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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	**PROTEST, OBJECTION, AND MOTION TO DISMISS "REPLACEMENT WATER PLANS"**

This Protest, Objection, and Motion to Dismiss "Replacement Water Plans" is filed on behalf of A & B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (Coalition) in response to the Idaho Ground Water Appropriators' Initial Plan for Providing Replacement Water (IGWA Plan) and the Request for Approval to Provide Replacement Water Diverted Under Water Rights Curtailed by the Directors April 19, 2005 Order (Simplot Plan). The IGWA Plan and Simplot Plan shall collectively be referred to as the "Replacement Plans".

PROCEDURAL BACKGROUND

The Coalition filed a letter with the Idaho Department of Water Resources (Department) on January 14, 2005, requesting immediate administration of water rights by priority within Water District No. 120 and requesting delivery of water to their senior flow and storage rights pursuant to Idaho law. The Idaho Ground Water Appropriators, Inc. (IGWA) filed a Petition to Intervene on February 3, 2005. The Petition was granted pursuant to an Order issued by the Department on February 14, 2005.

On February 8, 2005, IGWA filed an Application for Approval of Mitigation Plan (AFR). The Coalition, Idaho Power Company, United States Department of Interior, Bureau of Reclamation, and others filed Protests and/or Motions to Dismiss IGWA's Mitigation Application. The Department tentatively scheduled a hearing on IGWA's Mitigation Application for March 22 -25, 2005. Pursuant to an Order issued March 18, 2005, the hearing on IGWA's

Mitigation Application was continued, to be rescheduled at a later date.

On April 19, 2005, the Department issued an Order in response to the Coalition's Request for Administration. An Amended Order was issued May 2, 2005. The terms of the two Orders are identical as to the matters stated herein; changes shall be noted by reference to the "Amended Order."

Paragraph 9 of the Amended Order states:

> As required herein, the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, and other entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water with the Director, to be received in his offices not later than 5:00 pm on April 29, 2005. Requests for extensions to file a plan for good cause will be considered on a case-by-case basis and granted or denied based on the merits of any such individual request for extension. The plan will be disallowed, approved, or approved with conditions by May 6, 2005, or as soon thereafter as practicable in the event an extension is granted as provided in the order granting the extension. A plan that is approved or approved with conditions will be enforced by the Department and the watermasters for Water Districts No. 120 and No. 130 through curtailment of the associated rights in the event the plan is not fully implemented.

In response to the Order, IGWA filed the IGWA Plan on April 29, 2005 and J.R. Simplot Company filed the Simplot Plan on April 28, 2005.

MOTION TO DISMISS AND PROTEST ADOPTED BY REFERENCE

The IGWA Plan states: "To the extent that this replacement water plan is deemed a mitigation plan under the Department's conjunctive management rules, and due to the extremely short period of time allowed by the Directors' Orders to submit this document, the ground water

districts incorporate herein by reference each provision of the February, 2005 mitigation plan as may be required by such rules to be included in a mitigation plan under consideration by the Department."

To the extent that the IGWA Plan is deemed to be a mitigation plan, the Coalition incorporates herein by reference each provision of the Surface Water Coalition's Motion to Dismiss the Ground Water District's Application dated March 21, 2005 and the Surface Water Coalition's Protest Against Approval of Proposed Mitigation Plan dated March 21, 2005.

"REPLACEMENT WATER PLANS" AS DESCRIBED IN THE DEPARTMENT'S ORDER AND AS SET FORTH IN THE REPLACEMENT PLANS VIOLATE DUE PROCESS AND CONJUNCTIVE MANAGEMENT RULE 43

As set forth above, paragraph 9 of the Department's Amended Order states "... entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water with the Director, to be received in his offices no later than 5:00 pm on April 29, 2005..... The plan will be disallowed, approved, or approved with conditions by May 6, 2005....." No provision is made in the Order for objections, protests, or comments on the mitigation plan. In addition, there is no provision made for notice or hearing, and the Order does not set forth the factors to be considered by the Department in determining whether or not the "Replacement Plans" will prevent injury to senior rights. Effectively, the procedure set forth in the Order and the mitigation proposed by the Replacement Plans eliminate the right of the Coalition and other affected water right holders to address the plans in any meaningful manner. There is no provision in the Conjunctive Management Rules or in the law

for the Department to create a new mitigation procedure as described in the Department's Order or to consider something other than the mitigation plans described in Conjunctive Management Rule 43.

Conjunctive Management Rule 43 (attached) clearly sets forth the method for submitting mitigation plans, requires notice and hearing, requires that the plan be considered under the procedural provisions of Idaho Code § 42-222 in the same manner as applications to transfer water rights, and sets forth specific factors that may be considered by the Director of the Department in determining whether a proposed mitigation plan will prevent injury to senior rights.

The Department has no legal right or ability to unilaterally create new conjunctive management rules nor do those proposing mitigation have any legal authority to proceed other than as set forth in the Conjunctive Management Rules. Should the Director or the Department desire to create new rules, the provisions of the Idaho Administrative Procedure Act must be followed. See Idaho Code § 67-5201 *et seq.*

OTHER GROUNDS FOR OBJECTION AND IN SUPPORT OF MOTION TO DISMISS

In addition to the glaring procedural error that is committed by considering the Replacement Plans, the Coalition objects to the Replacement Plans on the grounds set forth in the Petition to be filed by the Coalition seeking hearing on the Order. The grounds shall include, but not be limited to, the following:

1. Paragraph 4 of the Order requires the ground water districts represented by IGWA to provide 101,000 acre-feet of "replacement water" to mitigate diversions of ground water.

Paragraph 5 of the Order states "The required replacement water can be provided over time on an annual basis in amounts at least equal to the increase in reach gains in the Snake River between the Near Black Foot Gage and Minidoka Gage that would result from curtailment of the affected ground water rights based upon simulations using the Department's ground water model for the ESPA." Paragraph 5 goes on to state, "The total amount of replacement water provided for mitigation in 2005 shall not be less than 27,700 acre-feet, which equals the amount of the predicted shortage in 2005 set forth in Findings 115 and 116.

2. Paragraph 9 of the Order states: "...entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water with the Director...." There is no limitation in paragraph 9 that any "replacement water" plan address only replacement water for 2005. The Order finds that 101,000 acre-feet of water must be provided in order to mitigate diversions of ground water. The Order authorizes the replacement water to be provided over time. The Replacement Plans that are submitted do not set forth any replacement water plan that would provided 101,000 acre-feet of water "over time on an annual basis in amounts at least equal to the increase in reach grains in the Snake River between the Near Black Foot Gage and Minidoka Gage that would result from curtailment of the affected ground water rights based on simulations using the Department's ground water model for the ESPA."

3. The Replacement Plans lack the specificity required by the requirements of a mitigation plan as described in Conjunctive Management Rule 43:

3.1. The Replacement Plans do not specify the ground or surface water rights that

would "benefit" from the plan.

3.2. There is no analysis of the reliability of the proposed replacement water supplies and whether the water to be supplied complies with the directives of the Order. Although lessors and amounts of water are described, the source of the replacement water is not described.

3.3. There is no contingency provision to assure protection of senior priority rights in the event mitigation water becomes unavailable.

4. The IGWA Plan proposes to grant control of the replacement water to IGWA [IGWA Plan, paragraph A(1)(b)] who will notify the Director which water sources will be used and when the water will be delivered. The plan does not take into account when the water may be needed by members of the Coalition, and gives the Coalition no control over delivery.

5. The credits requested by IGWA are vague and uncertain.

6. There is no lease or exchange agreement in place between IGWA and the Bureau of Reclamation as described on Attachment A to the IGWA Plan.

7. The IGWA Plan proposes to receive credit for wells located in Aberdeen Springfield Canal Company that are recapturing surface water diversions.

8. Any replacement water provided and the accounting of such water must designate the location of such water and the associated conveyance losses to deliver the replacement water to the headgates of the injured parties.

9. No basis exists for the mitigation crediting of past actions pursuant to previous voluntary action agreements of the parties. See IGWA's initial Application for Approval of

Mitigation Plan, pp 5-6.

10. No basis exists for the mitigation crediting proposed pursuant to proposed settlement regarding certain groundwater uses within the Aberdeen-Springfield Canal Company service area.

11. To the extent that mitigation credits are proposed following years where water is delivered in 2005, the Coalition would object.

REQUEST FOR RELIEF

The Coalition requests that the Replacement Plans be denied and/or dismissed on the grounds that the procedure utilized by the Order violates due process and the Conjunctive Management Rules and the Plans fail to comply with the requirements of a mitigation plan under the Conjunctive Management Rules. Those desiring to submit mitigation plans should be required to comply with the existing Conjunctive Management Rules pertaining to submittal of those plans.

DATED May 5, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2005, I served a true and correct copy of the foregoing **PROTEST, OBJECTION, AND MOTION TO DISMISS "REPLACEMENT WATER PLANS"** on the following by the method indicated:

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