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DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF GROUND WATER DISTRICTS' APPLICATION FOR APPROVAL OF MITIGATION PLAN FOR THE AMERICAN FALLS REACH OF THE SNAKE RIVER	**GROUND WATER DISTRICTS' RESPONSE TO MOTIONS TO DISMISS**

Pursuant to Idaho Department of Water Resources' ("IDWR") Rule of Procedure 270, the American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, South West Irrigation District, North Snake Ground Water District, and Magic Valley Ground Water District (the "Ground Water Districts" or "Districts"), through their counsel Givens Pursley LLP, hereby respond to three motions to dismiss filed March 21, 2005: *Surface Water Coalition's Motion to Dismiss the Ground Water Districts' Application* ("Coalition Motion"); *Reclamation's Motion to Dismiss Mitigation Application or in the Alternative to Request Hearing to Reset* ("Reclamation Motion") and; *[Idaho Power Company's] Motion to Dismiss Petition and Brief in Support Thereof* ("Idaho Power Motion") (collectively, "Movants" or "Motions").

I. Introduction.

It is not clear what motivations underlie the Motions.

The Coalition has made a delivery call but now seeks to block mitigation as a potential alternative, presumably leaving only widespread curtailment of ground water users as an option. It is illogical for one believing it is entitled to replacement of depletions to oppose the idea of mitigation, particularly since curtailment of ground water pumping alone will not produce significant quantities of water in the Snake River, particularly not in the short term.

Reclamation's and Idaho Power's motivations are even less clear. Neither has initiated a delivery call alleging injury to its water rights, yet each seemingly is trying to dictate the most destructive option for Idaho's economy and the State's water policy. And, as discussed in more detail below, Idaho Power does so in direct contradiction of the Swan Falls Agreement and implementing statutes.

II. It is appropriate for the Director to consider and approve the Districts' proposed mitigation plan now.

The Coalition and Reclamation suggest the Districts' mitigation plan is premature because the Director has not yet determined the existence or extent of material injury suffered by senior right holders and caused by junior right holders. Coalition Motion at 4-5; Reclamation Motion at 10-11. We concede that a determination of material injury is a prerequisite to implementing a mitigation plan, and recognize that the proceeding necessary to determine material injury has not yet occurred.[1] However, the Conjunctive Management Rules certainly

[1] By using the term "material injury" or "injury" in this Response, the Districts do not suggest that this is the only factor to be determined. As the Rules indicate, the questions of futile call, reasonable means of diversion, full economic development, and similar concepts are all necessary elements to be determined before a delivery call can be implemented through shutting off junior rights in the conjunctive management context. The Districts' use of the term herein is intended to encompass all of these principles.

permit the evaluation of a mitigation plan before the material injury question has been determined.

In responding to a petition for delivery call, such as that made by the Coalition on January 14, 2005, "[t]he Director will take into account the existence of any approved mitigation plan before issuing any order prohibiting or limiting withdrawal of water from any well." IDAPA 37.03.11.030.07.g (emphasis added). Further, in responding to a delivery call, the watermaster "shall first determine whether a mitigation plan has been approved by the Director." IDAPA 37.03.11.040.02.c (emphasis added).

The Conjunctive Management Rules do not prohibit a water right holder from proposing a mitigation plan that cannot yet be implemented because material injury has not yet been determined or because its proponent has not yet acquired all of the elements—potentially including the purchase of water rights or facilities—necessary to actually implement the plan. Indeed, it simply is not feasible for a proposed mitigation plan of the scope proposed here, especially one that might be phased-in over time, to have all of its elements in place before it is even considered or approved. In this sense, a mitigation plan such as that proposed by the Districts is akin to an insurance policy, formulated against a potential future liability.

The Districts are fully entitled to bring forward for consideration and approval by the Director the most complete framework for mitigation currently available. How else could there be an existing, approved plan for the Director to consider in responding to a delivery call within in any reasonable amount of time? The Districts should not be compelled to risk sweeping and economically-devastating curtailment on the assumption that the Movants would await enforcement of a curtailment order until a mitigation plan can be considered that is filed after the Director has determined material injury exists. Nor would it be reasonable for the Districts to

incur substantial debt and obligate their members to undertake the exceedingly expensive actions proposed in their Mitigation Plan, without some predetermination that those actions are appropriate. By considering the Districts' mitigation plan now, the Director has the opportunity to consider whether it presents a workable framework for dealing with the complex hydrological circumstances and the broad claims of injury—should any such claims be proved—engulfing the Eastern Snake Plain Aquifer ("ESPA") during the current multi-year drought.

The Districts agree with the Movants that a mitigation plan cannot and should not be implemented until there is a specific determination of material injury to be redressed. They have pointed out that the Department has not yet fulfilled the requirement to complete the contested case procedure necessary to make such determinations. The Districts do not agree, however, that the Director may not even consider a mitigation plan until all proceedings pertaining to proving material injury are completed and the hydrological details necessary for implementation all are known. The question before the Director is whether the Mitigation Plan describes an appropriate framework for providing replacement supplies or reducing depletions in the event and to the extent material injury is shown.

Under the Conjunctive Management Rules, a mitigation plan can be approved before being considered in the context of a delivery call. But the Rules also provide specific safeguards in case the plan, as ultimately implemented, does not effectively redress material injury.

> Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.

IDAPA 37.03.11.040.05. Thus, it is appropriate under the Conjunctive Management Rules for the Director to consider and approve the Districts' mitigation plan, as presented, now.

III. The Districts' mitigation plan is sufficient.

The Districts' Mitigation Plan is not intended to, and need not, describe how the Districts would mitigate any specific instance of material injury experienced by a surface water user. Rather, the Mitigation Plan describes the limits of the Districts' mitigation obligation to any senior water right diverting from the American Falls reach of the Snake River ("AFR") if and when injury might be determined. It sets out the means by which that obligation would be met, again, if and when injury is determined. The appropriateness of the Mitigation Plan with respect to these key issues would be ripe for determination regardless of whether a delivery call has been made.

Here, a delivery call has been made. The Districts' Mitigation Plan is part of the response. The Director should consider, in his analysis of how to proceed with the delivery call, the fact that the Mitigation Plan has been filed. The plan certainly should not be dismissed.

Under the Mitigation Plan, the limit of the Districts' mitigation obligation is the amount of increased reach gains to the AFR that could be produced by curtailment of junior ground water rights *and* could be diverted to beneficial use during the irrigation season in the year in which material injury might be demonstrated. The Districts' Mitigation Plan proposes that this limit is represented by a maximum of 65,000 acre-feet of replacement water in any year. Given the infrequency of surface water shortages historically, and the historical trend of increased reservoir fill and spill past Milner, it would not be reasonable to provide or require a greater level of mitigation. Otherwise, the additional water more often than not could not be diverted to beneficial use but would spill past Milner and result in a waste of economic resources and water

resources. The Districts are entitled to confirmation that the Mitigation Plan sets an appropriate potential mitigation level regardless of whether a senior water right holder has yet to demonstrate, or ever will demonstrate, material injury at that level.

Under the Mitigation Plan, the Districts propose contingencies in the event all 65,000 acre-feet might be required, but are unavailable, in a given year to mitigate injury. While the reliability of the source of replacement water over the term in which it is to be used is a factor the Director may consider in reviewing a mitigation plan, it is not the only factor. Other factors include: whether the plan uses generally accepted and appropriate values for aquifer characteristics and is based on computer simulations using generally accepted and appropriate engineering and hydrologic formulae; whether the plan proposes artificial recharge of an area of common ground water supply; whether the plan takes into account the history and seasonal availability of water for diversion so as not to provide replacement water when the surface water right historically would not have received a full supply such as during annual low flow periods or extended droughts; and whether the plan is consistent with the conservation of water resources. *See* IDAPA 37.03.11.043.03.a – o.

The Director has a great deal of discretion in considering the adequacy of a proposed mitigation plan. The factors listed in Rule 43.03 "<u>may</u> be considered by the Director." IDAPA 37.03.11.043.03 (emphasis added). These factors allow the Director to evaluate the likelihood that once a plan is fully implemented against a specific determination of material injury, it will effectively prevent or compensate for such injury.

The Districts' Mitigation Plan addresses each of the factors in Rule 43.03. The Districts have taken affirmative steps to secure and develop access to a firm supply of water to be used to provide replacement water if and when that may be required. It is curious that the Movants

object to a process of determining whether more, less, or nothing more would be required of the Districts to mitigate material injury by asking the Director to summarily dismiss the proposed plan.

In summary, while a determination of material injury is necessary before a mitigation plan can be implemented—that is, before the junior right holders can be compelled to provide the mitigation—the Conjunctive Management Rules do not require the injury determination to be completed before a Mitigation Plan can be submitted or approved. Nor do the rules require that all of the components of such a plan be in place where there has as yet been no finding of material injury in the context of an actual delivery call. The Districts' Mitigation Plan affirmatively addresses each of the factors set out in the rules related to plan sufficiency and can be considered and approved as submitted.

IV. Under Idaho law, a junior water user defending itself against a delivery call does not bear the burden to establish its water use is not injuring the senior claimant.

Idaho Power, offering points that are contrary to Idaho law and seemingly irrelevant to this case, argues that when a senior water user makes a delivery call against a junior, the junior bears the burden to establish its water use is not causing injury to the senior. Idaho Power Motion at 5. To support this argument, Idaho Power cites three Idaho cases, none of which stands for the asserted proposition.

The cited passages in *A&B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 421-22 (1997) and *Martiny v. Wells*, 91 Idaho 215 (1966), simply state that water sources are presumed to be connected and any party claiming otherwise has the burden to prove the sources are separate. The Districts are not claiming any lack of interconnection here or in the Coalition's delivery call case. The burden of proof regarding interconnection has no bearing on the burdens and procedures in a delivery call case.

Idaho Power also cites to *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1 (1944). In *Beecher*, the Court reviewed the approval of an irrigation company's change in point of diversion to a location upstream of other rights (with the same or junior priority) according to the standards in Idaho Code § 42-108. In considering the alleged injury to junior rights, the Court cited the well-established principle of law that a "junior appropriator is entitled to divert water only at such times as all prior appropriators are being supplied under their appropriations under conditions as they existed at the time the appropriation was made." *Id.* at 9 (emphasis added). The Court then pointed to evidence indicating that before the transfer the junior rights had been filled before the irrigation company's senior right because water generally did not reach the senior's original downstream points of diversion. The Court concluded that all intervening appropriators, including the juniors, were entitled to divert water according to their priorities "in the same volume and under the same conditions as existed prior to the transfer." *Id.* at 9. The *Beecher* Court's general reference to the prior appropriation doctrine, which was not the controlling allocation principle in the case, says nothing of the relative burdens for proving material injury in a delivery call case.

Without Idaho law to support its position, Idaho Power turns to Colorado common law, arguing it is "remarkably applicable" to the case at hand. The decisions of another state's courts, however, are neither applicable nor useful in interpreting Idaho's statutes and unique administrative rules for conjunctive administration. This is particularly true of Colorado's case law, which interprets a state constitution and related statutes different from Idaho's. The Idaho Constitution expressly directs the Idaho Legislature to subject a water right's priority to "reasonable limitations" so as to extend "due regard to . . . the necessities" of junior priority rights, establishes the Idaho Water Resource Board to provide for "optimum development" of

our water resources, and declares that water used under a distribution scheme is a "public use." The Colorado Constitution simply states that priority is the operative principle in water allocation. Idaho Const. Art. XV, Secs. 4, 5 and 7; Colorado Const. Art. XVI, Sec. 6.

What Idaho Power fails to acknowledge is that *even in Colorado* a claimant in any legal proceeding must present a prima facie case supporting its claim and bears the ultimate burden of proof of his or her claim. 2 Am. Jur. 2d Administrative Law § 355.

Idaho's Ground Water Act requires anyone asserting a claim that a junior ground water right is adversely affecting the use of their senior surface or ground water right to establish that the junior's diversion not only adversely affects the senior's use, but also that the junior diversion is contrary to the declared policy of full economic development of underground water resources. *See* Idaho Code § 42-237b (senior surface water user claiming his right is adversely affected by diversion of a junior ground water right must submit a detailed statement in concise language of the facts upon which the claimant founds his belief that the use of his right is being adversely affected); Idaho Code § 42-237c (following a hearing, the ground water board has authority to determine whether use of the junior right affects, "contrary to the declared policy of this act," the use of the senior right).

Similarly, under Rule 30 of the Conjunctive Management Rules, a senior water user making a delivery call must provide certain supporting information, including "[a]ll information, measurements, data or study results available to the petitioner to support the claim of material injury." IDAPA 37.03.11.030.01.c. Ultimately, under the Conjunctive Management Rules, the Idaho Constitution, and Idaho Code §§ 42-226, 42-237b and 42-237c, which mandate special procedures and a hearing before curtailment of ground water rights in the conjunctive management context, the Director (and/or the local ground water board) must provide an

opportunity for hearing and weigh all of the evidence provided to determine whether enforcement of a claim of material injury would or would not block the full economic development of underground water resources.

V. Idaho Power lacks any ground even to be a party to this case.

Idaho Power bases its protest on the assertion that the Districts are injuring its water rights. It says: "Water and contract rights of Idaho Power have been and will continue to be short of water necessary to fulfill their need for beneficial use," and that "[o]peration of the Plan as proposed will cause material injury to water rights . . . owned by Idaho Power, through the continuation of out-of-priority depletions under junior water rights." Idaho Power Protest at 2-3. But which of Idaho Power's water rights does it claim are being injured, when, and by whom? Idaho Power does not say; it offers no particulars whatsoever.

But the more glaring omission, in both its Protest and its Motion to Dismiss, is Idaho Power's failure even to mention, much less explain, how it can be pressing its objections to the Mitigation Plan—and asserting injury to boot—in light of the fact that its hydropower water rights in the Snake River are subordinated to the water rights of the very ground water users who have proposed the Plan. The Plan will, and should, have nothing to do with Idaho Power.[2] Idaho Power's contention about "out-of-priority depletions" is particularly odd, since it is Idaho Power's rights that are out-of-priority. We are aware of no circumstance under which any of the ground water users could be required to curtail, much less provide mitigation, in favor of Idaho

[2] Nothing, that is, except for the incidental benefit Idaho Power will receive to the extent the Plan results in increased spill past Milner or increased spring flows in the Thousand Springs Reach. These benefits are similar to those Idaho Power realizes every year, as compared to the additional ground water development that supposedly was to occur as a result of the Swan Falls Agreement that essentially was stillborn by the Department's 1992 moratorium on ESPA ground water development. Yet the Company evidently now wants even more. By asserting its water rights are being injured by ground water pumping, it essentially seeks to throw out the Swan Falls compromise altogether and roll back existing ground water diversions.

Power's subordinated water rights. If Idaho Power sees it differently, it should be required to explain. Without an adequate explanation, it proceeds in this case in direct violation of law.

This is so because, in the Swan Falls Agreement, Idaho Power subordinated its hydropower water rights in the Snake River and associated springs to all water rights in place as of October 1, 1984, and also to all claims or applications bearing a priority of June 30, 1985 or earlier.

> The Company's rights . . . are also subordinated to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

Swan Falls Agreement at Section 7(D). This language is an absolute subordination of Idaho Power's water rights to all uses existing on these dates. This is confirmed by that portion of the State Water Plan implementing the Swan Falls Agreement:

> The 8,400 cfs claimed at Swan Falls is reduced by the agreement to that flow available after satisfying all applications or claims that demonstrate water was beneficially used prior to Oct. 1, 1984, even if such use would violate the minimum flows established in Policy 5B [the 3,900/5,600 cfs minimums]. Any remaining water above these minimum flows may be reallocated to new uses by the state providing such use satisfies existing Idaho law.

State Water Plan, Policy 5C at 20. The State Water Plan notes that the Swan Falls Agreement "further provides that Idaho Power's claimed water rights at facilities upstream from Swan Falls shall be considered satisfied when the company receives the minimum flow specified in Policy 5B at the Murphy gaging station." *Id.* The "water rights at facilities upstream from Swan Falls" would include all Idaho Power's claimed rights, including any storage entitlements above Milner.

Furthermore, Idaho Power's Snake River and spring rights also have been subordinated to those post-1985 water rights that were permitted and licensed under the "trust water" provisions of Idaho law. I.C. § 42-203C. This means that Idaho Power is not entitled to seek

curtailment of even the relatively few post-1985 water rights unless they are shown to cause material injury to the 3,900 cfs (5,600 cfs winter) minimum flow at the Murphy gauge. In other words, there are no water rights on the Eastern Snake Plain that can be administered as junior to Idaho Power's rights. Which is to say, in comparison to Idaho Power's rights, it is impossible for them to be out-of-priority. It is quite the other way around.[3]

There are two exceptions. The first is the situation where the exercise of a post-1985 "trust water" right actually is shown to violate the Murphy gauge minimum flow. Idaho Power has made no such claim here. Instead, by filing pleadings challenging the Mitigation Plan on the theory that junior ground water diversions are injuring its water rights, Idaho Power essentially denies that its rights are subordinated. The second is the existence of language in Idaho Code § 42-234, wherein by a 1994 amendment, Idaho Power's subordinated water rights were unsubordinated to water rights subsequently appropriated for aquifer recharge. Although the Districts' Mitigation Plan indicates their intent to cooperate in a state-managed, large-scale aquifer recharge program, diversions for recharge can only be made in priority, and the program can only be implemented consistent with state law. As such, Idaho Power has no grounds to complain on that score, unless it is staking out its position opposing a large-scale recharge program on the ESPA.

In addition to the Swan Falls Agreement, Idaho Power also signed, with the State of Idaho, the *Contract to Implement Chapter 259, Session Laws, 1983*. This contains an express

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[3] These principles also were confirmed in the Consent Judgments entered in *Idaho Power Company v. State of Idaho, et al.*, District Court for the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Case No. 81375 (February 12, 1990) and *Idaho Power Company v. State of Idaho, et al.*, District Court for the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Case No. 62237 (March 7, 1990) ("The Company's rights . . . are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract between the State and Company implementing the terms of Idaho Code §§61-539 and 61-540"). The "persons dismissed" included thousands of ground water right holders, most of whom are members of the Districts. Needless to say, these judgments are binding on Idaho Power, and are enforceable by the State and by the "persons dismissed."

provision extending third party beneficiary status to those water users who were subject to Idaho Power's lawsuit against thousands of water right holders in the ESPA. As to these holders, essentially the Ground Water Users here (or their predecessors), the Contract to Implement states that they "are third party beneficiaries of this contract who may seek enforcement of applicable provisions . . . in accordance with the laws of the State of Idaho." Contract to Implement at § 4.

The Contract to Implement further provides that Idaho Power "shall not . . . assert any claim against" holders of domestic water rights or of nonconsumptive commercial, industrial, or municipal uses from the Snake River watershed above Swan Falls Dam unless such uses would violate the Company's subordinated water rights or the minimum streamflow established by the State Water Plan. *Id.* Idaho Power's Protest in this case surely asserts a claim against those water rights represented by the Districts constituting nonconsumptive commercial, industrial, or municipal uses.

In addition, Idaho Power's unspecified assertions of injury, at least to the extent they are based on below-Milner water rights, run afoul of Idaho's "two rivers" law:

> For the purposes of the determination <u>and administration</u> of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

Idaho Code § 42-203B(2) (emphasis added). Water rights in Water District 120 presumably are tributary to the Snake River both upstream and downstream from Milner Dam (although the Coalition's delivery call is premised on the theory that they are more tributary upstream). But regardless, Idaho Power's below-Milner water rights cannot be served by any administration of river flows above Milner or by any limitations, mitigation requirement, or administration of tributary ground water in the "non-trust" water area.

Another statute implementing the Swan Falls Agreement provides: "A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law." I.C. § 42-0203B(6). The Districts contend that this statute erects an additional bar to Idaho Power pursuing objections to the Mitigation Plan, or at least those based on any claim asserting injury or priority. Indeed, under the statute, Idaho Power likely has no authority to raise <u>any</u> objection whose aim, as here, is to thwart the Districts' members' continued diversions under the proposed Mitigation Plan or otherwise.[4]

So why is Idaho Power involved in this case at all? The Districts and the Director are entitled to an explanation of how Idaho Power's participation and claims in this matter are anything other than a request for administration that is directly contrary to law.

If Idaho Power believes it is suffering material injury, and that it is entitled under the Swan Falls Agreement to assert material injury, then it should bring its own delivery call, identify those ground water rights it says are causing it injury, and prove up its case. Instead, Idaho Power criticizes the Mitigation Plan while standing behind a surrogate such as the Surface Water Coalition, which actually has instituted a delivery call. With its presence in this matter, and its protest of and motion to dismiss the Mitigation Plan, Idaho Power attempts to evade the binding obligations of the Swan Falls Settlement. And it does so at the expense of the vast majority of Idaho's ground water irrigators, and the cities, industries and dependent economies that use ESPA ground water. Idaho's Power's presence in this case is highly questionable, and its motion to dismiss the Mitigation Plan is without merit.

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[4] Districts members also are third party beneficiaries of the Swan Falls Agreement. *See, e.g.*, I.C. § 61-540 (codifying the 1983 act providing that "all consumptive water users who have beneficially used water . . . prior to November 19, 1982" and those water right applicants applications who have "made substantial investments" are "third party beneficiaries of [the Swan Falls Agreement]").

VI. Conclusion

As the Applicants, and proponents of the Mitigation Plan, the Districts have the burden of demonstrating that it is adequate to mitigate any material injury to senior surface water users resulting from diversions by the Districts' members. The Mitigation Plan establishes an upper limit of this potential obligation based on existing statutes, rules and decisions applying both. The Mitigation Plan outlines the proposed means by which the Districts' obligations can be met in the event material injury may be determined to be occurring. The Mitigation Plan speaks to and satisfies the factors governing Mitigation Plans set out in the Department's Conjunctive Management Rules. The Districts can and will satisfy their burden in this case.

The Districts also have taken, and will take, substantial steps to be prepared to implement this Mitigation Plan should material injury be demonstrated. It is quite curious then, why the Coalition, the Bureau of Reclamation and Idaho Power would want the Mitigation Plan matter dismissed, unless they prefer simple curtailment of all ground water rights on the ESPA to a plan that provides replacement water when and where needed and proposes a long-term effort to improve aquifer storage and discharges. The Districts' plan balances elements of priority of right with optimum use of water resources without waste, and they are entitled to a hearing to demonstrate as much.

In a different contested case, that being the Surface Water Coalition's delivery call, a different burden exists, and it lies squarely on the Surface Water Coalition members—the burden of proving that junior ground water diversions are adversely affecting their senior rights contrary to the State's declared policy of full economic development of ground water resources. In that different case, the Districts have submitted facts showing that ground water withdrawals under their members water rights are not the cause of recent declines in reach gains to the AFR, that the

Surface Water Coalition members' water supply is no worse today than it would have been when they made their appropriations or under similar historical drought conditions. The Movants mistakenly argue that *that* proof (of injury or non-injury) somehow must be made here or the Mitigation Plan must be dismissed. The Bureau of Reclamation at least recognizes that the Districts cannot be expected to *implement* their Mitigation Plan absent a finding of material injury.

The Movants' motives for seeking Dismissal here are suspect. Their legal grounds for dismissal are absent. Dismissal of a plan to mitigate material injury when it occurs implies that nothing but full-scale, devastating curtailment would be available or satisfactory to the Surface Water Coalition as a remedy, even though curtailment would produce no more water in any irrigation season than implementation of the Mitigation Plan would.

For all the above reasons, their Motions to Dismiss should be denied.

RESPECTFULLLY SUBMITTED this 4th day of April 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April 2005, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

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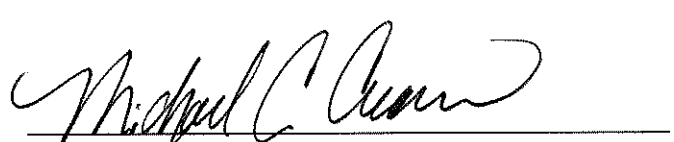

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