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DEPARTMENT OF WATER RESOURCES

Josephine P. Beeman (Idaho Bar # 1806)
Beeman & Associates, P.C.
409 West Jefferson Street
Boise, Idaho 83702
TELEPHONE: (208) 331-0950
FACSIMILE: (208) 331-0954
EMAIL: office@beemanlaw.com

Sarah A. Klahn
William A. Hillhouse II
Amy W. Beatie
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
TELEPHONE: (303) 595-9441
FACSIMILE: (303) 825-5632
EMAIL: sarahk@white-jankowski.com

Attorneys for City of Pocatello

Jeffrey C. Fereday (Idaho Bar # 2719)
Michael C. Creamer (Idaho Bar # 4030)
Bradley V. Sneed (Idaho Bar # 6254)
GIVENS PURSLEY LLP
601 Bannock Street, Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720
TELEPHONE: (208) 388-1200
FACSIMILE: (208) 388-1300

Attorneys for Idaho Ground Water Appropriators, Inc.

BEFORE THE DIRECTOR
OF THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	**IGWA AND POCATELLO'S MOTION TO COMPEL PRODCUTION OF DOCUMENTS OR IN THE ALTERNATIVE MOTION *IN LIMINE***

Pursuant to Rules 26 and 37 of the Idaho Rules of Civil Procedure, the Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello ("Pocatello"), by and through their undersigned counsel, hereby move the Idaho Department of Water Resources ("IDWR" or

"Department") to compel the A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and the Twin Falls Canal Company (collectively, the "Surface Water Coalition") to produce certain documents required to be produced, requested by Pocatello and IGWA, and never provided. In the alternative, Pocatello hereby moves IDWR to prohibit presentation of evidence, including testimony, by the Surface Water Coalition on any of the topics related to said documents.

I. BACKGROUND AND FACTS

On July 22, 2005, the Director of IDWR issued a Scheduling Order in this matter ("July Scheduling Order"). In it, the Director set out the discovery and filings allowed in this proceeding, the procedures for filing and serving documents, and the required contents of and deadlines for the documents. Paragraph 5 of the July Scheduling Order establishes the requirements for expert reports, and specifically sets out the documents required to be produced in addition to the reports. It states:

> By [December 30, 2005],[1] parties must submit expert witness reports. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the ***data or other information considered by the witness*** in forming the opinions; and exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

July Scheduling Order, ¶ 5 (emphasis added). This provision, whose language is verbatim that of the Federal Rule of Civil Procedure setting out the requirements for expert reports, contains six production requirements: (1) a report with opinions and bases therefor clearly spelled out; (2)

[1] Although some of the dates established in the July Scheduling Order have been revised in subsequent orders issued by IDWR, *see* Order Amending Scheduling Order of July 22, 2005 (September 1, 2005); Order Extending Time for Filing Expert Reports and for Hearing (October 17, 2005), the requirements established in the July Scheduling Order for the contents and substance of any filings allowed for under the July Scheduling Order have not been revised. The deadline for expert reports was changed twice, resulting in the date indicated in the brackets.

the data and other information considered by the expert in preparing the report; (3) exhibits; (4) the expert's qualifications; (5) the compensation paid for the report and testimony; and (6) a listing of the expert's cases and previous testimony.

When provided on December 30, 2005, the Surface Water Coalition's expert report consisted of two things: the report and exhibits. In other words, the Surface Water Coalition complied with only ***two*** of the six requirements of Paragraph 5. On January 5, 2006, Pocatello made a written request for the information it and IGWA seek in this motion. *See* Exhibit A to Affidavit of Brad V. Sneed dated January 24, 2006 [hereinafter "Sneed Affidavit"]. Rather than provide the information, there ensued a series of phone calls, primarily on January 8, 2006, in which the substance of the materials provided was discussed at length. Counsel for Pocatello and IGWA suggested that all parties' respective engineers participate in a phone call (with counsel on the line) to ensure that Pocatello's and IGWA's requests were understood. The Surface Water Coalition rejected this approach; their attorneys asserted that they would "provide what the Director's order required" and that no phone calls were necessary.

On the strength of these verbal guarantees, Pocatello and IGWA entered into an agreement with the Surface Water Coalition dated January 10, 2006 ("Expert Disclosure Agreement"). *See* Sneed Affidavit, Exhibit B. The Expert Disclosure Agreement was approved by the Director on January 13, 2006. *See* Sneed Affidavit, Exhibit C. The Agreement required the exchange of materials considered by IGWA's, Pocatello's, and the Surface Water Coalition's experts and other related documents, including the qualifications of the experts, if they had not already been provided. As of now, although some material has been exchanged, the Surface Water Coalition has not provided all of the required documents and thus has both breached the

Expert Disclosure Agreement and failed to comply with Paragraph 5 of the July Scheduling Order.

The filing of this motion should come as no surprise to the Surface Water Coalition. Everything possible has been done to avoid requesting the remedy sought herein, including the provision of detailed letters setting out the Surface Water Coalition's expert disclosure deficiencies, *see* Sneed Affidavit, Exhibits D and E, and the convening of an hour long face-to-face meeting on January 23, 2006, among the Surface Water Coalition, Pocatello, and IGWA, in which IGWA's and Pocatello's experts described in detail what was missing from the information previously received. Yet the Surface Water Coalition, without legal basis, has continued to refuse to provide the materials required. IGWA and Pocatello have been prejudiced by the Surface Water Coalition's withholding of materials and cannot effectively prepare for expert depositions or the hearing without the requested materials. The Department should not allow the Surface Water Coalition to further prejudice IGWA and Pocatello's hearing preparation.

The July Scheduling Order provides the Director with the authority to impose sanctions for any violations of that order or the Idaho Rules of Civil Procedure. *See* July Scheduling Order, at 4. Compelling the production of the materials the Surface Water Coalition has refused to supply or, in the alternative, prohibiting the use of these materials and any testimony on the subjects covered by these materials is properly within that sanction authority. In addition, the Director should provide IGWA and Pocatello costs and fees incurred in attempting to obtain this information.

II. ARGUMENT

Discovery in IDWR contested cases is governed by IDAPA 37.01.01.520 to 37.01.01.532. Rule 521 provides that a party "upon reasonable notice to other parties and all

persons affected thereby, may apply for an order compelling discovery in a manner consistent with the provisions of Rule 37(a) of the Idaho Rules of Civil Procedure." IDAPA 37.01.01.521. Furthermore, the Expert Disclosure Agreement specifically contemplated that failure to comply with its terms would result in a motion to compel. *See* Sneed Affidavit, Exhibit B, ¶ 11. The failure to provide the materials requested, although violating four of the six disclosure requirements, falls into two categories: (1) the materials considered by the Coalition's experts in forming their opinions; and (2) that of the qualifications of the Surface Water Coalition's experts.

A. The materials considered by the Surface Water Coalition's experts should have been provided without request.

Paragraph 5 of the July Scheduling Order uses the exact language of Federal Rule of Civil Procedure 26(a)(2) ("Rule 26(a)(2)") for the documents that were to have been produced in conjunction with the expert reports.[2] Thus, it is appropriate for the Department to rely on the law interpreting the federal rule. A "major purpose of [Rule 26(a)(2)] is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives." Wright & Miller, 8 Fed. Prac. & Proc. Civ.2d, Rule 26. The directives for production of documents under Rule 26(a)(2) are extremely broad and "are mandatory and self-executing." *Kern River Gas Transmission Co. v. 6.17 Acres of Land, More or Less*, 2005 WL 3257509, *5 (10th Cir. 2005). An expert need only have "considered" a document to subject it to the production requirement of

[2] Federal Rule of Civil Procedure 26(a)(2)(B) provides that an expert report:

> shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26 (a)(2)(B).

the rule. *Vitalo v. Cabot Corp.*, 212 F.R.D. 472, 474 (E.D. Pa. 2002) ("The only requirement of Rule 26(a)(2)(B) is that the expert 'consider[ ]' the information. The source of the information is irrelevant."). In other words, a party must produce all information considered by their expert without the need for written requests, agreements or otherwise. For example, the Surface Water Coalition's expert report states that its experts analyzed daily natural flow and storage diversions for each of the seven Surface Water Coalition member entities for the entire period of 1930 to 2004. All of this daily diversion data should have been provided as required by the July Scheduling Order. Thus far, the Surface Water Coalition has provided only information concerning monthly natural flow and storage diversions, and limited daily flow data for only a few select years. Affidavit of Charles M. Brendecke dated January 24, 2006, at ¶ 15 [hereinafter "Brendecke Affidavit"].

The Surface Water Coalition's Expert Report contains information based on computer-generated output from spreadsheets, among other technical information. As of now, the Surface Water Coalition has provided two different sets of documents it appears to believe satisfy the requirement to produce materials "considered" by their experts. The first set of documents was provided on compact disk. *See* Affidavit of Gregory K. Sullivan dated January 24, 2006, at ¶ 7 [hereinafter "Sullivan Affidavit"]; *See* Brendecke Affidavit, at ¶ 5. This information included copies of spreadsheets. The Surface Water Coalition, ultimately, but only after several requests, identified the formulae used in the spreadsheets. They did not, however, provide the formulae or data in a format useable by IGWA and Pocatello's experts. *See* Sullivan Affidavit, at ¶ 8; Brendecke Affidavit, at ¶¶ 7, 8. The second set of document production, provided on an FTP site whose access information was made available to IGWA and Pocatello on or about January 20, 2006, was also inadequate. *See* Sullivan Affidavit, at ¶ 9; Brendecke Affidavit, at ¶ 9 *et seq.*

The content that should have been disclosed along with the Surface Water Coalition's Expert Report is straightforward. In order for an opposing expert to test the reliability of evidence resulting from computerized materials, meaningful access to the underlying computer program and programming methods is required. Several federal courts have recognized this principle. In *City of Cleveland v. Cleveland Electrical Illuminating Co.*, 538 F.Supp. 1257, 1266 (D.C. Ohio 1980), the court was faced with a motion to compel production of data and calculations underlying the conclusions of the experts summarized in the plaintiff's experts' reports. In granting the motion to compel, the *Cleveland* court recognized that courts faced with the issue of discoverability of technical information have "consistently recognized the discoverability of underlying data as well as plans and programming methods from which a particular system or computer study emerged." *Cleveland*, 538 F.Supp at 1266.

Also instructive, an order of the United States District Court for the Southern District of Florida sanctioned a plaintiff that declined to provide "all ***documents, spreadsheets, schedules or work papers*** whether furnished to [the expert] that form[ed] the basis for any assumption, assertion or conclusion" in the expert report. *United States v. Batchelor-Robjohns*, 2005 WL 1761429, *4 (S.D. Fla. 2005) (emphasis added). The sanction was exclusion of the expert testimony at trial. *Id.* at *3-4 (S.D. Fla. 2005). The Court excluded the testimony because the defendants were "unable to test the reliability of the valuation methods used or verify the accuracy of [the expert]'s opinion without the aforementioned models." *Id.* at *3. *See also Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F.Supp. 1122 (S.D. Tex. 1976) (even though the plaintiffs made available to defendants the printouts of a computer model its experts had developed specifically for trial and agreed to provide "intermediate computer output," the court

ordered that access be provided to the entire model system documentation and subsystems themselves).

In yet another case addressing production requirements for technical information in which the experts created a simulation model and ran iterations, the United States District Court for the District of Colorado ordered liberal access to the model. It stated that:

> When one party seeks to present a computer study, in order to defend against the conclusions that are said to flow from these efforts, the discovering party not only must be given access to the data that represents the computer's work product, but he also must see the data put into the computer, ***the programs used to manipulate the data and produce the conclusions***, and the theory or logic employed by those who planned and executed the experiment.

Bartley v. Isuzu Motors Ltd., 151 F.R.D. 659, 660-61 (D. Colo. 1993) (emphasis added).[3]

The cases discussed above relied on the policy that an expert must have access to the information that will allow the comprehension and review of opposing expert testimony. *See Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F.Supp. at 1138; *Cleveland*, 538 F.Supp at 1267 (stating that "where, as here, the expert reports are predicated upon complex data, calculations and computer simulations which are neither discernible nor deducible from the written reports themselves, disclosures thereof is essential to the facilitation of effective and efficient examination of these experts at trial").

IGWA and Pocatello cannot investigate the Surface Water Coalition opinions—opinions which are "predicated upon complex data, calculations and computer simulations"—unless these parties receive the spreadsheets together with formulae in a format usable to verify, test, and replicate the conclusions of the author. Without such materials, Pocatello and IGWA are prejudiced and disadvantaged; the requested materials provide the only mechanism available to

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[3] *See also Southwest Ctr. for Biological Diversity v. U.S.D.A.*, 170 F.Supp.2d 931, 942 (D. Ariz. 2000) (stating that under Rule 26(a)(2), "research data, like all relevant information, must be disclosed even without a discovery request").

IGWA's and Pocatello's experts to assess the foundations upon which the Surface Water Coalition's expert report is based. By contrast, Pocatello provided the materials considered by its experts in a format and with the underlying materials so that the Surface Water Coalition, with ease and little expense, can test, verify and replicate the work of these parties' experts. *See* Sullivan Affidavit, at ¶ 8.f.

The Surface Water Coalition has advanced several arguments as to why it has withheld the information requested. First, it appears to suggest that the information Pocatello and IGWA seek is somehow "proprietary" or otherwise has a discernible value that requires compensation before production. Even if this argument were supported in the law of Rule 26(a)(2), which it is not, Pocatello and IGWA have provided the materials from their experts of the exact nature and in the same form sought from the Surface Water Coalition by Pocatello and IGWA. The cost and expense incurred by Pocatello and IGWA in producing the materials under the Expert Disclosure Agreement was not shared by the Surface Water Coalition. As of now, the Surface Water Coalition has obtained a benefit it refuses to believe is mutual, even though mutuality of exchange was required under the Expert Disclosure Agreement.

The Surface Water Coalition has also suggested that IGWA and Pocatello can recreate its experts' spreadsheets by manually entering the material. While this may be accurate, it frustrates the intent and spirit of disclosures, and would take a week or more, according to our experts. *See* Sullivan Affidavit, at ¶ 8.d.

The Surface Water Coalition has also suggested that the information sought by Pocatello and IGWA could be obtained through depositions. This is neither an efficient nor effective means of deposition time and, while theoretically possible to obtain such information, would require several weeks of deposition for each of their experts to truly obtain these materials, a

continuance to review the information, and then resumption of the expert depositions. This position is somewhat absurd. If the Surface Water Coalition is willing to provide the information through the mechanism of depositions, then why not simply provide the information in the form requested by IGWA and Pocatello?[4]

The affidavits filed by IGWA's and Pocatello's experts contemporaneously with this motion explain in detail how the information provided by the Surface Water Coalition is inadequate. *See generally* Brendecke Affidavit; Sullivan Affidavit. The Surface Water Coalition's failure to provide the information considered by its experts in arriving at the conclusions in the Surface Water Coalition expert report should be viewed as an attempt to delay pre-hearing preparations and prejudice Pocatello and IGWA, and the Director should order that the materials be provided immediately, or should order the exclusion of any Surface Water Coalition expert testimony related to the materials so withheld.

B. The Surface Water Coalition was required to disclose *all* of its experts *and* their qualifications.

Paragraph 1(c) of the July Scheduling Order required, as one of the first disclosure requirements, the disclosure of expert witnesses. *See* July Scheduling Order, ¶ 1(c). As stated by the United States Court of Appeals for the Seventh Circuit, "[f]ormal disclosure of experts is not pointless. Knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial." *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 757-58 (7th Cir. 2004). In their disclosures, the Surface Water Coalition members each individually identified their experts. Each identified the following: Charles E. Brockway, John Koreny, Allison MacEwan, David Shaw, and Norman Young. However, the Surface Water Coalition's expert report identifies three additional people whose opinions are expressed in the report. On page 1-3 of the Surface

[4] At bottom, the Surface Water Coalition has agreed to provide some of the information, just not in a form that can be easily usable and not without substantial cost to all parties (including the Surface Water Coalition, itself).

Water Coalition's Expert Report, it describes the responsibilities of those who prepared the report, in other words, the people whose opinions are expressed in the report. *See* Sneed Affidavit, Exhibit F. Three additional people who have not been disclosed were included in that list: Jennifer Stevens, Steve Thurin, and Larry Land. More recently, Jennifer Stevens, although previously undisclosed, has been named as primarily responsible for some of the materials in the report. *See* Sneed Affidavit, Exhibit G. This violates the rules for disclosure of expert witnesses and the July Scheduling Order.

Paragraph 5 of the July Scheduling Order requires disclosure of expert qualifications. Repeated requests have been made for each of the Surface Water Coalition's experts' qualifications, which are typically provided in the form of professional resumes; however, only that of one of the Surface Water Coalition's experts has been provided. *See* Sneed Affidavit, Exhibit G. The Surface Water Coalition has also refused to provide the compensation paid for its expert report and testimony and the list of cases in which its experts have testified in the last four years. These failures violate the July Scheduling Order, and have prejudiced IGWA's and Pocatello's ability to prepare for expert depositions. The Director should order that the materials be provided immediately, or that the Surface Water Coalition expert testimony be excluded in its entirety for failure to comply with the procedural requirements of the July Scheduling Order.

III. PRAYER FOR RELIEF

More than reasonable notice has been provided to the Surface Water Coalition that the documents not provided were necessary for hearing preparation and, more immediately, for expert depositions. In some cases, the Surface Water Coalition has indicated it will not provide the most important materials requested unless ordered to do so by the Department. Thus, an order compelling production is the proper remedy for the Surface Water Coalition's discovery violations. In the alternative, the Director should strike the Surface Water Coalition's expert

report, prohibit the use at the hearing of all information not disclosed, and prohibit the introduction of any testimony related to the subject of those documents.

WHEREFORE, IGWA and Pocatello respectfully request the Director to:

1. Compel the Surface Water Coalition to produce ***all documents considered by their experts in arriving at the opinions expressed in the report***, including, but not limited to, those document expressly identified in the correspondence between IGWA and the Surface Water Coalition and Pocatello and the Surface Water Coalition. *See* Sullivan Affidavit; Brendecke Affidavit.

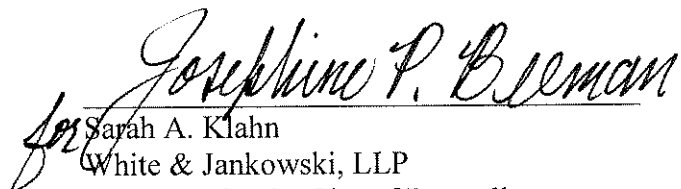
2. Require the Surface Water Coalition to pay all fees and costs incurred by IGWA and Pocatello in prosecuting this motion.

3. Hold a hearing forthwith to avoid any additional prejudice from the Surface Water Coalition's withholding of documents.

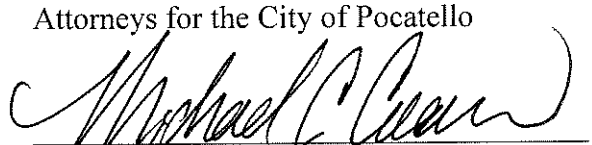
In the alternative, IGWA and Pocatello request that the Department strike the expert report provided by the Surface Water Coalition, exclude from presentation at the hearing any of the documents the Surface Water Coalition should have provided but failed to, and exclude from presentation at the hearing any testimony related to the subjects of those documents.

Respectfully submitted this 24th day of January, 2006.

Josephine P. Beeman
Beeman & Associates, P.C.
Attorneys for the City of Pocatello



for Sarah A. Klahn
White & Jankowski, LLP
Attorneys for the City of Pocatello

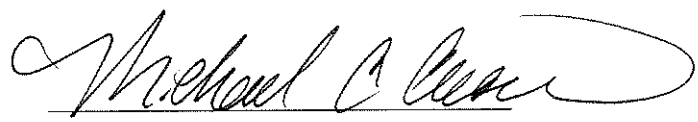


Michael C. Creamer
Givens Pursley LLP
Attorneys for the Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of January 2006, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

Mr. Karl J. Dreher, Director Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098	_____ _____ _____ X _____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
C. Tom Arkoosh, Esq. Arkoosh Law Offices, Chtd. 301 Main Street P.O Box 32 Gooding, ID 83330	X _____ _____ _____ _____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
W. Kent Fletcher, Esq. Fletcher Law Office P.O. Box 248 Burley, ID 83318-0248	X _____ _____ _____ _____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Roger D. Ling, Esq. Ling, Robinson & Walker 615 H St. P.O. Box 396 Rupert, ID 83350-0396	X _____ _____ _____ _____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
John A. Rosholt, Esq. John K. Simpson, Esq. Travis L. Thompson, Esq. Barker, Rosholt & Simpson 113 Main Avenue West, Ste. 303 Twin Falls, ID 83301-6167	X _____ _____ _____ _____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 550 West Fort Street, MSC 020 Boise, ID 83724-0020	X _____ _____ _____ _____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail

Matt J. Howard, Esq. U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	X ____ ____ ____ ____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Scott L. Campbell, Esq. Moffatt Thomas Barrett Rock & Fields, Chtd. 101 S. Capitol Blvd., 10th Floor P.O. Box 829 Boise, ID 83701-0829	X ____ ____ ____ ____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Michael S. Gilmore, Esq. Deputy Attorney General Civil Litigation Division Office of the Attorney General P.O. Box 83720 Boise, ID 83720-0010	X ____ ____ ____ ____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Josephine P. Beeman, Esq. Beeman & Associates PC 409 West Jefferson Boise, ID 83702-6049	X ____ ____ ____	U.S. Mail Facsimile Hand Delivery E-mail
Sarah A. Klahn, Esq. White & Jankowski, LLP 511 16th Street, Suite 500 Denver, CO 80202	X ____ ____ ____	U.S. Mail Facsimile Overnight Mail E-mail
Terry T. Uhling, Esq. J.R. Simplot Company 999 Main Street P.O. Box 27 Boise, ID 83707	X ____ ____ ____ ____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Mr. Ron Carlson Mr. Lewis Rounds Idaho Department of Water Resources Eastern Regional Office 900 North Skyline Dr. Idaho Falls, ID 83402-6105	X ____ ____ ____ ____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail

Mr. Allen Merritt Ms. Cindy Yenter Idaho Department of Water Resources Southern Regional Office 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery _____ E-mail