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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 and	)	**SURFACE WATER COALITION'S OPPOSITION TO IGWA'S MOTION TO CONSOLIDATE THE CONTESTED CASE ON THE DIRECTOR'S MAY 2, 2005 ORDER WITH THE CASE ON THE MITIGATION PLAN**

IN THE MATTER OF GROUND WATER)
DISTRICTS' APPLICATION FOR APPROVAL)
OF MITIGATION PLAN FOR THE AMERICAN)
FALLS REACH OF THE SNAKE RIVER)
_____)

COME NOW A & B Irrigation District, Burley Irrigation District, Minidoka Irrigation District, Twin Falls Canal Company, American Falls Reservoir District #2, Milner Irrigation District, and North Side Canal Company (collectively hereinafter referred to as the "Surface Water Coalition" or "Coalition"), and hereby submit, by and through their attorneys, their objection to the motion of the Idaho Ground Water Appropriators, Inc. ("IGWA") to consolidate proceedings on an application by six (6) ground water districts and an irrigation district for approval of a mitigation plan with the formal proceedings and hearing on the Director's May 2, 2005 Order, and in support of said objection state:

PROCEDURAL BACKGROUND

I. The Coalition's Requests for Water Right Administration within and outside Water District No. 120.

On January 14, 2005, the Coalition delivered a letter to Karl J. Dreher, Director of the Idaho Department of Water Resources, requesting water right administration in Water District 120, and for the delivery of water to the Coalition members under their senior natural flow and storage water rights pursuant to Idaho law. The response to this call for water delivery was governed by Rule 40 of the Department's conjunctive management rules (IDAPA 37.03.11 *et seq.*).[1] As required by Rule 40, the Coalition's request for water right administration stated that diversion of water by holders of junior-priority ground water rights within Water District 120 and

[1] The Coalition disputes the legality of the conjunctive management rules, notes their constitutionality is at issue in a district court case in Ada County (*Rim View Trout v. Dreher et al.*, 4th Jud. Dist., Case No. CV-03-07551D), and submits the rules violate Idaho law, both on their face and as applied in the context of the Coalition's delivery call.

having a common ground water supply was causing the Coalition members to suffer material injury.[2] The Amended Order of May 2, 2005 issued by the Director was in response to that delivery call as required by Rule 40.

The Coalition also filed with the Director on January 14, 2005 a formal *Petition* requesting administration of ground water rights outside of organized water districts and designation of the Eastern Snake Plain Aquifer ("ESPA") as a ground water management area pursuant to Rule 30 of the Department's conjunctive management rules. This rule allows the holders of senior-priority surface water rights to call for water delivery against the holders of junior-priority ground water rights within areas of the state not in an organized water district or within water districts where ground water regulation has not been included in the functions of such district or within areas that have not been designated ground water management areas. The procedures to be taken in responses to this petition are governed by Rule 30. The inclusion in the petition of a request for designation of the ESPA as a ground water management area is contemplated by Rule 30.06. Under Rule 30.02 the Department is required to consider this petition as a petition for contested case under its rules of procedure. As shown by these Rules, the response to a formal petition under Rule 30 is substantially separate and distinct from the response required under Rule 40.

Notwithstanding the separate and distinct petitions filed by the Coalition, and the separate and distinct responses required by the Director, there appears to have been a partial consolidation by the Director, first indicated by the Director's Order of January 25, 2005. A subsequent order of the Director on February 14, 2005 again addressed and issued orders in regard to both the

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[2] Although the Director applied the conjunctive management rules to the Coalition's request for water right administration, the Coalition does not assert those rules are valid as a matter of law and herein reserves the right to

letter petition and the formal petition.

On April 19, 2005 the Director entered an Order addressing issues primarily involved with the Coalition's request for water right administration in Water District No. 120 (expanded by the Director to include Water District No. 130). On May 2, 2005 the Director issued an Amended Order, without hearing, amending the April 19, 2005 Order and again addressing issues raised by the letter request and issues raised by the formal petition of the Coalition. It is unclear as to who may be legally bound by the findings of facts and conclusions of law contained in the Amended Order of May 2, 2005, as the same was not served upon those parties who had answered or responded to the formal petition of the Coalition after service of the petition by the Coalition on ground water appropriators in the ESPA but outside of Water District Nos. 120 and 130. This issue may need to be addressed before proceeding to a hearing on the formal petition as requested by the Coalition and as provided by the Department's conjunctive management rules.

Although the Amended Order of May 2, 2005 addresses factual and legal issues common to the entire ESPA, the Order apparently only addresses the administration of ground water rights within Water Districts 120 and 130, not other areas of the ESPA. As part of that administration, the Director has set forth requirements for a "replacement water plan" process, apparently as a substitute for an acceptable mitigation plan, if followed by the holders of junior ground water rights in Water Districts 120 and 130. This procedure and newly created vehicle for avoiding curtailment of ground water rights as required by the Director's May 2, 2005 Order is the subject of separate protests, motions, and petitions filed by the Coalition, Idaho Power, and Reclamation,

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challenge those rules, both on their face, and as applied in the context of the Coalition's delivery call.

and will not further be discussed herein.

II. Ground Water Districts' Application for Approval of a Mitigation Plan

On February 8, 2005 the American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville County-Jefferson Ground Water District, Madison Ground Water District, South West Irrigation District, North Snake Ground Water District, and Magic Valley Ground Water District (hereinafter collectively referred to as the "Ground Water Districts") applied for the approval of a Mitigation Plan. The Director tentatively scheduled a hearing on the application that was set to begin one day after the protest period ended, however, that order was later amended only after the Ground Water Districts filed a motion to vacate the hearing. Motions were filed by the Coalition, Reclamation, and Idaho Power Company to dismiss the application for approval of the mitigation plan filed by the Ground Water District. Protests to the application were also filed by those entities along with the joint protest of the City of Pocatello, Basic American Foods, and ConAgra/Lamb Weston, and requests for a hearing were made. The motions to dismiss are still pending and the Director has yet to issue an order on those motions or set any schedule in that proceeding.

STANDARD FOR CONSOLIDATION

Rule 556 of the Department's Rules of Procedure provides that the Department "may consolidate two (2) or more proceedings for hearing upon finding that they present issues that are related and the rights of the parties will not be prejudiced." The standard requires the cases to contain "related issues" and demands that no parties can be "prejudiced" by a consolidation. The hearing on the Director's May 2, 2005 Amended Order responding to the Coalition's request for water right administration and the contested case involving the Ground Water Districts'

Mitigation Plan do not involve "related issues." To the contrary, each proceeding concerns distinct and separate issues and is fundamentally different in both a procedural and substantive approach. The case reviewing the Director's May 2, 2005 Order concerns legal and factual issues regarding the Director's obligations to administer water rights according to priority whereas the Mitigation Plan proceeding involves the adequacy of that plan and whether or not it meets the requirements of Rule 43. Moreover, the cases vary distinctly from one another as evidenced by the numerous issues set forth by the parties requesting a hearing on the Director's May 2, 2005 Order and the issues set forth by the protests to the Mitigation Plan. In addition, given statutory deadlines for protesting the Mitigation Plan and requesting a hearing on the Director's May 2, 2005 Amended Order have passed it is obvious consolidation would prejudice existing parties by allowing all parties to become involved in both proceedings despite certain parties not filing the required pleadings in each. Moreover, consolidation prejudices the parties by confusing procedures, legal and factual issues, as well as the standards of review. Finally, consolidation stands to further complicate a truncated hearing schedule on the Director's order which involves legal, technical, and factual issues of first impression before the Department. As set forth below, IGWA's motion does not meet the standard for consolidation and as such it should be denied.

ARGUMENT

I. The Mitigation Plan Contested Case and the Contested Case on the Director's May 2, 2005 Amended Order Involve Different Parties, Procedures, Legal and Factual Issues.

A. Each Case Involves Different Parties

Several parties protested the Ground Water Districts' Mitigation Plan, including the

Coalition, Reclamation, Idaho Power, and the City of Pocatello, Basic American Foods, ConAgra/Lamb Weston. These parties all filed timely protests under the procedures set forth under I.C. § 42-222. In the contested case involving the Director's May 2, 2005 Amended Order, a group of "aggrieved persons" filed petitions requesting a hearing on the order, including the Coalition, Reclamation, Idaho Power, IGWA, the State Ground Water Agencies, the Idaho Dairyman's Association, and the City of Pocatello. These parties all filed timely requests for hearing as provided by Idaho law, I.C. § 42-1701A(3). Clearly, the two contested cases involve different parties. To allow the parties involved in the contested case on the Director's order to participate in the case involving the Ground Water Districts' Mitigation Plan would unduly broaden the scope of that proceeding and confuse the issues involved therein. In essence, it would give parties who did not file timely protests to the Mitigation Plan an opportunity to participate and present their views on the plan. Similarly, a consolidation would inappropriately allow parties involved in the Mitigation Plan case an opportunity to participate and present their views on the Director's May 2, 2005 Amended Order despite failing to file a petition within the required statutory timeframe. Accordingly, the Director should deny the motion to consolidate on the basis of different parties.

B. Each Case Involves Different Procedures and Issues

The hearing on the Director's May 2, 2005 Amended Order involves a de novo review of that order, including the creation of a formal record to determine whether or not the Director properly responded to the Coalition's request for water right administration by priority. The Director's order contains numerous legal and factual findings that will be addressed through discovery, motions, and ultimately a hearing. Primarily, the review of the Director's May 2,

2005 Amended Order will consider whether or not the Director's order is consistent with the prior appropriation doctrine, and whether or not he correctly applied the concept of "material injury" in responding to the Coalition's request for water right administration.

The hearing on the Mitigation Plan, on the other hand, will address the adequacy of the Ground Water Districts' plan and whether or not it meets the requirements of Rule 43 of the conjunctive management rules. The filing of a mitigation plan for approval under Rule 43 is premised upon the fact that junior ground water rights are depleting the water source that would otherwise be available for senior water rights. Whether or not such "injury" is occurring is not an issue for the hearing on the Mitigation Plan. For instance, it is indisputable that the ESPA is hydrologically connected to the Snake River in the American Falls reach which supplies the water rights of the Coalition members. It is also beyond dispute that pumping under junior ground water rights depletes the ESPA and reduces the tributary spring flows and reach gains in the American Falls reach. The question for the Mitigation Plan proceeding is whether or not that plan is sufficient to offset the depletive effect caused by pumping under those junior ground water rights in order to avoid curtailment.

Moreover, in filing the Mitigation Plan, the Ground Water Districts clearly understood that the approval of the plan under Rule 43 required a notice and hearing, as determined necessary, and that it would be necessary to consider the plan under the procedural provisions of §42-222, Idaho Code, in the same manner as applications to transfer water rights. Procedural provisions further demand the Director to determine that no other water rights are injured and any change, if any, does not constitute an enlargement in use of the original right, that the change is consistent with the conservation of water resources within the State of Idaho, is in the local

public interest, and will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates. None of these standards are involved in the contested case and hearing on the Director's May 2, 2005 Amended Order. As such, consolidation of the two proceedings is inappropriate and would only confuse how the two cases are handled, including what issues are relevant and should be presented, and who carries the burden to prove various elements in the two separate cases.

In addition, it is significant that the factors to be considered for approval of the Mitigation Plan under Rule 43.03 require a determination as to the time and place replacement water is required by the senior-priority water rights, the amount of replacement water necessary to offset the depleted 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, and the extent to which replacement water supplies or other appropriate compensation to a senior-priority water right is 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. Until the extent of material injury to senior surface water rights has been established, it is impossible to determine the sufficiency of any particular mitigation plan. As there is no basis upon which the Mitigation Plan can be analyzed under Rule 43 of the conjunctive management rules until an order for the administration of the entire ESPA has been entered, consideration of the proposed mitigation plan is premature. This is especially so when no hearing has been set for the formal petition filed by the Coalition for administration of ground water rights located outside the boundaries of existing water districts. Again, the different procedures and issues involved with the two contested cases warrant against consolidation.

II. Consolidation Would Prejudice the Parties and Unduly Broaden the Scope of Each Contested Case

Consolidation of a hearing for approval of a mitigation plan for ground water diversions from the ESPA with a hearing on administration of ground water in Water Districts 120 and 130 is not consistent with Rule 556 of the Department's Rules of Procedure. As noted, the rule requires a finding that the issues are related and that the rights of the parties will not be prejudiced. The Coalition would be prejudiced if it was required to proceed with a hearing for approval of the mitigation plan filed by the Ground Water Districts along with the hearing on the Director's May 2, 2005 Amended Order. For example, at the June 15th status conference, the Director stated that he intends to hold a hearing on the May 2, 2005 Order in January 2006. That expedited schedule leaves approximately six months to conduct discovery, file motions, complete expert reports and testimony, and conduct a hearing on his 64-page order involving numerous legal, technical, and factual issues. The number of issues stated by each party who filed a petition requesting a hearing on the Director's order is reason enough to decline consolidation. Adding more "issues" to this list, by including those involved with the Mitigation Plan and the protests to that plan, would only broaden the scope of the hearing.

Moreover, as previously noted, it is also clear that a hearing on the Mitigation Plan would not be appropriate at this time, whether alone or in consolidation with other issues. It should also be pointed out that the Mitigation Plan sought to be approved by IGWA is a mitigation plan filed for and on behalf of certain named ground water districts, many of which are not within Water Districts 120 and 130, and are not presently bound by any delivery call, and are apparently not affected by the Director's May 2, 2005 Order. It would also be inappropriate to consolidate a hearing on any application for approval of the Mitigation Plan when there are pending Motions

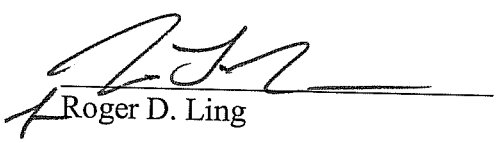
and Protests for Dismissal of the Plan based upon procedural deficiencies and the inadequacy of the Mitigation Plan, on its face. Only after these preliminary matters have been resolved, and the Application for Approval of the Mitigation Plan is still pending, should a hearing be held and that hearing should stand alone as a separate and distinct contested case involving parties that received notice and elected to participate in the hearing required by the conjunctive management rules.

CONCLUSION

WHEREFORE, the Coalition respectfully submits that IGWA's Motion to Consolidate a hearing on the Application for Approval of the Ground Water Districts' Mitigation Plan, which may not require a hearing, with a hearing to be held on the Director's May 2, 2005 Order should be in all respects denied.

Respectfully submitted this 29th day of June 2005.

LING ROBINSON & WALKER



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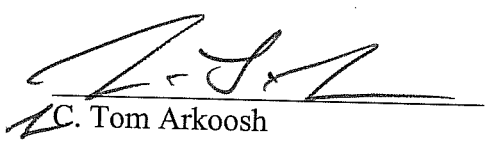

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2005, I served a true and correct copy of the foregoing *Surface Water Coalition's Proposed Schedule for Hearing on Director's May 2, 2005 Amended Order* on the following by the method indicated:

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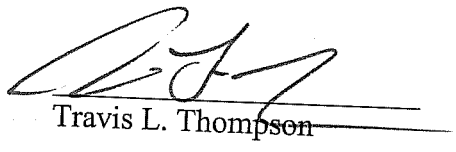

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