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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Idaho Power Company

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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|---|---|---|
| IN THE MATTER OF GROUND WATER DISTRICTS' APPLICATION FOR APPROVAL OF MITIGATION PLAN FOR THE AMERICAN FALLS REACH OF THE SNAKE RIVER | ) | **PROTEST AND REQUEST FOR INDEPENDENT HEARING OFFICER** |

Idaho Power Company ("Idaho Power"), by and through its counsel, Brownstein Hyatt & Farber, P.C., and James C. Tucker, Senior Attorney for Idaho Power Company, respectfully submits to the Idaho Department of Water Resources (the "Department") its Protest to the Application of 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 (collectively, the "Districts" or "Applicants") for Approval of a Mitigation Plan (the "Plan"). In support of its Protest, Idaho Power states as follows:

## I. Name, mailing address and telephone number of Protestant:

The name of the Protestant is the Idaho Power Company. The names of the representatives of the Protestant in this proceeding and the persons to be utilized for the purposes of service and receipt of all official documents are:


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c/o James C. Tucker
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## II. Grounds for Protest

1. The Eastern Snake Plain Aquifer is hydraulically connected to the Snake River and tributary surface water sources, including specifically the American Falls Reach. Senior natural flow and storage water rights in the Snake River basin have been and will continue to be short of water necessary to fulfill their need for beneficial use. As a result, the Eastern Snake Plain Aquifer and hydraulically connected surface sources in the Snake River basin are overappropriated. Curtailment of junior groundwater diversions in the Eastern Snake Plain Aquifer will result in increased reach gains in the Snake River, and increased water availability to senior natural flow and storage rights. See, Contor, Cosgrove, Johnson, Rinehart and Wylie, Snake River Plain Aquifer Model Scenario: Hydrologic Effects of Curtailment of Ground Water Pumping "Curtailment Scenario," October 2004, Idaho Water Resources Research Institute Technical Report 04-023. Therefore, junior water rights, including groundwater rights diverting water from the Eastern Snake Plain Aquifer within the Districts, must be curtailed in accordance with the prior appropriation doctrine in order to satisfy beneficial use needs under senior water rights. See, Final Order Creating Water District No.120, at 4; Final Order Creating Water District No.130; In the Matter of Distribution of Water Rights Nos. 36-15501, 36-02551, and 36-07694, Amended Order, March 10, 2004, Paragraphs 2, 3, 5 and 6; In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation District, et. al., Order, February 14, 2005, Paragraphs 5, 12, 59, 64, 67; Musser v. Higginson, 871 P.2d 809, 812 (1994)

2. Because the Eastern Snake Plain Aquifer and the Snake River basin are overappropriated, depletions under junior water rights within the Districts are presumed to be causing material injury to senior natural flow and storage rights in the basin, including those owned by Idaho Power. The Districts have the burden to establish by a preponderance of the evidence that the proposed Mitigation Plan prevents or compensates for injury to senior water rights, including those owned by Idaho Power, in time, quantity, quality, and location.

3. Idaho Power owns water rights in the Snake River basin, including but not limited to water and contract rights to water stored in and released from American Falls Reservoir for use in the Snake River both above and below Milner. 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. Operation of the Plan as proposed will cause material injury to water rights within the Snake

River basin, including those owned by Idaho Power, through the continuation of out-of-priority depletions under junior water rights. See Rules Conjunctive Management of Surface and Ground Water Resources, IDAPA § 37.03.11.43.03.c. and j (hereinafter "Rule 43").

4. The Plan proposes changes of water rights, by proposing that unspecified natural flow and storage rights be used for the changed purpose, time and place of use for replacement purposes. Therefore, the Districts must meet the substantive requirements of I.C. § 42-222 and IDWR's Administrative Memorandum, Transfer Processing No. 24, Re: Transfer Processing Policies and Procedures, October 30, 2002. The Plan fails to meet these requirements.

5. The Districts have failed to meet their burden to provide the Director of the Department of Water Resources (the "Director") with sufficient information demonstrating that the Plan will prevent or compensate senior water rights from material injury occasioned by diversions under junior groundwater rights within the Districts. See Rule 43. Among the deficiencies in the Plan as filed are the following:

(a) The Plan fails to identify either the senior water users that are the intended beneficiaries of the replacement water to be provided under the Plan, or the junior wells whose out-of-priority withdrawals must be replaced under the Plan. Rule 43.01.b.

(b) The Plan fails to set forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. Rule 43.01.c. No specific water rights or sources of supply for mitigation are described anywhere in the Plan.

(c) The Plan fails to identify the replacement water to be used under the Plan, and it is therefore impossible to determine that the Plan will operate in compliance with Idaho law. The petitioner must meet the substantive requirements of Idaho law with regard to changes of water rights, and has failed to do so. Rule 43.03.a.

(d) The Plan does not provide replacement water "sufficient to offset the depletive effect of ground water withdrawals . . . at the time and place required by senior-priority water rights". Rule 43.03.b. The Plan does not address the timing, quantity, location or quality of replacement water. Further, the Plan does not attempt to calculate the depletive effect of the ground water withdrawals at issue, nor does it calculate the Districts' total diversions or consumptive use of water under the water rights subject to the Plan. Rule 43.03.e., f. and g.

(e) The Plan fails to account for and mitigate the depletive effect of multiple years of pumping under junior groundwater rights. Rule 43.03.c. The Plan purports to account for the effects of only one year of pumping.

(f) The Plan relies on a conceptual artificial recharge program discussed at political and administrative levels of Idaho state government. Such a program is neither funded nor operational. The nature, scope, location, water rights or operation of such a recharge scheme is vague and conceptual. The Districts' participation in such a plan is therefore speculative and cannot be considered in the approval of the Plan. Rule 43.03.d.

(g) The Plan fails to identify the actual source of replacement water the Districts propose to use, or that the source of replacement water is reliable. Rule 43.03.h. The Plan does not indicate that Applicants have any firm commitment, in the form of a contract, lease or purchase agreement, to acquire water from any other specific source. The Plan does not assure a reliable replacement supply on a permanent basis. Moreover, the Plan purports to rely on a State recharge program, and a State-sponsored water rights exchange, that are neither funded, authorized, nor operational. Such reliance is speculative, in contravention of the specific requirements of the Rule, which require the identification of replacement sources of water.

(h) The Plan does not adequately describe the Districts' proposed method of delivery, storage or use of replacement water, making it impossible for the Director to determine whether material injury to water rights will be prevented.

(i) Because the Plan does not attempt to quantify the depletive effects of ground water pumping by junior water rights within the Districts, and does not clearly identify a plan for providing replacement water to seniors, the Plan would allow junior ground water pumpers to enlarge their water rights by withdrawing groundwater out-of-priority to the injury of junior and senior appropriators. The Plan does not identify how the Districts will prevent any enlargement in the use of any replacement water. I.C. § 42-222; Rule 43.03.i.

(j) The Plan is not consistent with the public interest. Rule 43.03.j. It is well established under Idaho law that water must be administered consistent with the doctrine of prior appropriation. See Musser v. Higginson, 871 P.2d 809 (Idaho 1994); I.C. § 42-602.

(k) The Plan does not contain any real means of enforcement and is largely voluntary. Rule 43.03.k.

(l) The monitoring elements of the Plan are largely cooperative and voluntary, and do not commit the Districts to performing the required monitoring to protect senior-priority water rights from material injury. Rule 43.03.k.

(m) The Plan does not assure maintenance of the water quality historically enjoyed by senior water users, which is an integral part of their vested water rights. IDWR's Administrative Memorandum, Transfer Processing No. 24, Re: Transfer Processing Policies and Procedures, October 30, 2002 at 19.

(n) Idaho Power does not concede that the computer simulations and calculations relied on by the Districts used accepted and appropriate engineering and hydrologic formulae for calculating the depletive effect of ground water withdrawal. Rule 43.03.e. Idaho Power also does not concede that the computer simulations and calculations relied on by the Districts use appropriate values for aquifer characteristics, such as transmissivity and specific yield. Rule 43.03.f.

(o) Although the Plan purports to mitigate for pumping over some 800,000 acres, it does not propose the division of the area into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. Rule

43.03.n.

(p) The Districts and Idaho Power have not entered into any agreement on an acceptable mitigation plan. Rule 43.03.o.

6. The Plan contains inadequate information on which to fully assess the extent to which other water users including Idaho Power will be injured under its terms. Idaho Power reserves the right to supplement its objections and to assert additional grounds for objection to the Plan following completion of discovery.

7. There is currently pending in Case No. CV OC 0307551 D, in the District Court of the Fourth Judicial District, County of Ada, a case which challenges the constitutionality of the Department's Conjunctive Management Rules. Idaho Power has a pending motion to intervene in the Ada County proceedings. By filing this Motion and proceeding under the Rules in this matter, Idaho Power does not concede the constitutionality of the Conjunctive Management Rules, either on their face or as applied. Idaho Power reserves the right to challenge the constitutionality of the Conjunctive Management Rules or the application thereof in these or any other proceedings.

**III. Request for Relief.**

1. The Plan on its face fails to meet the requirements of Rule 43, and, accordingly, Idaho Power requests the Director to dismiss or deny the Plan. Any order granting the Plan should be made only pursuant to terms and conditions adequate to prevent material injury to other water rights.

2. Idaho Power requests the appointment of an independent hearing officer in this matter to hear all motions, oversee any discovery, take evidence and enter orders.

Dated this 21st day of March 2005.

IDAHO POWER COMPANY

By: _____
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Senior Attorney, Idaho Power Company

and

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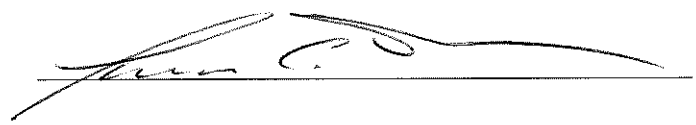
## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 2005 a true and correct copy of the foregoing PROTEST was deposited in the United States Mail, postage prepaid addressed to:

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