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BEFORE 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	**SURFACE WATER COALITION'S INITIAL STATEMENT OF ISSUES TO RAISE AT HEARING**

TO: HEARING OFFICER

The Surface Water Coalition ("Coalition") respectfully submits the following list of issues that the Coalition anticipates raising in the hearing of this matter. This list should not be deemed inclusive to the extent that the Coalition's *Petition Requesting Hearing on May 2, 2005 Amended Order* raises issues not specifically identified herein.

1. Whether the actual boundaries of the ESPA as defined by the ESPA Ground Water Model are accurate.

2. Whether or not data from the time period from May of 1980 through April of 2002 is a representative time period to determine average annual recharge to the ESPA and average annual discharge from the ESPA.

3. Whether or not the Director's definition of a "steady-state condition" is supported by scientific and hydrologic evidence.

4. Whether or not the ESPA Ground Water Model, calibrated to recorded ground water levels in the ESPA and reach gains or losses to the Snake River flows over the period of time used resulted in predictions that understated depletions to the ESPA by ground water withdrawals.

5. Whether or not as a result of the hydraulic connection between the ESPA and the Snake River, there is any legal or factual basis to consider only certain portions of the ESPA, and not the entire ESPA, as being the cause of depletions to the flows of the Snake River in the form of reduced reach gains or increased reach losses.

6. Whether or not the implementation by the Department of conjunctive administration of rights to the use of hydraulically connected surface and ground waters within the Eastern Snake Plain is consistent with Idaho law and available information.

7. Whether or not the simulations used by the Department in its ground water model and the results of those simulations are suitable for making factual determinations on which to base conjunctive administration of surface water rights of the Surface Water Coalition and junior ground water rights diverted from the ESPA assumptions made in the re-calibration and reformation of the model and the estimated uncertainty as to the results of the model simulations.

8. Whether or not the Department's ground water model and the simulations from the ground water model that were used by the Department represent the best available science

for determining the effects of ground water diversions or withdrawals on appropriated surface water supplies from the Snake River and provide a reasonable scientific and legal basis for administration.

9. Whether or not the calibration of the Department's ground water model is the most reliable calibration available to obtain the most accurate simulations from that ground water model for the ESPA that can be used to determine the effects of ground water diversions on the ESPA.

10. Whether or not the Conjunctive Management Rules have been properly interpreted and applied by the Department to acknowledge all elements of the prior appropriation doctrine as established by Idaho law.

11. Whether or not the Director's *May 2, 2005 Amended Order* erred in describing the rate of diversion under Water Right Nos. 01-00211B and 01-00214B of Burley Irrigation District and should have described those rates of diversion from the Snake River in the amounts of 1200 cfs and 544 cfs, respectively, subject to certain conditions which may reduce said flows, but not below 655.88 cfs and 380 cfs respectively.

12. Whether or not the Director's *May 2, 2005 Amended Order* erred in the priority date for Water Right No. 01-00017 held by Milner Irrigation District and should have identified the priority date as November 14, 1916.

13. Whether members of Surface Water Coalition are entitled to receive water stored in space allocated to them in United State Bureau of Reclamation ("Reclamation") dams and reservoirs pursuant to contracts with Reclamation under which each respective member agreed to and has paid for its allocated construction costs of said storage facility and the operation and maintenance costs of the facility, which stored water is used as each respective entity deems appropriate for the irrigation of crops, and such storage water was acquired and is used by the respective members of the Surface Water Coalition to insure an adequate supply of water for the irrigation of lands of the landowners and shareholders of that

entity when sufficient water is not available as the result of climatic conditions. Such storage water was never acquired to mitigate the out-of-priority diversions of water to which members of the Surface Water Coalition would otherwise be entitled to receive.

14. Whether or not it was appropriate for the Department to consider reach gains to the Snake River from 1928 through 1999 to establish significant trends or the lack thereof, when significant ground water diversions or withdrawals did not commence until the 1950s.

15. Whether or not using input from the period of May 1, 1980 to April 30, 2002 to calibrate the ground water model is acceptable in the scientific community and supportable by the facts to make a conclusion that the SRBA was close to dynamic equilibrium in 2002.

16. Whether or not ground water depletions are a cause of the declines of measured reach gains between the Near Blackfoot Gage and the Neeley Gage since 1999, and if so, to what extent are those depletions the cause of the declines.

17. Whether or not reduced flows caused by ground water withdrawals have and had a significant effect upon the availability of water for storage in Palisades Dam and Reservoir as a result of reduction of available water in the Snake River for storage in American Falls.

18. Whether or not the rental of storage water by or to members of the Surface Water Coalition or other spaceholders in Water District No. 1, through the district's Rental Pool is relevant, as a matter of law, in regard to the right of each member of the Surface Water Coalition to enforce the water rights they have acquired or own equitable title to, or can in any way affect a delivery call based upon those rights.

19. Whether or not the manner by which a member of the Surface Water Coalition uses its storage water and thereby may reduce carryover in subsequent years is neither relevant nor material to the enforcement of their water rights.

20. As a result of the voluntary leasing of stored water to the rental pool operated by the Committee of Nine which has occurred, such rental has increased the incidental

recharge to the ESPA, but such use has not been sufficient to mitigate the ground water withdrawals under junior ground water rights.

21. Whether or not storage water, including carryover storage, held by a member of the Surface Water Coalition, or the lack thereof, cannot legally in any way diminish the rights of members of the Surface Water Coalition to natural flow water rights or storage rights held by or acquired for said members.

22. Whether or not the lawful uses of storage water by those entitled to such water contributes to the injury to the water rights of members of the Surface Water Coalition caused by diversions under junior ground water rights. The effects of ground-water depletions which result in material injury to a senior priority surface water right held by a member of the Surface Water Coalition is not dependent upon the total natural flow water that may be available under its rights for the year or the existence or non-existence of stored water carried over from year to year.

23. Whether or not the rights to divert water under a water right that are senior in time may be limited as the result of supplemental water rights acquired.

24. Whether or not the reduction of combined diversions of natural flow and storage above Milner Dam on an annual basis can be used to administer water rights, as the reduction in diversions often result from the shortage of water available for diversion as a result of ground water withdrawals.

25. Water that is generally needed to fully irrigate crops growing on lands over the Eastern Snake River Plain does not change significantly, but the climatic conditions and water supplies do change.

26. Whether or not a full water supply for the lands irrigated under any member of the Surface Water Coalition can be measured by the total quantity of water diverted during the irrigation season, as opposed to the maximum duty of water as defined by the decree.

27. Whether or not in the administration of water rights and the distribution of water under water rights by the priority system, a measurement of water rights can be accomplished by determining trends in the use of water under a water right or the natural flow of the Snake River at different gage measuring stations.

28. Whether or not the diversion of supplemental ground water rights held by a member of the Surface Water Coalition, if any, would exacerbate and add to the injury caused by the reduction in reach gains of the Snake River as the result of ground water withdrawals.

29. Whether or not material injury to the water supply under a senior water right, when said water could be applied to a beneficial use, which occurs as the result of ground water withdrawals, is material injury to the right, without regard to the extent of injury to a crop that could and should have been irrigated or the value of such crops.

30. Whether or not there is sufficient foundation to support comments made by agricultural extension agents of the University of Idaho or employees of the United States Department of Agriculture in regard to shortages in the amounts of water available for irrigation in any particular year.

ISSUES IN REGARD TO CONTROLLING LAW

The Surface Water Coalition has specifically set forth its issues in regard to the controlling law in its delivery call under Section III of its *Petition Requesting Hearing on May 2, 2005 Amended Order*. Reiteration of these issues is not useful.

ADDITIONAL ISSUES RAISED BY *MAY 2, 2005 AMENDED ORDER*

These additional issues are self-explanatory. Reference is made to Section IV of the Surface Water Coalition's *Petition Requesting Hearing on May 2, 2005 Amended Order* in which 19 additional issues are clearly set forth, and a repeat of such issues would not be helpful.

SCHEDULING

There are a number of jurisdictional and legal issues that should be resolved prior to scheduling of discovery and ultimately, a hearing before a hearing officer. Further, given the extensive number of issues raised by the parties, the hearing officer should take the opportunity to examine the opportunities for consolidation with other pending requests for hearing to consider common legal and factual origin. The Coalition would request a second status conference once the hearing officer appointed has the opportunity to review the pleadings and seek additional input from the parties. If the hearing should consider a case management order appropriate, the Coalition would request the opportunity to provide a proposed order following a review of the pleadings before the hearing officer.

REQUESTED RELIEF

The Surface Water Coalition has set forth the relief to which they feel they are entitled under their letter delivery call. To the extent the Surface Water Coalition's requests are inconsistent with the Director's *May 2, 2005 Amended Order*, such inconsistency creates an issue that must be addressed in these proceedings. Little could be gained by restating the relief sought and the issues created as the result of the relief being different than the relief granted by the *May 2, 2005 Amended Order*.

Respectfully submitted this 14th day of June, 2005.

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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 Initial Statement of Issues for Hearing* the following by the method indicated:

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