Roger D. Ling, ISB #1018
LING ROBINSON & WALKER
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

Attorneys for A & B Irrigation District and
Burley Irrigation District

C. Tom Arkoosh, ISB #2253
ARKOOSH LAW OFFICES, CHTD.
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for American Falls
Reservoir District #2

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
Twin Falls, Idaho 83301-6167
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Milner Irrigation District,
North Side Canal Company, and
Twin Falls Canal Company

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

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	**SURFACE WATER COALITION'S PETITION FOR REVIEW OF DIRECTOR'S JUNE 3, 2005 ORDER DENYING REQUESTS TO APPOINT AN INDEPENDENT HEARING OFFICER**

COMES NOW, 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 (hereinafter collectively referred to as the "Surface

Water Coalition" or "Coalition"), and hereby file this *Petition for Reconsideration of Director's June 3, 2005 Order Denying Requests to Appoint an Independent Hearing Officer* pursuant to Rule 711 of the Department's Rules of Procedure (IDAPA 37.01.01.711). The *Affidavit of Charles E. Brockway, Ph.D., P.E.* is attached as "Exhibit A" and is being filed in support of this petition. The bases for this petition are as follows:

FACTS

The Surface Water Coalition hand delivered a letter to the Director on January 14, 2005, requesting administration of junior ground water rights within Water District No. 120 in 2005. *See January 14, 2005 Letter to Director*. On January 20, 2005, the Coalition sent the Director another letter concerning questions about statements Department personnel had made to the public about the Coalition's request for water right administration. *See January 20, 2005 Letter to Director*. The Coalition requested the Director identify the Department personnel and their statements, and remove those individuals from participating in the Department's response to the request for water right administration. *See id.* at 3.

The Director immediately responded to the Coalition's January 20, 2005 letter and issued an *Order* on January 25, 2005 ("*Jan. Order*"). The Director deemed the Coalition's letter "to be a petition for disqualification pursuant to Idaho Code § 67-5252." *Jan. Order* at 1. Consequently, the Director denied "the request to recuse and remove the Director as the presiding officer in responding to the delivery calls made by the Surface Water Coalition." *Id.* at 6.

Shortly after the Director issued his first order, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a petition to intervene on February 3, 2005. On February 11, 2005, Idaho Power Company filed a letter in support (petition to intervene) of the Coalition's request for

water right administration by priority. In response to the Coalition's request for water right administration the Director issued an initial order on February 14, 2005 ("*Feb. Order*"). The order was designated as "interlocutory" except for two matters and claimed to initiate a "contested case" pursuant to Idaho Code § 67-5240. *Feb. Order* at 33. The Director also granted IGWA's petition to intervene. *See id.* at 34. Following the Director's *Feb. Order* the Idaho Dairyman's Association ("IDA") filed a petition to intervene on February 18, 2005. Later, on March 7, 2005, the United States Bureau of Reclamation ("Reclamation") also filed a petition to intervene. The Director granted IDA's and Reclamation's petitions to intervene and denied Idaho Power's motion to intervene by order on April 6, 2005. Approximately two weeks later the Director issued a final order responding to the Coalition's water right delivery request on April 19, 2005, which was then superceded by an amended order on May 2, 2005 ("*May Order*"). On April 26, 2005, the City of Pocatello ("Pocatello") and several state agencies ("State Ground Water Users") filed petitions to intervene. The Director granted these petitions to intervene by order on May 11, 2005.

Petitions requesting a hearing on and/or reconsideration of the Director's *May Order* were filed by the Coalition, Reclamation, Idaho Power, IGWA, IDA, Pocatello, J.R. Simplot Company, and the State Ground Water Users following the *May Order*. The Coalition and Idaho Power requested the Director to appoint an independent hearing officer to conduct the hearing on the Director's *May Order*. The Director responded to the various petitions and requests by his order of June 3, 2005 ("*June Order*"). The Director denied the requests for an independent hearing officer. *June Order* at 3.

ARGUMENT

Rule 711 allows any "party or person" affected by an interlocutory order to petition for "review" of that order. The Coalition requests the Director to amend his *June Order* and appoint an independent hearing officer to preside over the hearing in the above-captioned matter. The Director's participation and involvement with the recalibration of the ESPA groundwater model, his involvement in gathering facts related to "injury" suffered by the Coalition members as determined in the May 2, 2005 Order, and his prior involvement in direct negotiations between the parties all warrant the appointment of an independent hearing officer to preside at the hearing in the matter.

I. THE DIRECTOR'S PARTICIPATION IN THE RECALIBRATION OF THE ESPA GROUNDWATER MODEL WARRANTS THE APPOINTMENT OF AN INDEPENDENT HEARING OFFICER IN THIS PROCEEDING.

Last year, the Department and its consultant, the Idaho Water Resources Research Institute (IWRRI) completed a recalibration and reformation of the Eastern Snake Plain Aquifer groundwater model. As part of this recalibration effort, the Director received input and advice from the ITCH Advisory Committee, a committee of hydrologists and experts chaired by the Director. *See* Brockway Aff. at ¶¶ 3-4. Although the committee provided input on the recalibration work being performed by IWRRI, including input on assumptions that factored into the recalibration, if no consensus was reached by committee members, the Director and IWRRI made the final decision on the model's recalibration and reformation inputs. *See id.* at ¶ 6.

The ESPA groundwater model was the administrative tool utilized by the Director to respond to the Coalition's request for water right administration. *See* May 2, 2005 Order at 7, 17. Since the Director participated and directed the process that resulted in the recalibrated ESPA groundwater model, and since the Director used the ESPA groundwater model in

formulating his May 2, 2005 Order, it is likely that factual questions will be raised during the course of the proceeding that will need to be answered personally by the Director. Accordingly, it would be appropriate to have an independent hearing officer weigh the evidence supplied in support of, or in opposition to, how the ESPA groundwater model was recalibrated and used in responding to the Coalition's request for water right administration.

II. THE DIRECTOR'S PARTICIPATION IN GATHERING OUTSIDE FACTUAL INFORMATION RELATED TO THE DETERMINATION OF THE COALITION MEMBERS' "INJURY" WARRANTS THE APPOINTMENT OF AN INDEPENDENT HEARING OFFICER IN THIS PROCEEDING.

Similar to the basis set forth above related to the ESPA groundwater model, the Director's participation in gathering factual information related to the determination of "injury" to the Coalition members' water rights warrants the appointment of an independent hearing officer. In the *May Order*, the Director estimates "losses in crop production" in the various counties where the Coalition members deliver water based upon discussions with individuals employed by the University of Idaho Agricultural Extension Agents and by the U.S. Department of Agriculture Farm Service Agency as County Directors. *May Order* at 25. The Director's *June Order* indicates that an employee of the Department, not the Director, conducted these discussions with the extension agents and county directors. *June Order* at 3. A review of the documents contained in the *Partial Agency Record of Documents and Ground Water Model Simulations Relied upon by the Director for the Amended Order of May 2, 2005, in the Matter of the Surface Water Coalition Delivery Call* reveals that Dave Tuthill reviewed the above referenced information "at the request of the Director." *See* April 15, 2005 Memorandum from Dave Tuthill to Karl Dreher (Exhibit B). Therefore, it appears that the Director "requested" the information on "crop losses" in the various counties, and may have directed the types of questions to be asked of these agents. Accordingly, it is likely that factual questions will be

raised during the course of this proceeding that will need to be answered personally by the Director. Accordingly, it would be appropriate to have an independent hearing officer weigh the evidence regarding why and how that information was used in determining "injury" to the Coalition members' water rights as set forth in the *May Order* responding to the Coalition's request for water right administration.

III. THE DIRECTOR'S PARTICIPATION IN PRIOR NEGOTIATION SESSIONS BETWEEN THE PARTIES WARRANTS THE APPOINTMENT OF AN INDEPENDENT HEARING OFFICER IN THIS PROCEEDING.

Finally, the Director admits that he participated in direct negotiation sessions between the parties during the course of 2004. *See June Order* at 3. Regardless of who requested the Director's presence at these meetings, it does not change the fact that the Director actively participated in these negotiations, including providing comments on strategies to resolve the issue of conjunctive administration of surface and ground water rights. The Director was made aware of settlement offers made throughout the negotiations, including the parties' various theories on water supply needs and replacement supplies, as well as the overall strategy for long-term conjunctive administration of surface and ground water rights in the ESPA. Given the Director's participation in these negotiations sessions, it would be appropriate to have an independent hearing officer weigh the evidence reviewing the May 2, 2005 Order responding to the Coalition's request for water right administration.

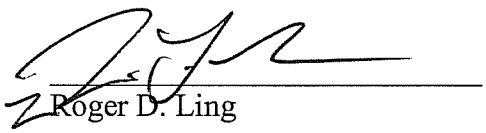
REQUEST FOR RELIEF

Based upon the foregoing reasons, the Coalition requests the Director to amend his June 3, 2005 Order and appoint an independent hearing officer to preside over the hearing in this matter. The Coalition further requests the Director to designate the responsive order to this request as a "final order." Resolution of this issue in a timely manner is necessary to ensure that

the Department and the parties make the best use of time and resources prior to proceeding with the hearing.

DATED this 14th day of June 2005.

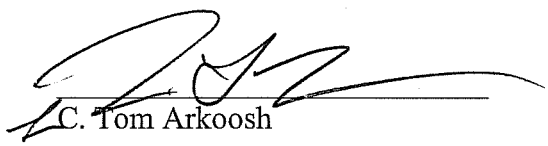
LING ROBINSON & WALKER



Roger D. Ling

Attorneys for A & B Irrigation District
and Burley Irrigation District

ARKOOSH LAW OFFICES CHTD.



C. Tom Arkoosh

Attorneys for American Falls
Reservoir District #2

FLETCHER LAW OFFICES

W. Kent Fletcher

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP

John A. Rosholt
John K. Simpson
Travis L. Thompson

Attorneys for Milner Irrigation District,
North Side Canal Company, and
Twin Falls Canal Company

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2005, I served a true and correct copy of the foregoing *Surface Water Coalition's Petition for Review of Director's June 3, 2005 Order Denying Requests to Appoint an Independent Hearing Officer* the following by the method indicated:

Via Email and U.S. Mail

Director Karl Dreher
Idaho Department of Water Resources
322 E. Front St.
Boise, Idaho 83720-0098
victoria.wigle@idwr.idaho.gov

IDWR – Eastern Region
900 N. Skyline Dr., Suite A
Idaho Falls, Idaho 83402-1718

IDWR – Southern Region
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380

Jeffrey C. Fereday
Michael C. Creamer
Givens Pursley LLP
601 Bannock St., Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720
cf@givenspursley.com
mcc@givenspursley.com

Kathleen Marion Carr
U.S. Department of Interior
550 West Fort St., MSC-020
Boise, Idaho 83724
kmarioncarr@yahoo.com

James C. Tucker
Idaho Power Company
1221 West Idaho St.
Boise, Idaho 83702
jamestucker@idahopower.com

Jo Beeman
Beeman & Assoc.
409 W. Jefferson St.
Boise, Idaho 83702
jo.beeman@beemanlaw.com

James S. Lochhead
Adam T. DeVoe
Brownstein, Hyatt & Farber P.C.
410 17th St., 22nd Floor
Denver, Colorado 80202
jlochhead@bhf-law.com
adevoe@bhf-law.com

Michael Gilmore
Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010
mike.gilmore@ag.idaho.gov

Terry T. Uhling
J.R. Simplot Company
999 Main St.
Boise, Idaho 83702
tuhling@simplot.com

Scott L. Campbell
Moffatt Thomas Chtd.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701
slc@moffatt.com

Travis L. Thompson

EXHIBIT "A"

Roger D. Ling, ISB #1018
LING ROBINSON & WALKER
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

Attorneys for A & B Irrigation District and
Burley Irrigation District

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
Twin Falls, Idaho 83301-6167
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Milner Irrigation District,
North Side Canal Company, and
Twin Falls Canal Company

C. Tom Arkoosh, ISB #2253
ARKOOSH LAW OFFICES, CHTD.
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for American Falls
Reservoir District #2

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

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	**AFFIDAVIT OF CHARLES E. BROCKWAY, Ph.D., P.E.**

STATE OF IDAHO)
)
County of Gooding)

CHARLES E. BROCKWAY, Ph.D, P.E., being first duly sworn on oath, deposes and hereby states:

1. I am a professional engineer and hydrologist for Brockway Engineering LLC in Twin Falls, Idaho.
2. That I have been retained by Twin Falls Canal Company and North Side Canal Company to perform certain services on hydrologic and hydraulic issues pertaining to their water rights.
3. That as a part of my services I did attend a series of meetings commonly known as the ESPM Advisory Committee whose primary responsibility was to provide input into the re-calibration and reformation of the Eastern Snake Plain Aquifer (EPSA) Groundwater Model.
4. Many of these meetings were chaired by the Director of the Department of Water Resources or the Department's consultant, the Idaho Water Resource Research Institute (IWRRI).
5. That these meetings were structured for committee members to provide input on matters relating to the re-calibration and documentation process, and modeling scenarios. The Director and IWRRI also provided input. The actual re-calibration and reformation work was performed by IWRRI.
6. That when input was provided on matters, including assumptions that factored into the re-calibration and reformation of the ESPA model, the initial effort was to reach a consensus. If a consensus was not reached, the Director and the Director's consultant made the ultimate decision on the re-calibration and reformation inputs.

7. That I have reviewed the Director's May 2, 2005 Order and June 3, 2005 Order regarding statements about the ESPM Advisory committee process, and that any implication that the recalibration of the model was "collaborative" in that all advisors involved participated in the ultimate decisions on the model's recalibration and reformation is not accurate as explained above.

8. With respect to modeling scenarios run by the ESPA model, the Director provided input on the model runs. In fact, the Director instructed that the Director's "Strawman Proposal" be the initial model run commenced after the "base case" scenario. Additional model runs were instituted thereafter with the Director's input and direction.

Further, your affiant sayeth naught.

DATED this 14 day of June 2005.

Charles E. Brockway

SUBSCRIBED AND SWORN to before me on this 14 day of June 2005.

CAM PURCHASE
Notary Public
State of Idaho

Notary Public for IDAHO
Residing at GLENNS FERRY
My commission expires: 7/16/10

EXHIBIT “B”

MEMORANDUM

TO: Karl Dreher

FROM: Dave Tuthill

DATE: April 15, 2005

RE: Results of an Investigation Regarding the Impact of the Drought on Crops Irrigated by Lower Basin 01 Water Delivery Entities

This memorandum is prepared at the request of Director Dreher to review the impact of the drought on crops located in the lower area of IDWR Administrative Basin 01, Snake River above Milner Dam. The review centers on crops irrigated partially or totally from the Snake River in the counties of Gooding, Jerome, Lincoln, and Twin Falls (see Attachment A).

Two primary sources of information were reviewed in this analysis: personnel who work in agricultural advising roles in the counties, and agricultural statistical data. Personnel who work in agricultural advising roles include University of Idaho Agricultural Extension Agents (see Attachment B), and County Executive Directors of Farm Service Agency offices (see Attachment D). Based on his extensive experience in the area, only one county extension agent, Bill Hazen, was interviewed (see Attachment C). Three Farm Service Agency managers were also interviewed (See Attachments E-G). The economic chapter from the "Coordinated Water Resource Management Plan, Counties of Gooding, Jerome, Lincoln, Twin Falls, Cassia and Minidoka", authored in 2005 and provided by Bill Hazen, County Extension Agent for Gooding County, is provided as Attachment H.

The notes from these discussions consistently describe that many potential impacts of the drought have been prevented due to (1) implementation of technology such as sprinklers, and (2) careful water management. The information provided indicates that drought impacts are estimated to have been 5% or less in most of the large water delivery companies in Basin 01, with the exception of American Falls Reservoir District No. 2, where the severely depleted supplies in both the Big Wood River system and the Snake River system caused revenue reductions of perhaps 15%. The notes indicate, however, that the benefits of technology and management have been stretched to the limit and more severe impacts are anticipated for 2005.

Crop information was assembled for the four counties in question. This information was found as a result of discussions with personnel in the Boise office of the Idaho Agricultural Statistics Service. Data downloaded from the national website at http://www.usda.gov/nass/, were augmented by additional information from the Boise office, and were assembled in three charts for each county. Chart 1 depicts production for the years 1990 through 2004 (or in some cases 2003 based on data availability), for the following crops: barley, beans, corn, hay, oats, potatoes, sugarbeets and wheat. The unit of production varies by crop. For example the unit is hundredweight for potatoes and tonnage for hay. Chart 2 depicts the annual value for each crop, computed by

multiplying production times statewide value per unit of production. For example, for Gooding County in 1990, the production of hay was 181,700 tons. The statewide price for hay that year was $81.83 per ton. The resulting product is $14,896,117. Chart 3 represents the sums of the reported crops for each year. Attachments I-L contain all three charts for each of the four counties.

The use of this crop information is somewhat limited in that the reporting of data has ot been totally consistent. For example, in Lincoln County the reported production for potatoes is unrealistically lowered after 2000. A discussion with staff at the Agricultural Statistics Service revealed that on occasion the reporting practices in a county change. Nevertheless, it appears based on a review of data in all four counties that agricultural revenues for these counties peaked in 1996 and have declined steadily since that time.

Attachments

A Map of Water Delivery Organizations and Counties

B University of Idaho County Extension Agent Contact Information

C Notes from discussion with Bill Hazen, Gooding County University of Idaho Extension Agent

D U.S. Farm Service Agency Contact Information

E Notes from discussion with Jim McLaughlin, County Executive Director of the Twin Falls County and Jerome County Farm Service Agency offices

F Notes from discussion with Harold Boggs, County Executive Director of the Gooding County Farm Service Agency office

G Notes from discussion with Sue Cenarrusa, County Executive Director of the Lincoln County Farm Service Agency office

H Economic Section, Coordinated Water Resource Management Plan, Counties of Gooding, Jerome, Lincoln, Twin Falls, Cassia and Minidoka, authored and provided by Bill Hazen, County Extension Agent, Gooding County, 2005

I Crop information for Gooding County

J Crop information for Jerome County

K Crop information for Lincoln County

L Crop Information for Twin Falls County

M Spreadsheet of initially recommended acres for selected water delivery organizations