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DEPARTMENT OF
WATER RESOURCES

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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 PETITION FOR HEARING ON DIRECTOR'S JULY 22, 2005 *SUPPLEMENTAL ORDER* AND DIRECTOR'S *AMENDED ORDER OF* MAY 2, 2005, AS AMENDED AND SUPPLEMENTED**

COME 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 request a hearing on the Director's July 22, 2005 *Supplemental Order Amending Replacement Water Requirements* and the May 2, 2005 *Amended Order*, as amended and supplemented, in which the Director has again responded to the Coalition's January 14, 2005 request for water right administration in Water District No. 120, and petitions for modification or amendment of the May 2, 2005 *Amended Order* (hereinafter "*Order*") and the Director's July 22, 2005 *Supplemental Order* (hereinafter "*Supplemental Order*"). The initial basis for the Coalition's request and petition is as follows:

I.

PROCEDURAL RECITATIONS

Pursuant to the provisions of chapter 52, title 67, Idaho Code, the provisions of which were adopted by Idaho Code § 42-1701A, and the implementing provisions of the Department's Rules of Procedure, IDAPA 37.01.01 *et seq.*, the Coalition has petitioned for the modification or amendment of the Director's May 2, 2005 *Amended Order* and hereby petitions for the modification or amendment of the Director's July 22, 2005 *Supplemental Order* and for the clarification, declaration, and construction of the law administered by the Department and of the Coalition's rights and obligations administered by the Department. The Coalition reserves the right to supplement this *Petition* as necessary as other facts and issues are discovered through the course of this proceeding.

II.

INCORPORATION OF AND SUPPLEMENT TO PETITION FOR HEARING OF AMENDED ORDER

The Coalition hereby adopts and incorporates herein as though fully set forth

herein, its *Petition* for hearing on Director's May 2, 2005 *Amended Order,* except as modified by the Director's July 22, 2005 *Supplemental Order* and this *Petition* of the Coalition for a hearing and modification and amendment of said *Supplemental Order*. The Coalition reserves the right to supplement this *Petition* and the *Petition for Hearing and Clarification and Amendment* of the Director's May 2, 2005 *Amended Order* as other facts and issues are discovered through the course of this proceeding.

III.

FACTUAL BASIS

1. That this *Petition* shall present the initial factual basis of the Coalition's claim by reference to the contents of the *Supplemental Order* and its constituent paragraphs through reference to the paragraph numbers and the constituent paragraphs of the *Amended Order*, as amended and supplemented by the *Supplemental Order* and through reference to the paragraph numbers of said *Supplemental Order*.

2. That all paragraphs, or parts thereof, not specifically admitted to be either factually or legally correct, are hereby denied and alleged by the Coalition to be incorrect, or incorrectly applied.

3. The Coalition admits to certain factual allegations contained in paragraphs 1 through 20 of the *Supplemental Order,* as set forth herein, and adopts the same herein as true and correct as though the same were set forth herein in full and denies certain factual allegations contained in paragraphs 1 through 20 of the *Supplemental Order* as set forth herein; and comments upon and corrects the following factual allegations contained in paragraphs 1 through 20 of the *Supplemental Order,* as set forth herein.

Procedural History

1. The Coalition admits the procedural history of these proceedings contained in pages 1 through 3 of the *Supplemental Order*, denies that said procedural review is complete nor that it accurately portrays the import or meaning of the Director's *Amended Order* of May 2, 2005 or the subsequent approval *Order* of the Director dated June 24, 2005.

2. The Coalition objects to the procedural history as it fails to acknowledge additional information provided by the Coalition at its request, including the amendment to Exhibit A on March 18, 2005 and its supplemental response to the Director's request for information on April 18, 2005.

Findings, Conclusions and Order

Findings of Fact (Pages 4-8 of *Supplemental Order*)

The Coalition hereby admits, denies, or otherwise responds to the Findings of Fact in the *Supplemental Order*, as follows:

1. The Coalition admits that, following the issuance of the May 2, 2005 *Amended Order*, precipitation in April, May and a part of June in 2005 was unusually high. The Coalition has insufficient information or belief as to the balance of the statements contained in paragraph 1, and therefore denies the same.

2. The Coalition admits that the unusually high precipitation, coupled with cool temperatures in April, May and part of June, resulted in a significant delay in diversions of natural flow for irrigation from the upper Snake River basin. The Coalition has insufficient information and belief as to the remaining statements and findings set forth in paragraph 2, and therefore denies the same.

3. The Coalition admits paragraph 3.

4. The Coalition denies that on June 30, 2005, the maximum storage in the upper Snake River basin reservoirs had accrued, but admits the balance of paragraph 4 that sets forth the preliminary accounting that occurred on June 30, 2005.

5. The Coalition admits paragraph 5.

6. The Coalition has insufficient information or belief as to the findings contained in paragraph 6, and therefore denies the same. The Coalition specifically denies that the 2005 irrigation season ends on September 30, and objects that the definition of "water year" is not provided or explained by the Director.

7. The Coalition admits that there is uncertainty in predicting the remaining amount of unregulated inflow that may be divertible in 2005 under the water rights of members of the Coalition, denies each and every other finding of paragraph 7, and objects to the failure of the Director to acknowledge that the amount of unregulated flow has been significantly reduced by ground water diversions and that such reduced inflow is now injuring water rights of members of the Coalition.

8. The Coalition admits that the Director has attempted to correct Finding 104 of the May 2, 2005 *Amended Order* by reallocating diversions between Burley Irrigation District and Minidoka Irrigation District, but denies each and every finding of paragraph 8.

9. The Coalition admits that paragraph 8 supersedes the amounts set forth in Finding 104 of the May 2, 2005 *Amended Order.*

10. The Coalition admits that paragraph 10 contains the preliminary storage accruals as determined by Water District No. 01, but denies that said storage accruals are

accurate and otherwise denies paragraph 10.

11. The Coalition admits that Finding 10 supersedes Finding 105 in his May 2, 2005 *Amended Order*.

12. The Coalition has insufficient information or belief as to the validity or accuracy of the Department's accounting program, preliminary storage allocations for members of the Coalition, or the natural flow predictions of the Director for the 2005 irrigation season, and therefore denies each and every allegation of paragraph 12.

13. The Coalition admits that paragraph 12 supersedes the amounts set forth in Finding 106 of the May 2, 2005 *Amended Order*.

14. The Coalition denies Finding 14 and affirmatively alleges that annual volumes of water diverted is not relevant and cannot be compared to the rate of diversion required to make full deliveries to landowners and shareholders of the members of the Coalition.

15. The Coalition denies the statements contained in Finding 15 and affirmatively alleges that storage volumes cannot be predicted or established without considering diversion rates required to make full deliveries under the water rights of the respective members of the Coalition or without recovering storage water that otherwise would have accrued in the absence of junior ground water diversions. It is further alleged that storage rights are not subordinated to junior ground water diversions and the rights to water that would otherwise be stored under the storage water rights of members of the Coalition has not been abandoned or forfeited.

16. The Coalition acknowledges that Finding 15 supersedes Finding 116 of the May 2, 2005 *Amended Order*.

17. The Coalition admits that "material injury" for 2005 is reasonably likely to occur and alleges that it will and has occurred, but denies the Director's determination as to what constitutes "material injury", shortfalls in unregulated inflows and predicted carryover and the reasonable amounts of carryover storage to which each member of the Coalition is entitled under its spaceholder contracts with the United States Bureau of Reclamation, and therefore denies each and every allegation of Finding 17.

18. The Coalition admits that Finding 17 supersedes the amounts set forth in Finding 120 of the May 2, 2005 *Amended Order*.

19. The Coalition agrees that material injury has occurred in 2005, and therefore the predictions of the Director are reasonably likely. It is further alleged that material injury to the natural flow and storage rights held by members of the Coalition or to which members of the Coalition are entitled cannot be determined without identifying and defining the "mechanism" referred to by the Director in his Finding 122 of the May 2, 2005 *Amended Order;* and that the Director fails to acknowledge the right of each person holding storage to determine the amount and extent to which carryover will be or may be held, and has failed to recognize the importance of the location of carryover storage held by members of the Coalition. The Coalition denies Finding 19.

20. The Coalition does not have sufficient information, knowledge or belief to admit or deny Finding 20, and therefore denies the same.

Conclusions of Law (Pages 8-9 of *Supplemental Order*)

1. The Coalition denies that the Conclusions of Law in the May 2, 2005 *Amended Order* can be incorporated into the Director's *Supplemental Order*, as his Findings and

Conclusions are inconsistent with said Conclusions.

2. The Coalition alleges that dynamic changes in water supply conditions and predicted shortages are only a small part of factors to be determined whether or not members of the Coalition are suffering material injury in accordance with Rule 42 of the Conjunctive Management Rules, including 01. Factors a, c, d, and a reasonable amount of carryover storage to assure water supplies for future dry years which includes the requirement that the Director consider the average annual rate of fill of storage reservoirs, the average annual carryover for prior comparable water conditions and the projected water supply for the system, not a comparison with only two years over a period of one hundred years. The Coalition therefore denies Conclusion 2.

3. The Coalition denies Conclusion 3, and affirmatively alleges that the emphasis by the Director of water supply conditions in only 2005 is contrary to the provisions of Rule 40 of the Conjunctive Management Rules, IDAPA 37.03.11.040, which provides in section 01.a that "where the material injury is delayed or long range may, by order of the director, be phased in over not more than a five-year period to lessen economic impact of immediate and complete curtailment." and the acknowledgment by the Director that depleted flows (reach gains) depend upon ground water elevations and that depletionary effects from ground water pumping cause reduced ground water elevations. (Findings 24 and 25, *Amended Order* dated May 2, 2005.) The Coalition denies Conclusion 3 as a prediction of material injury that is occurring and has occurred to the water rights of members of the Coalition.

4. The Coalition alleges that the Director has not considered the method by which replacement water will be delivered to members of the Coalition, the reservoir to which

said replacement water will be delivered if replacement water is not provided until after the irrigation season, the actual shortages in water supplies being experienced by individual members of the Coalition as the result of ground water depletions in 2005 and prior years, and the authority by which he may hold replacement water. Said omissions by the Director have lead to his failure to regulate the diversion and use of water in accordance with the priorities of rights of the various surface and ground water users. The Coalition denies Conclusion 4.

5. The Coalition admits that the minimum amount of 27,700 acre-feet of replacement water should be provided to members of the Coalition in the year 2005. The Coalition admits the balance of Conclusion 5.

6. The Coalition alleges that replacement water delivered at the end of the 2005 irrigation season in lieu of curtailment by junior ground water pumpers in 2005 will not mitigate the diversion of ground water under junior ground water rights which have caused material injury to the surface and storage water rights of members of the Coalition or their contractual rights under said rights. The Coalition further alleges that the Director has failed to disclose or contemplate the method or methods by which he intends to deliver the 27,700 acre-feet of replacement water and any additional replacement water required at the end of the irrigation season to mitigate depletions that occur during the 2005 irrigation season. The Coalition therefore denies Conclusion 6.

Order (Page 10 of *Supplemental Order*)

1. The Coalition denies that 27,700 acre-feet of replacement water is adequate to mitigate the depletions caused by diversions of ground water by junior water right holders.

2. The Coalition denies that replacement water provided by natural flow can be delivered to members of the Coalition after the end of the irrigation season in mitigation of depletions occurring during the 2005 irrigation season, nor may such after the season delivery of replacement water offset actual shortages in water supplies available to individual members of the Coalition during the 2005 irrigation season, and therefore objects to paragraph 2 of the Order.

3. The Coalition alleges that an Order under the delivery call of the Coalition is not adequate when replacement water has neither been identified nor quantified by the Director as the minimum amount required to mitigate depletions in 2005, nor the method by which replacement water can be used to mitigate material injury as determined after the 2005 irrigation season. The Coalition therefore objects to paragraph 3 of the Order.

IV.

CONTROLLING LAW

The Coalition denies the Director's application of controlling law with respect to administration of senior surface and junior ground water rights as set forth in his *Supplemental Order*. The conjunctive management rules, both on their face, and as applied through the Director's order are unconstitutional and violate due process rights of the Coalition members. Any conclusions of law made by the Director not specifically admitted are herein denied.

DATED this 5th day of August, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2005, I served a true and correct copy of the foregoing *Surface Water Coalition's Petition For Hearing on Director's July 22, 2005 Supplemental Order and Director's Amended Order of May 2, 2005, as Amended and Supplemented* on the following parties, by the method indicated:

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