. 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).

36. Given present snowpack conditions and low carry-over storage in reservoirs in the Upper Snake River Basin, injury to the senior priority water rights held by or for the benefit of the members of the Surface Water Coalition is likely during the 2005 irrigation season. However, the extent of the likely injury is not reasonably determinable at this time because: (1) it is presently outside the authorized season of use for the rights held by the members of the Surface Water Coalition; and (2) a reasonable projection of the amount of fill in the reservoirs operated by the USBR for the benefit of the members of the Surface Water Coalition and a reasonably likely projection of the total amount of water that may be available to the members of the Surface Water Coalition under their respective rights can not be determined with reasonable certainty until at least April 1, 2005, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for period April 1 through July 1.

37. If injury to the senior priority water rights held by or for the benefit of the members of the Surface Water Coalition is determined to be occurring on an individual member basis after April 1, 2005, because of the diversion and use of ground water from the ESPA under junior priority rights, the Director will order mitigation or curtailment of junior ground water diversions in at least Water Districts No. 120 and 130 to the extent of that injury, in accordance with Idaho law.

38. In order to make a determination of the likely extent of injury as soon after April 1 as is practicable, the Surface Water Coalition must submit the following information for the past fifteen (15) irrigation seasons, 1990 to 2004, for each of its respective member entities:

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.

39. The Director should deny the request by the Surface Water Coalition for designation of the ESPA as a ground water management area, and hold for further action the requests for administration and curtailment of ground water rights within the areas of the ESPA located within an organized water district, located within an existing ground water management area, and located outside an organized water district or ground water management area.

40. The Director should deny the Request for Information filed by the Surface Water Coalition but the Department should assist the Surface Water Coalition in identifying ground water rights in the ESPA pursuant to the provisions of Idaho Code § 42-221J.

41. Pursuant to Department Rule of Procedure 353, IDAPA 37.01.01.353, the Director should grant the petition to intervene filed by IGWA in the matter of the Surface Water Coalition Letter requesting administration and curtailment of ground water rights within Water District No. 120. IGWA has shown that the ground water districts and holders of ground water rights represented by IGWA have a direct and substantial interest in the proceeding because of the potential effect the proceeding will have on their respective rights to divert ground water from the ESPA. Intervention in the proceeding by IGWA will not unduly broaden the issues required to be determined by the Director. For the same reasons the Director should grant the petition filed by IGWA to intervene in the matter of the Surface Water Coalition Petition seeking the administration and curtailment of ground water rights in the American Falls Ground Water Management Area. The Director should hold without action the petition filed by IGWA to intervene in the matter of the Surface Water Coalition Petition to designate the ESPA as a ground water management area.

ORDER

The Director enters the following Order as an initial response to the Letter, Petition, and Request for Information filed by the Surface Water Coalition, and the petitions to intervene filed by IGWA, for the reasons stated in the foregoing Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED as follows in response to the Letter filed by the Surface Water Coalition requesting water right administration in Water District No. 120 and delivery of senior surface water rights:

1. A contested case is initiated pursuant to Idaho Code § 67-5240 to consider the relief requested.

2. 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. This portion of the Order is final. Any person aggrieved by this final portion of the Order has the right to request a hearing before the Department pursuant to the provisions of Idaho Code § 42-1701A(3).

3. 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.

4. The Director will consider the water delivery call as a call for administration and curtailment of junior priority ground water rights in Water Districts No. 120 and No. 130 that are alleged to be causing injury to the senior surface water rights of the members of the Surface Water Coalition.

IT IS FURTHER ORDERED as follows in response to the Petition filed by the Surface Water Coalition:

1. The part of the Petition seeking the administration and curtailment of junior priority ground water rights not in a water district created pursuant to chapter 6, title 42, Idaho Code, or in the American Falls Ground Water Management Area shall be held for a period of not more than thirty (30) days from the date of this Order to provide time for the Surface Water Coalition to identify and file with the Department the names, addresses, and description of the water rights of the ground water users who the Surface Water Coalition allege are causing material injury to the rights of the Coalition and to serve each of the identified right holders with a copy of the Petition.

2. The part of the Petition seeking the administration and curtailment of junior priority ground water rights in the American Falls Ground Water Management Area is designated a contested case pursuant to Idaho Code § 67-5240 to consider the relief requested. A fact finding hearing will be scheduled as early in April of 2005 as possible for this proceeding.

3. The part of the Petition seeking the designation of the ESPA as a ground water management area is DENIED. This portion of the Order is final. Any person aggrieved by this final portion of the Order has the right to request a hearing before the Department pursuant to the provisions of Idaho Code § 42-1701A(3).

IT IS FURTHER ORDERED that the Request for Information filed by the Surface Water Coalition is DENIED. However, the Department, if so requested, will assist the Surface Water Coalition in gathering the required information as provided by Idaho Code § 42-221J. For research in excess of one (1) hour, the Department's current charge is $48 per hour.

IT IS FURTHER ORDERED that the petitions filed by IGWA to intervene in the request for administration and curtailment of ground water rights in Water District No. 120 and to intervene in the request for administration and curtailment of ground water rights in American Falls Ground Water Management Area are GRANTED.

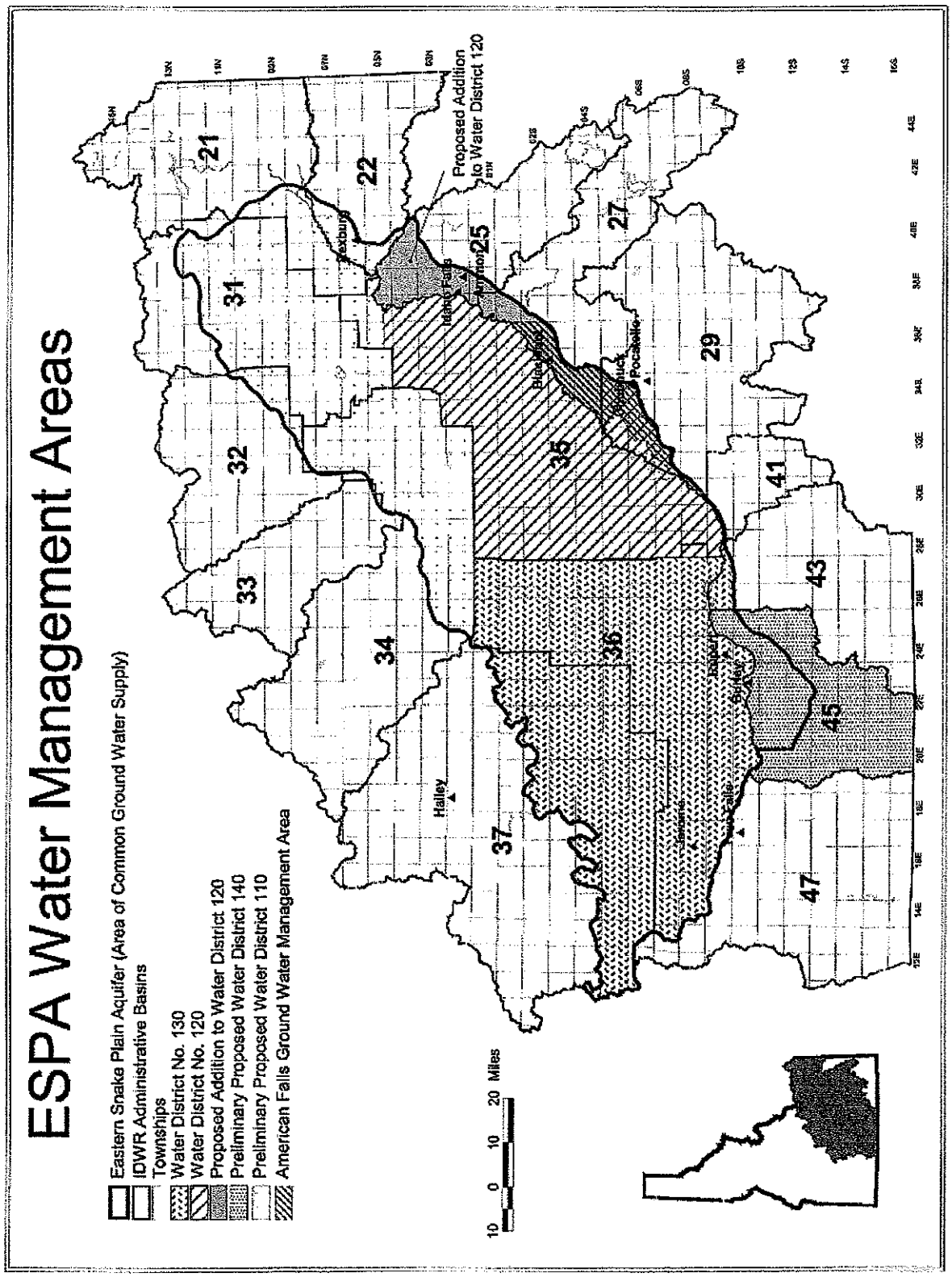
IT IS FURTHER ORDERED that not later than thirty (30) days from the date of this Order, each member of the Surface Water Coalition is to file with the Director the information called for under Conclusion of Law No. 38 of this Order.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, this is an interlocutory order and is not subject to review by reconsideration or appeal, with the exception of the portions of the Order that (1) determines water rights nos. 01-04045, 01-04052, 01-04055, 01-04056, and 01-04057 to be junior in priority for the purposes of distributing water to any decreed, licensed, or permitted water rights; and (2) denies the portion of the Petition seeking designation of the ESPA as a ground water management area. The Director may review this interlocutory order pursuant to Rule 711, IDAPA 37.01.01.711.

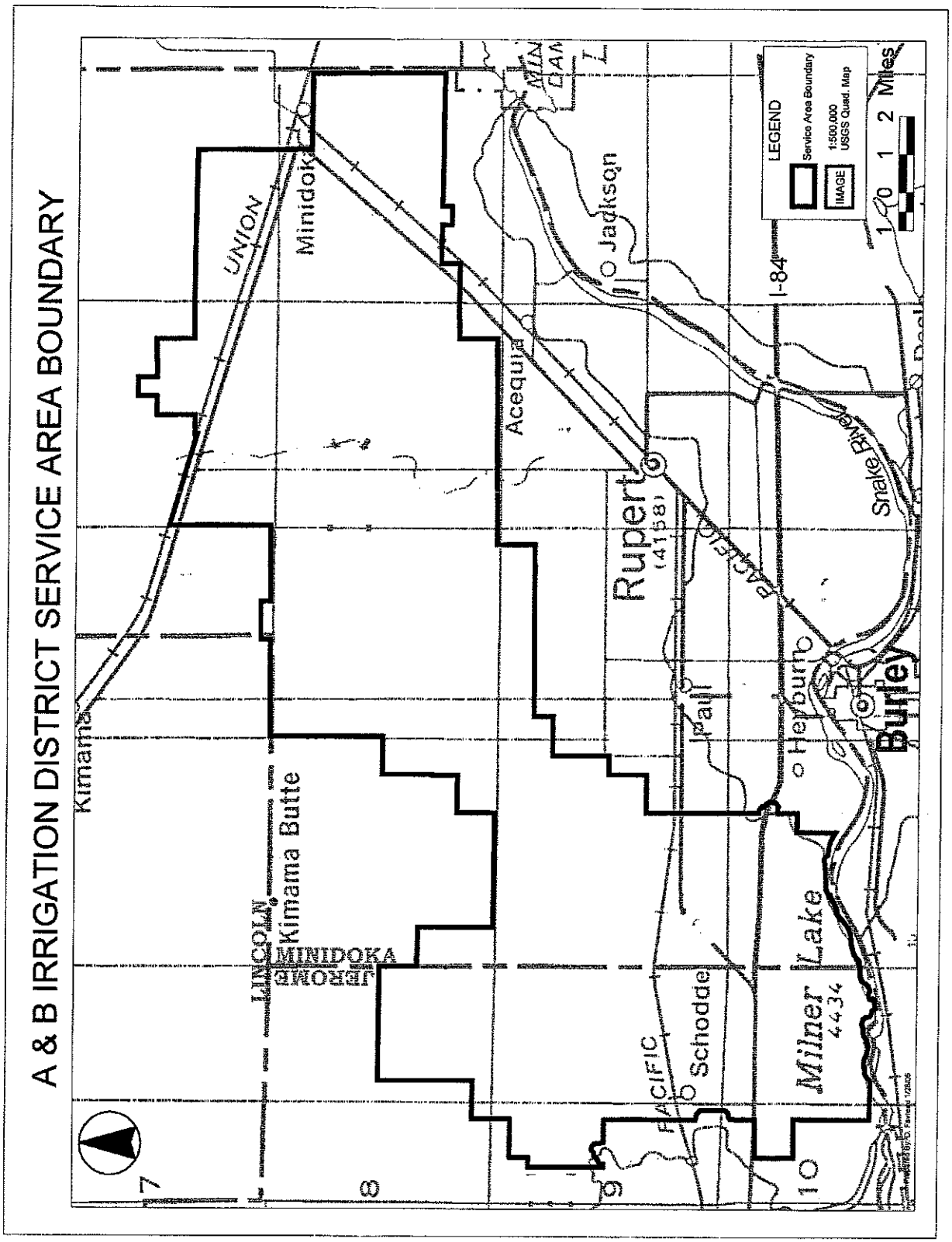
DATED this 14th day of February 2005.

KARL J. DREHER
Director

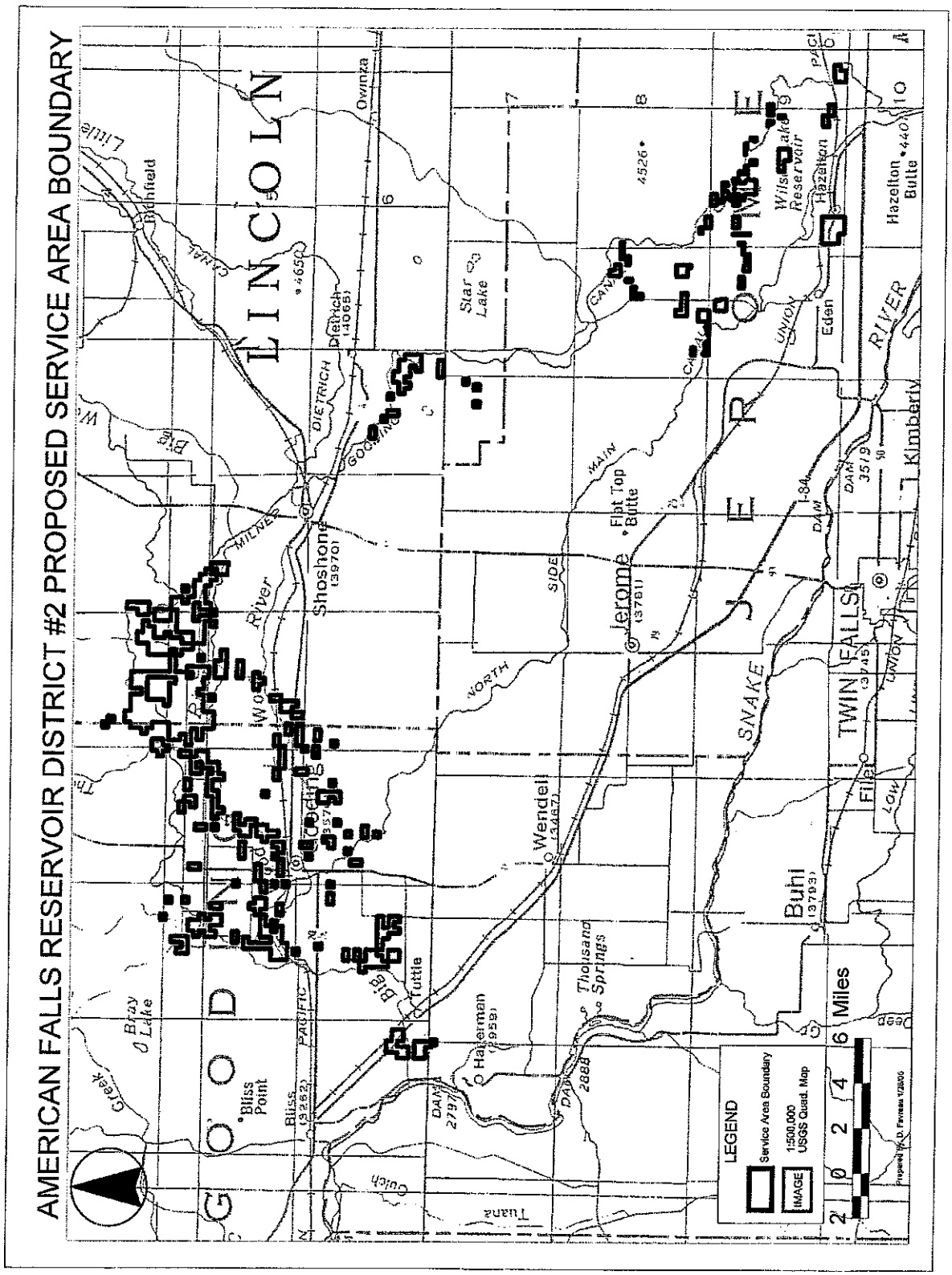
ATTACHMENT A



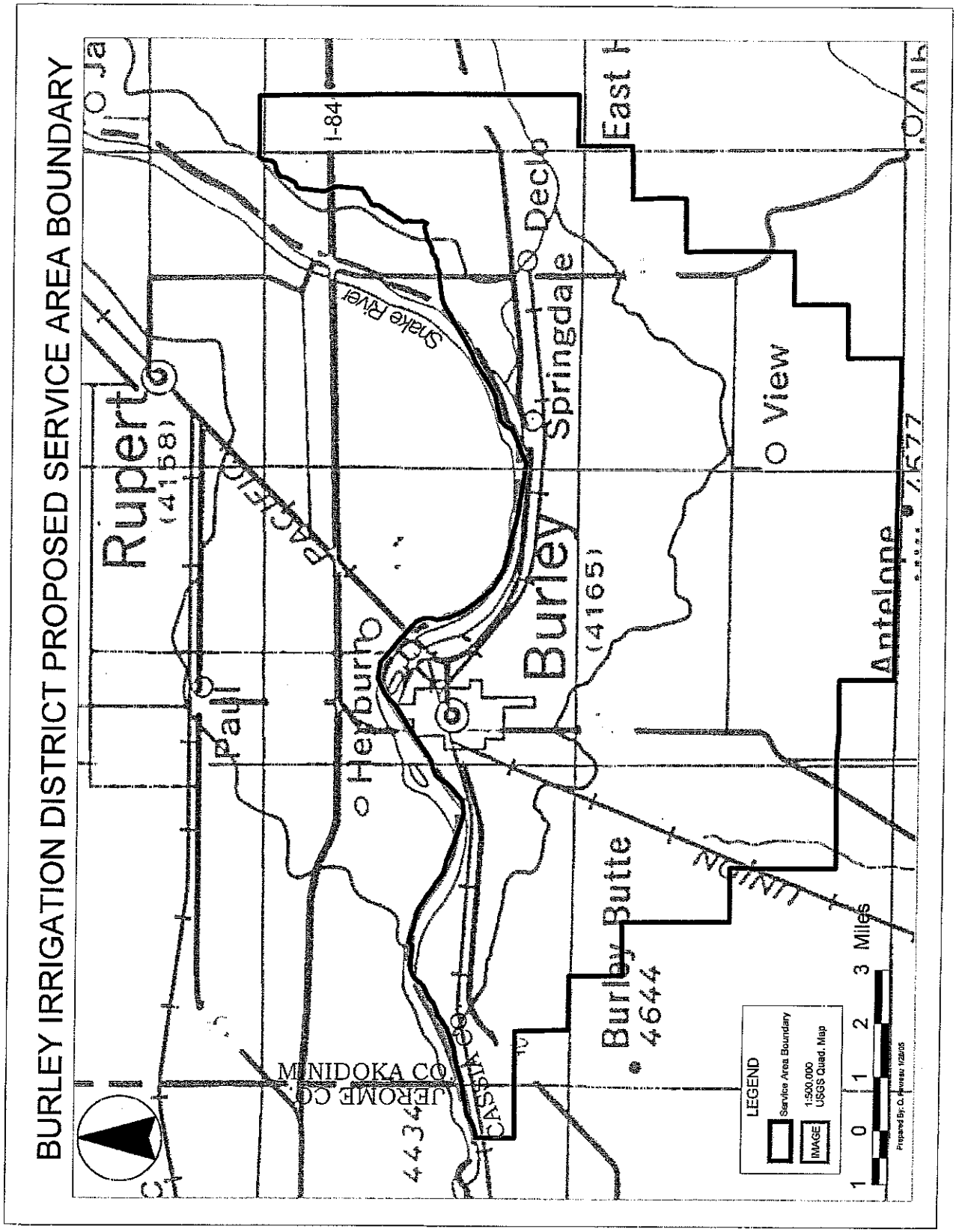
ATTACHMENT B



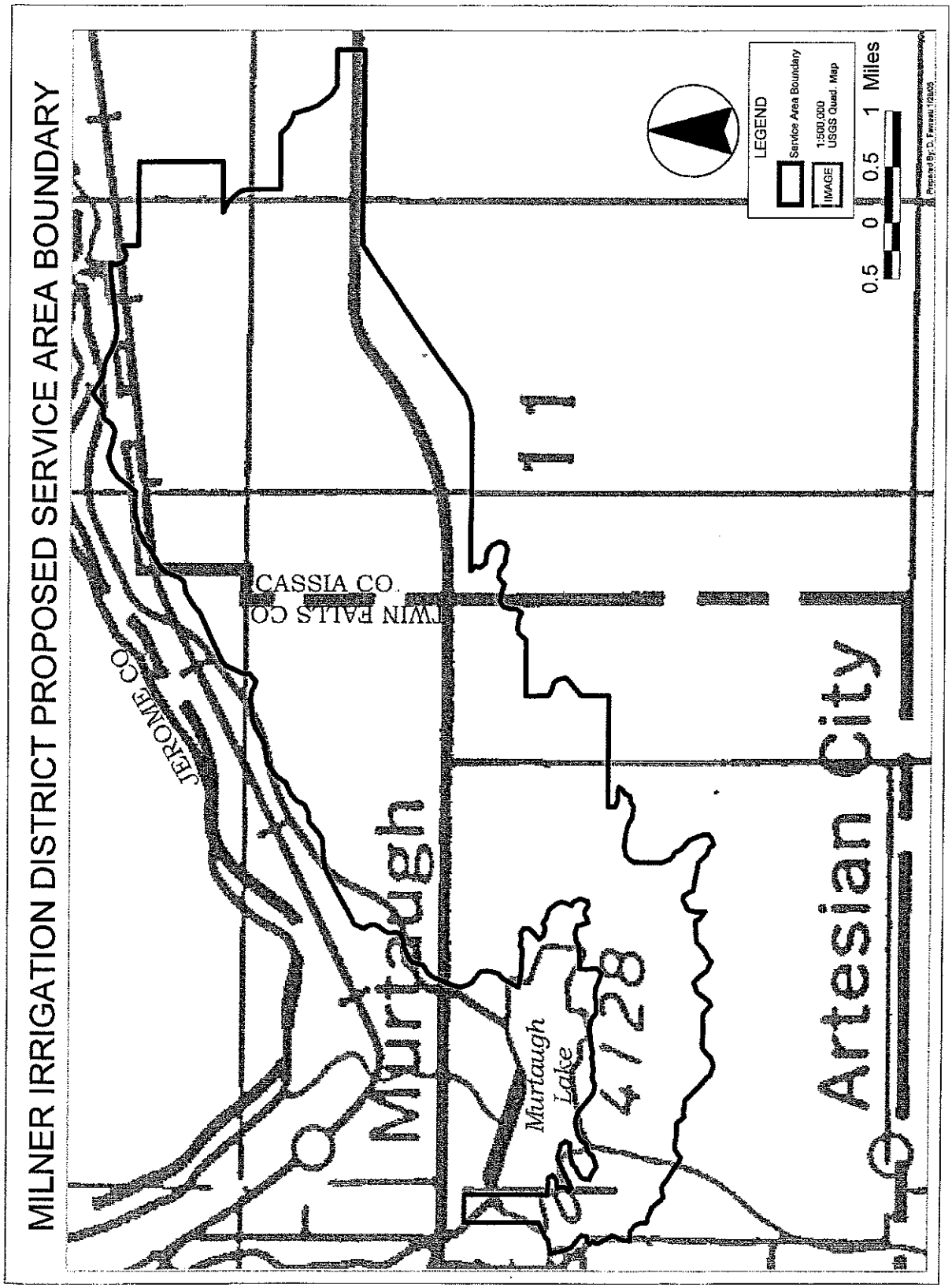
ATTACHMENT C



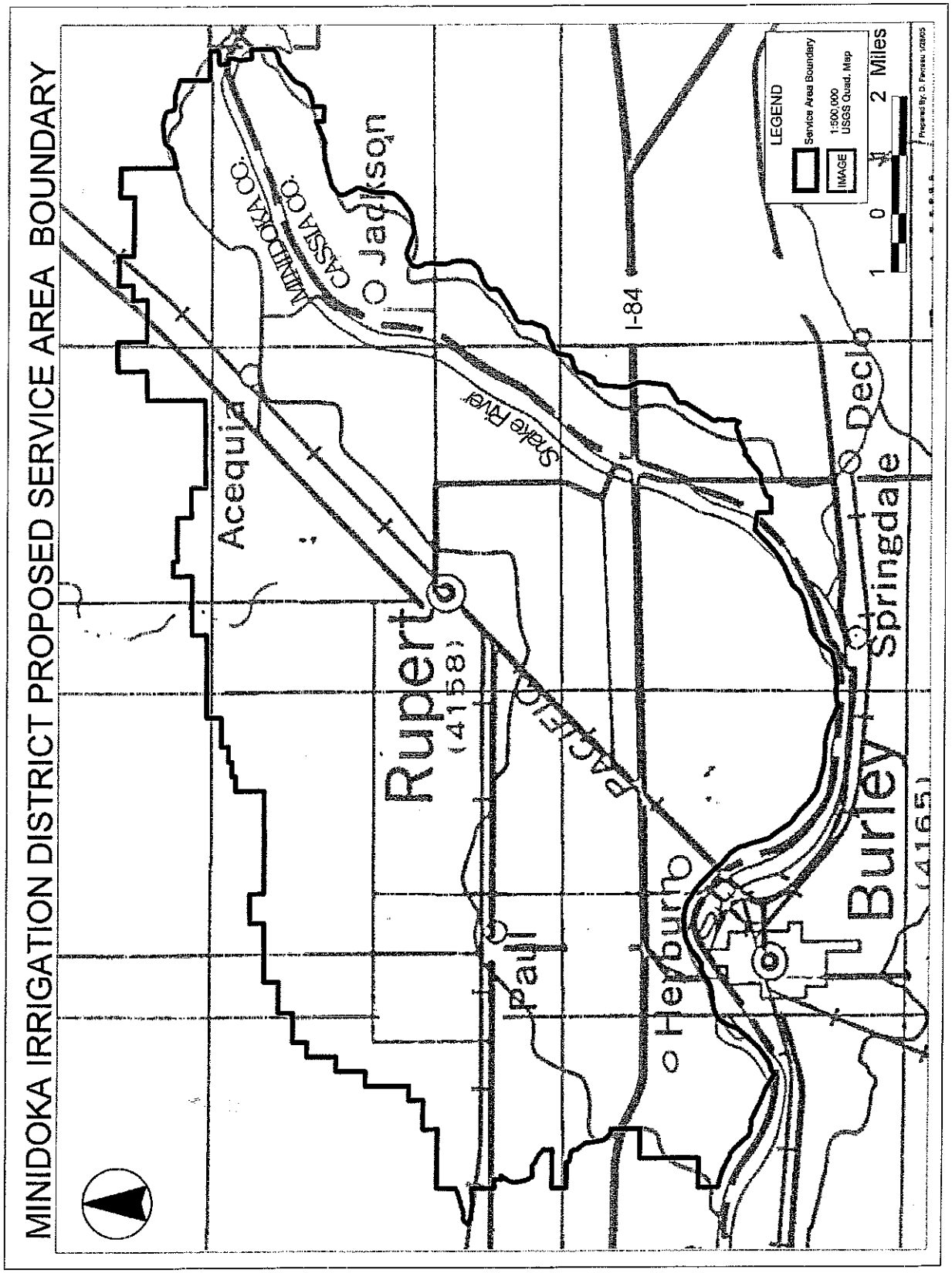
ATTACHMENT D



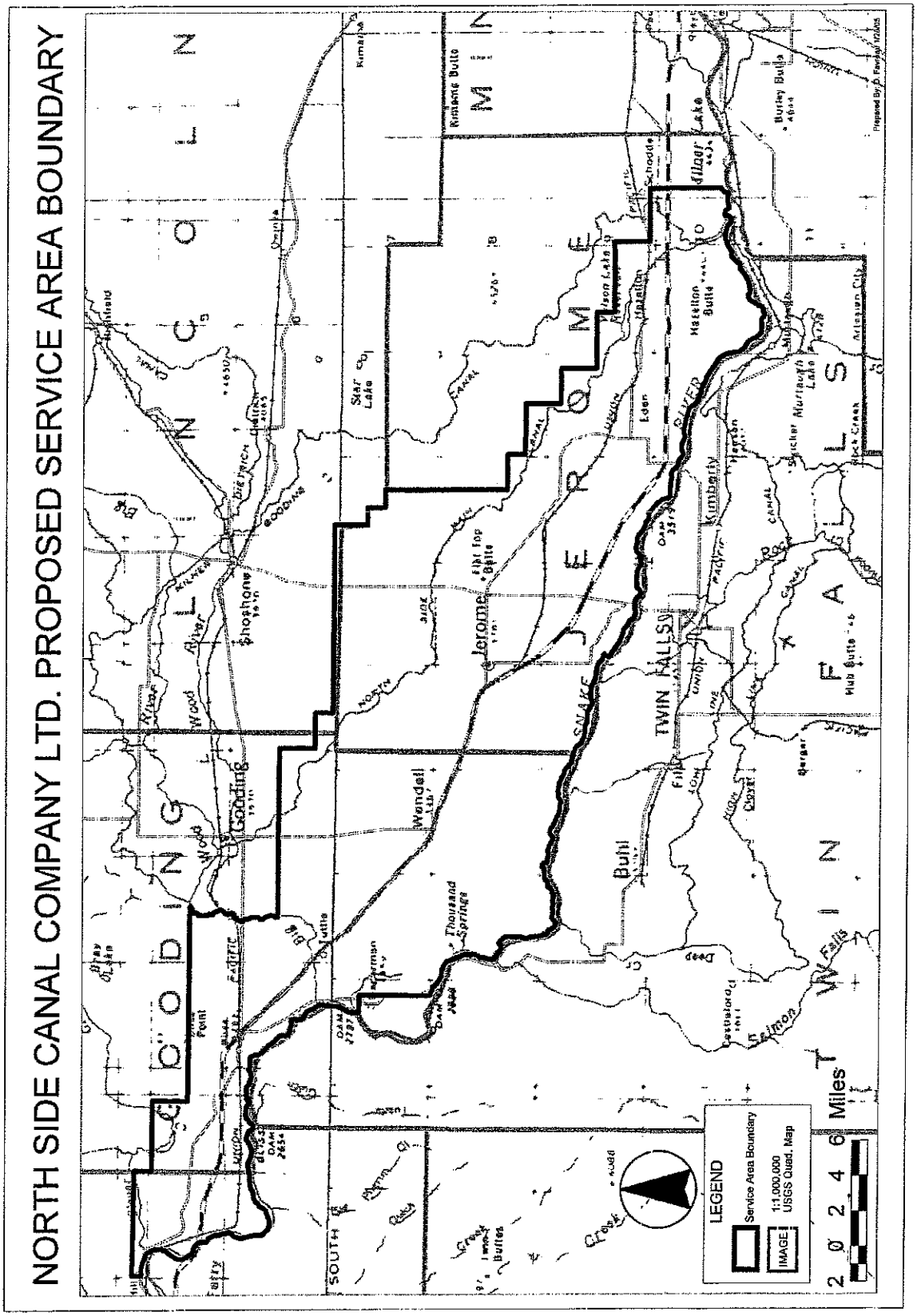
ATTACHMENT E



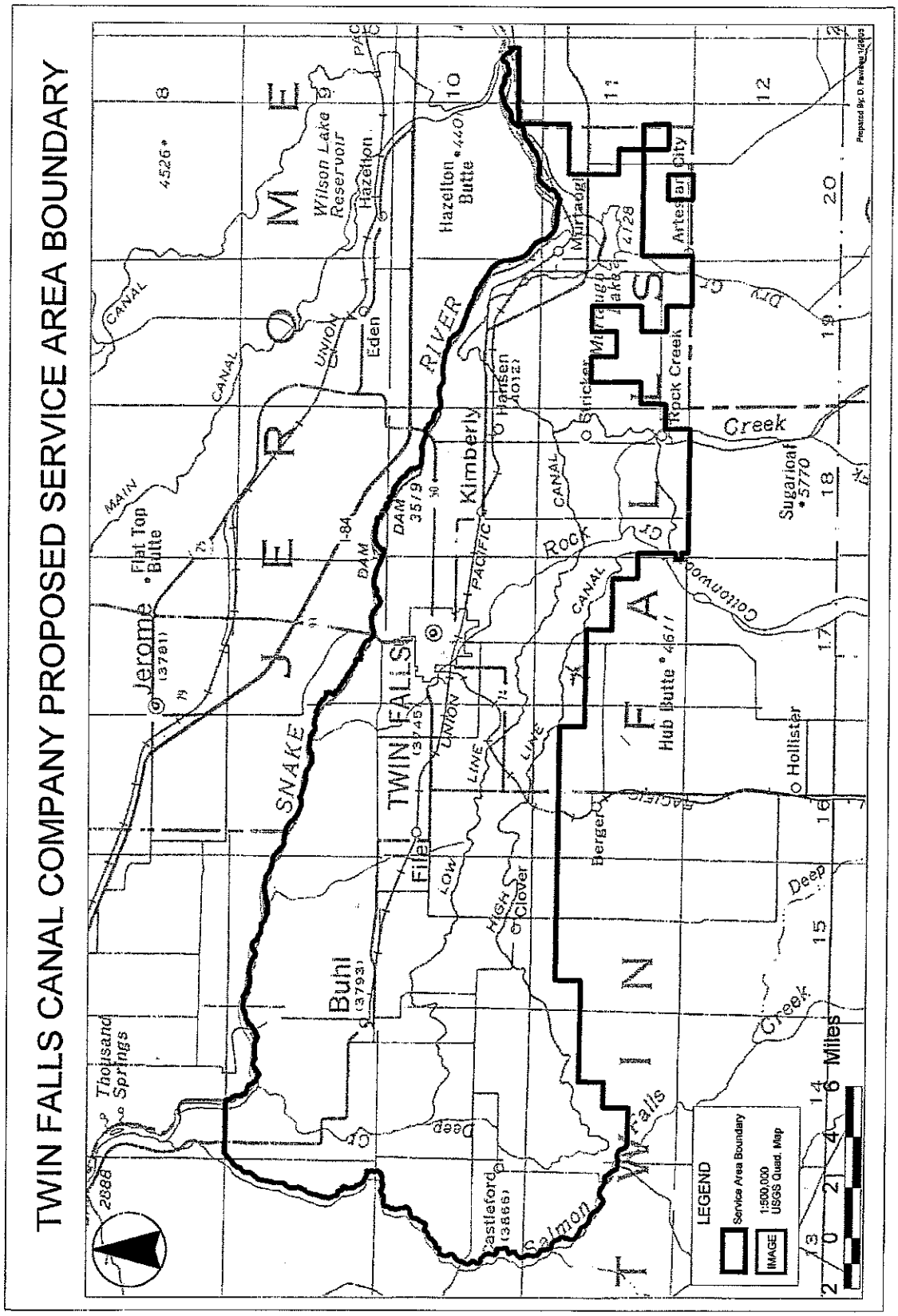
ATTACHMENT F



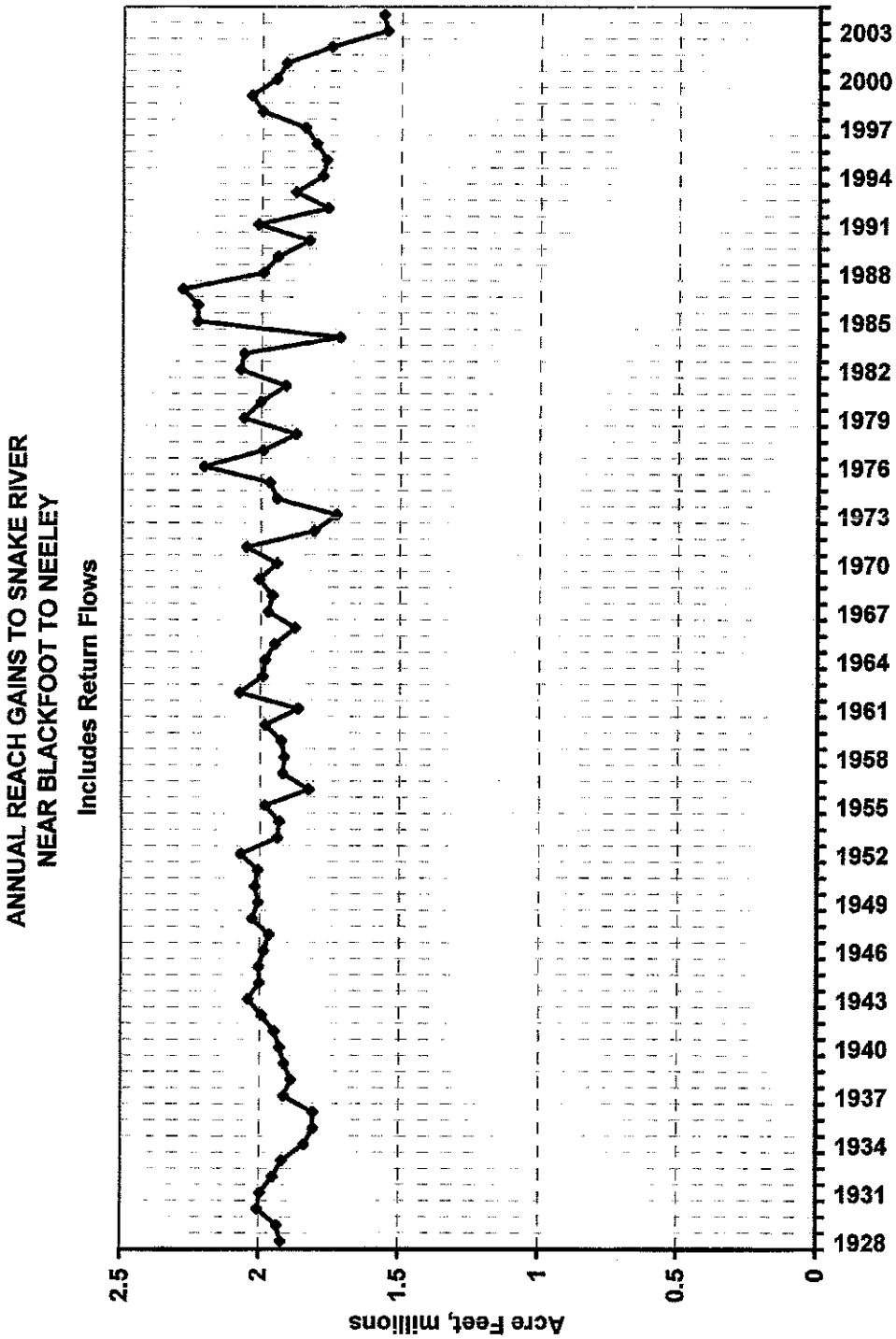
ATTACHMENT G



ATTACHMENT H



ATTACHMENT I



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 2005, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

JOHN K. SIMPSON
BARKER ROSHOLT
205 N 10TH STE 520
PO BOX 2139
BOISE ID 83701-2139

ROGER LING
LING ROBINSON
615 H ST
PO BOX 396
RUPERT ID 83350

TOM ARKOOSH
ARKOOSH LAW OFFICES
PO BOX 32
GOODING ID 83330

KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318

JEFFREY C. FEREDAY
MICHAEL C. CREAMER
GIVENS PURSLEY LLP
601 BANNOCK ST STE 200
PO BOX 2720
BOISE ID 83701-2720

IDWR - EASTERN REGION
900 N SKYLINE DR STE A
IDAHO FALLS ID 83402-1718

IDWR – SOUTHERN REGION
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380

Victoria Wigle

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