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DEPARTMENT OF
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BEFORE THE DEPERTMENT 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 SRFACE 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	**MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE EXPERT REPORT OF JOHN CHURCH**

I. Introduction

The Idaho Ground Water Appropriators, Inc., (IGWA) have submitted the *Expert Report of John Church* (Report) in the Surface Water Coalition's (Coalition) Request for Administration Relief in Water District 120, which is currently pending before the Idaho Department of Water Resources (IDWR). The stated purpose of the Report "is to evaluate certain questions regarding the economic implications of ground water pumping as it may have affected the water supplies of certain surface water diverters who use such water for irrigation of commercial agricultural crops, and the economic effects of shut-offs of groundwater wells as proposed by these surface water diverters in the present delivery call before the Idaho Department of Water Resources." *Report* at 3. Evidence of economic impact should not be considered in this Request for Administrative Relief, based on Idaho Rule of Evidence 403 and the sections of the Idaho Administrative Code dealing with Conjunctive Management.

The Coalition has never based its delivery call on the junior ground water's economic impact to the members of the Coalition. In reality, the delivery call was instituted to curtail certain junior ground water users whose use has had an adverse effect on the water supply available to the Coalition members, under their senior water rights. Based upon the current rules for conjunctive management in Idaho, 'resulting economic implications' are not valid considerations for the Director or IDWR to review when determining whether senior right holders are suffering material injury and are entitled to the waters of the State of Idaho.

ARGUMENT
I.R.E. 403

Under Idaho Rule of Evidence Rule 403, certain evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

presentation of cumulative evidence. The following provisions of IRE 403 are applicable to IGWA's Report because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues...waste of time or needless presentation of cumulative evidence.

Unfair Prejudice

The Report, with its accompanying documents, partly relies upon the concept that the benefit to the surface users would be minor and speculative, while the effect on curtailed pumpers would be immediate and devastating. However, this confuses the issue and creates unfair prejudice to the Coalition as it focuses on secondary effects of the application of the prior appropriation doctrine. All water users in Idaho operate under the assumption that their water rights could be shut off if a senior user makes a valid delivery call, makes the necessary showings and the junior user can not provide a mitigation plan. There will no doubt be adverse effects to junior ground water users if their rights are shut off. However, this should not be a topic of discussion in this Request for Administration. The Report is mainly an analysis of three studies of potential curtailment of ground water appropriators and seeks to establish that the benefit to the surface users would be minimum.

Therefore, the submission of the Report should be prohibited as it creates unfair prejudice by focusing the decision maker's attention to criteria that do not apply to the conjunctive management of water rights in the State of Idaho.

Confusion of the Issues

As discussed above, one of the purposes of the Report is to evaluate certain questions regarding the economic impact of ground water pumping as it may have affected the water supplies of surface water diverters. This is not a valid consideration when a call has been made. Under Rule 40 of the Idaho Administrative Code (IDAPA) 37, Title 03, Chapter 11, when a delivery call is made by a senior user alleging that by reason of diversion of water by a junior user from an area

having a common ground water supply in an organized water district that the user is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the water master shall act. The Eastern Snake Plain Aquifer has a common ground water supply.

A good deal of the Report offers an analysis that South Central Idaho has and continues to endure difficult agricultural circumstances based on other factors than water shortages. This may be the case, but it confuses the real issue the Director should be reviewing – whether the curtailment of junior ground water users will provide the senior users a water supply to obtain a full allotment under their decreed water rights. The Coalition has never based its delivery call on the junior ground water's economic impact to the senior users or the impact on ground water users. Therefore, the Report should not be accepted as evidence in the Coalition's delivery call.

Waste of Time

Consideration of the Report provides no beneficial information to help the Director and IDWR resolve the Coalition's Request for Administration. Information of the economic impact of junior users is irrelevant. What the Report tries to establish is that it is Idaho's sluggish agricultural economy that is truly hurting the Coalition. That is irrelevant and has no place for the decision-maker in this Request for Administration. The lengthy Report and accompanying documents will simply delay a decision by the Director.

Needless Presentation of Cumulative Evidence

Included in the Report is an affidavit of John Church already on file with IDWR. The affidavit was filed on March 23, 2005. Also attached to the Report are three economic reports discussing or addressing the curtailment of ground water users in the Eastern Snake Plain Aquifer (ESPA). The three economic reports discussed in the Report and Church's accompanying affidavit was commissioned and compiled by different organizations including the Expanded Natural

Resources Interim Committee of the Idaho Legislature. They each discuss, in some form or another, the economic impact of ground water curtailment in Water District 130. The result is the needless presentation of cumulative evidence. These documents do not shed any new light of the Coalition's request for administration, nor do they resolve the fundamental issue that senior surface users are not able to currently exercise their full water rights in the ESPA due to the large diversion by junior ground water appropriators. Therefore, the Report should not be allowed as evidence in this matter in violation of I.R.E. 403.

PRIOR APPROPRIATION

The fundamental issue in the Coalition's request is that senior appropriators are seeking the benefit of their rights by requesting IDWR to curtail junior appropriators. "As between appropriators, the first in time is first in right." Idaho Code § 42-106. This has long been the law in Idaho. Neither the Idaho Legislature nor the courts have carved out an exception that junior water right holders were entitled to use water, claimed by a senior appropriator, if the impact to the junior appropriator would suffer a economic hardship or that the shut off would have a negative impact on the local economy. In *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973), a group of junior ground water appropriators appealed a district court decision, granting an injunction preventing the junior appropriators from pumping their wells in a common aquifer. The trial court found that the senior appropriators would exhaust the entire annual recharge of the aquifer without any pumping by junior appropriators; if the junior appropriators were allowed to continue pumping they would mine the aquifer. On appeal the Supreme Court stated:

> Appellant argues in essence that mutual pro rata rights in the aquifer should be established. This argument is based upon the doctrine of correlative rights. The correlative rights doctrine is based upon the riparian principle of land ownership. (citations omitted) The doctrine of correlative rights is repugnant to our constitutionally mandated prior appropriation doctrine. The court in *Hinton v. Little*, 50 Idaho 371, 296 P. 582 (1931) expressly rejected the theory upon which the

doctrine of correlative rights is based.

Baker at 95 Idaho at 583, 513 P.2d at 635.

The junior appropriators argued that under the Idaho Ground Water Act the "court of equity should have decreed that each of the parties had a proportional interest in the water resources." *Baker* 95 Idaho at 584, 513 P.2d at 636. The equitable argument apparently stemmed from Idaho Code § 42-226, which stated that a reasonable exercise of a water right "shall not block full economic development of underground water resources." The court declined to grant the junior appropriators a proportional or pro rata right in the aquifer based on economic considerations. The senior appropriators were permitted to enjoin the junior appropriators and were granted their full decreed rights despite the immediate impact on the junior ground water appropriators.

IDAHO ADMINISTRATIVE CODE

Under Idaho Administrative Code (IDAPA) 37, Title 03, Chapter 11, the Director of IDWR, in responding to a delivery call shall conduct a fact-finding hearing on the petition at which the parties may present evidence on the water supply, and the diversion and use of water. Rule 41.01.b. The Director then may act according to options provided under Rule 41. In determining whether the holders of water rights are suffering material injury and using water efficiently and without waste the Director may consider the following factors under Rule 42:

> **a.** The amount of water available in the source from which the water right is diverted.
>
> The effort or expense of the holder of the water right to divert water from the source.
>
> Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.

> If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.
>
> The amount of water being diverted and used compared to the water rights.
>
> The existence of water measuring and recording devices.
>
> The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.
>
> The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

As listed above, Rule 42 does not contemplate that the Director should consider the economic implications of ground water pumping or the economic effects of shutting off ground water wells. When considering whether the Coalition members are suffering material injury and using water efficiently, the Director may only consider the above-mentioned factors; <u>economic considerations should not be and are not a factor to consider</u>.

Furthermore, the rules governing mitigation plans also do not permit the Director to consider the economic impact to junior users when considering a mitigation plan. Under Rule 43, the factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to a senior right holder include:

> a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan.

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal.

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors.

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use.

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury.

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply.

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan.

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies.

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

What emerges from a careful review of these rules is that economic impact to junior ground water users should not be a consideration by the Director, when lawful senior appropriators have made a legitimate call and request for administration.

CONCLUSION

Therefore, the Export Report of John Church and its accompanying documents should be excluded from evidence as its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues…waste of time or needless presentation of cumulative evidence.

DATED this 23 day of January, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2006, the above and foregoing was served by the method indicated below, and addressed to the following:

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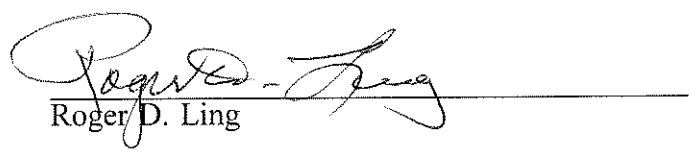

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