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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 REQUESTING HEARING ON DIRECTOR'S MAY 2, 2005 *AMENDED ORDER* AND REQUESTING APPOINTMENT OF AN INDEPENDENT HEARING OFFICER**

COMES 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 requests a hearing on the Director's May 2, 2005 *Amended Order* (hereinafter "*Order*"), in which the Director 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 *Order*. The initial basis for the Coalition's request and petition is as follows:

I.

PROCEDURAL RECITATIONS

1. Pursuant to the provisions of chapter 52, title 67, Idaho Code, as adopted by Idaho Code § 42-1701A, and the implementing provisions of the Department's Rules of Procedure, IDAPA 37.01.01 *et seq.*, the Surface Water Coalition hereby petitions for the modification or amendment of the Director's May 2, 2005 *Amended Order* and the clarification, declaration, and construction of the law administered by the Department and of the Surface Water 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.

FACTUAL BASIS

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

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

3. The Surface Water Coalition admits to the following factual allegations contained in paragraphs 1 through 128 of the *Order* as set forth herein, and adopts the same herein as true and correct as though the same were set forth herein in full; denies the following factual allegations contained in paragraphs 1 through 128 of the *Order* as set forth herein; and comments upon and corrects the following factual allegations contained in paragraphs 1 through 128 as set forth herein:

FINDINGS OF FACT (Pages 2-31)

Procedural History (Pages 2-5, ¶¶ 1-18)

1. Paragraphs 1 through 18 are admitted except as explained below.

2. With reference to paragraph 8, the Coalition filed an amendment to Exhibit A on March 18, 2005, not 2004.

3. The Coalition supplemented its responses to the Director's request for information on April 18, 2005. In the *Order* the Director states that he "has not had sufficient time to evaluate the supplemental submittal." Since the Director had fourteen (14) days between the time the information was filed and the *Order* was issued, the Coalition presumes the Director has had "sufficient time" to evaluate the additional information.

ESPA and the Department's Ground Water Model (Pages 5-7, ¶¶ 19 –33)

1. Paragraphs 19 and 20 are admitted, however, the actual boundaries of the ESPA are no longer accurately described by the 1992 USGS Report or the conjunctive management

rules. The definition excludes major portions of the aquifer now defined by the new ESPA groundwater model.

2. Paragraphs 21 and 22 are denied since the *Order* does not present any factual information to justify the general conclusions stated.

3. Paragraphs 23 through 24, and 26 through 29 are admitted. As to paragraph 25, the Coalition denies the same in that under the definition of "steady-state condition" set forth by the Director it is clear that a steady-state condition cannot occur until ground water elevations are lowered to an elevation below the bed of the Snake River across the ESPA.

4. The Coalition is without sufficient information regarding the statements in paragraph 30 and therefore denies the same.

5. Paragraph 31 is denied to the extent the Director qualifies that ground water withdrawals from "certain portions" of the ESPA caused depletions to the Snake River.

6. Paragraph 32 is denied.

7. Paragraph 33 is denied.

Creation and Operation of Water Districts No. 120 and No. 130, and Status of the American Falls Ground Water Management Area (Pages 8-9, ¶¶ 34-40)

1. Paragraphs 34 through 37 are admitted.

2. The Coalition admits the first sentence in paragraph 38 but denies the remaining statements. The Coalition further notes that the Director's August 29, 2003 Order is the subject of another request for hearing and contested case pending before the Department.

3. The first sentence in paragraph 39 is admitted. The Coalition is without sufficient information regarding the remaining statements in paragraph 39 and therefore denies the same.

4. The first sentence in paragraph 40 is admitted. The Coalition is without sufficient information regarding the remaining statements in paragraph 40 and therefore denies the same.

Conjunctive Management Rules (Pages 9-10, ¶¶ 41-45)

1. Paragraphs 41, 42 and the first sentence of paragraph 43 are admitted. The Coalition denies the last sentence of paragraph 43, and all of paragraphs 44 and 45.

Letter Filed by the Surface Water Coalition (Pages 10-11, ¶¶ 46-50)

1. Paragraphs 46 through 50 are admitted.

Petition Filed by the Surface Water Coalition (Page 11, ¶¶ 51-53)

1. Paragraphs 51 through 53 are admitted.

Water Rights Held by or for the Benefit of Members of the Surface Water Coalition (Pages 11-72, ¶¶ 54-72)

1. The first, third, and fourth sentences of Paragraph 54 are admitted. The Coalition is without sufficient information regarding the remaining statements in paragraph 54 and therefore denies the same.

2. Paragraphs 55 through 66, 68, and 69 are admitted insofar as these findings accurately reflect the referenced decrees, licenses, or water right claims. The reference to the April 30, 1931 priority date for water right number 01-17 held by Milner Irrigation District is denied in that the decreed priority date is November 14, 1916.

3. The first sentence in paragraph 67 is denied; the last two sentences are admitted.

4. Paragraph 70 is admitted insofar as the stated amounts of storage space accurately reflect the various contracts between the Coalition members and the United States Bureau of Reclamation.

5. As to paragraph 71, the question of ownership to the listed storage water rights is currently a question of law on appeal before the Idaho Supreme Court regarding storage water rights in Reclamation's Boise Project.

6. Paragraph 72 is denied insofar that the same avers that the storage rights described in Paragraph 70 are in any way "supplemental," as opposed to a primary vested water and property right.

General findings in Response to Letter and petition Filed by the Surface Water Coalition (Pages 16-19, ¶¶ 73-87)

1. Paragraphs 73 is admitted to the extent it describes the Coalition's petition that was filed as of January 14, 2005. Since then, names, addresses, and a description of ground water rights located outside of existing water districts have been identified and served with a copy of the referenced petition.

2. The first sentence of paragraph 74 is admitted, however, the second sentence is denied. The Coalition caused the referenced petition to be served by U.S. Mail on March 30, 2005.

3. Paragraph 75 is admitted.

4. Paragraph 76 is admitted to the extent the Coalition's January 14, 2005 letter requested administration of ground water rights in Water District No. 120. However, the Coalition also filed a petition on January 14, 2005 seeking administration of ground water rights in all other areas of the ESPA not covered by an existing water district.

5. The Coalition is without sufficient information regarding the statements in paragraphs 77 through 79 and therefore denies the same.

6. The first sentence of paragraph 80 is admitted. The remaining statements in paragraph 80 are denied.

7. Paragraph 81 is denied.

8. Paragraph 82 is denied. The statement regarding "steady state" is overly broad and is not supported by the facts stated. Many factors influence the effects, including the level of

the aquifer at "steady state." The Coalition further alleges that the effects of "steady state" are not yet known or realized.

9. To the extent paragraph 83 acknowledges that ground water depletions reduce the amount of water in the Snake River that would otherwise be available for storage in American Falls Reservoir, it is admitted.

10. As to paragraphs 84 through 87, the Coalition admits that all lawful uses of storage water, including the uses described, by the members of the Surface Water Coalition can and often do reduce carryover storage, but deny that such uses in any way contribute to the injury caused by diversions under junior ground water rights, and therefore deny each and every other allegation in paragraphs 84 through 87.

Water Supply Historically Available and Predicted to be Available in 2005 (Pages 19-24, ¶¶ 88-107)

1. Paragraphs 88 through 94 are denied.

2. Paragraph 95 is admitted to the extent the diversions and carryover figures are accurately reported from the records of Water District No. 1.

3. Paragraph 96 is denied.

4. The first sentence of paragraph 97 is admitted, the second sentence is denied.

5. The first sentence of paragraph 98 is admitted. The Coalition is without sufficient information regarding the remaining statements in paragraph 98 and therefore denies the same.

6. Paragraph 99 is admitted.

7. The Coalition is without sufficient information regarding the remaining statements in paragraphs 100 through 102 and therefore denies the same.

8. Paragraphs 103 through 107 are denied.

Material Injury Predicted in 2005 (Pages 24-27, ¶¶ 108-122)

1. Paragraph 108 is admitted.

2. Paragraph 109, and 115 through 121 are denied. As to paragraph 118, Rule 42 of the conjunctive management rules speaks for itself. The Coalition denies any legal effect of that rule or the conclusions drawn by the Director based upon that rule in paragraphs 119 and 120. As to paragraphs 120 and 121, the Coalition admits that "material injury" for 2005 is reasonably likely and alleges that it is certain, but denies the Director's determination of what constitutes "material injury" and the minimization of "material injury" as described in the *Order*.

3. The Coalition is without sufficient information regarding the statements in paragraphs 110 through 114 and in 122 and therefore denies the same.

Simulated Curtailment of Junior Priority Ground Water Rights (Pages 27-31 ¶¶ 123-131)

1. The Coalition is without sufficient information regarding the statements in paragraphs 123 through 130 and therefore denies the same.

2. Paragraph 131 is denied.

III.

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 *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.

CONCLUSIONS OF LAW (Pages 31-44, ¶¶ 1-53)

1. Paragraphs 1 through 8 are admitted to the extent the cases and points of law cited are accurately quoted from the respective filings. However, the Coalition denies any characterizations or interpretations presented in those paragraphs.

2. As to paragraphs 9 through 12, the Coalition admits that Idaho law permits members of the Coalition to pursue a water right delivery call, however the remaining statements are denied to the extent they imply that such a right is unique "under the circumstances" in this case.

3. As to paragraph 13 the Coalition alleges that I.C. § 42-607 speaks for itself.

4. The Coalition denies paragraph 14.

5. The Coalition admits paragraph 15.

6. The Coalition denies paragraph 16, and affirmatively alleges that the current state of the law in Idaho requires the Director to recognize that storage water rights are independent vested property rights and are entitled to have water delivered to satisfy those rights pursuant to the prior appropriation doctrine.

7. As to paragraphs 17 and 18, the Coalition alleges the referenced statutes speak for themselves and require the Director to administer water rights pursuant to priority.

8. The Coalition denies paragraphs 19 and 20, and affirmatively alleges that the cited provisions of Idaho law as well as the decisions from the Idaho Supreme Court and SRBA District Court found in the Coalition's *Memorandum in Support of Surface Water Coalition's Request for Water Right Administration* filed on April 16, 2005 all address the issue as to the administration of surface and ground water rights by priority. The Coalition's *Memo* is herein incorporated in this *Petition*. Furthermore, Idaho law mandates that the Director has a "clear

duty" to administer the Coalition members' water rights at any time. In particular, the Director has a clear legal duty to administer junior ground water rights since depletions of groundwater under those rights are preventing the Coalition members' senior surface water rights from filling the quantity element of their respective licensed or decreed rights.

9. As to paragraph 21, the Coalition alleges that the cited constitutional provision and statute speak for themselves.

10. As to paragraph 22, the Coalition alleges that Idaho Code Section 42-226 speaks for itself. The Coalition affirmatively alleges that the preamble language cited in paragraph 22, and contained in Idaho Code § 42-226 premises the statutory requirement that prior appropriators of ground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the Director. This concept has absolutely no application in the context of conjunctive management between surface and ground water rights. The Coalition further affirmatively alleges that the priority doctrine has been constitutionally determined to be the means of full economic development of water resources in the State of Idaho in the context of water right administration between senior surface water users and junior ground water users.

11. As to paragraph 23, the Coalition denies the first sentence and alleges the rule cited speaks for itself. The Coalition denies the statements are relevant in the context quoted and therefore denies the same. The Coalition affirmatively alleges that the context of *Schodde v. Twin Falls Land and Water Company*, 224 U.S. 107, 119 (1912) provides that the means of appropriation must be reasonable, but in no way limits access to a vested water right, or in any way authorizes the Department or the Director to adjudicate the quantity element of a vested water right through an administrative process relating to the administration of water rights.

12. As to paragraph 24, the Coalition admits that watermasters must distribute water within water districts pursuant to the prior appropriation doctrine, however the remaining statements are denied.

13. Paragraph 25 is admitted.

14. The Coalition is without sufficient information regarding the statements in paragraph 26 and therefore denies the same.

15. As to paragraph 27, the Coalition admits the Director has a statutory duty to administer all water rights within the ESPA and hydraulically connected reaches of the Snake River irrespective of a delivery call. The Coalition denies any implication in paragraph 27 that the Coalition's request for water right administration in Water District No. 120 was an effort to "preclude" administration of ground water rights in Water District No. 130. The Coalition requested water right administration in Water District No. 120 on the basis of the Director's prior findings set forth in the March 10, 2004 *Amended Order* In The Matter of Distribution of Water to Water Right Nos. 36-15501, 36-02551, and 36-07694, wherein the Director stated that "depletions to the ESPA from the diversion and use of ground water in Water District No. 120 under water rights junior in priority to July 13, 1962, do not cause material injury to" Rangen's water rights in Water District No. 130. *Rangen Order* at p. 18, ¶ 73, p. 24, ¶ 17.

16. As to paragraphs 28, 29, 32, and 33 the Coalition admits the Department adopted the cited conjunctive management rules, but the Coalition alleges the rules speak for themselves. The Coalition further alleges that insofar as the rules and their interpretation by the Director: 1) limit administration of water rights to a "call"; 2) are used to allow the Department to administer water rights in any manner that violates the prior appropriation doctrine; 3) allow ground water users to divert water, or make water available to ground water users, in any instance when

diversion of water from the aquifer by a junior ground water right depletes the quantity of water that would otherwise be available for use by a senior water right; 4) allow provision of water to a junior ground water right at any time prior to a showing by that water right holder by clear and convincing evidence that the depletions caused do not deplete the quantity of water available for use by a senior water right holder or; 5) in any other way excuses administration of water rights so the burden of proof upon a junior user shifts to a senior user, the same are unconstitutional, unconstitutionally applied, and contrary to Idaho law.

17. Paragraph 30, 31, and 35 are denied. The Coalition further alleges that the use of the term "injury" in paragraph 30 is a misapplication of "material injury" as defined by the conjunctive management rules and at law.

18. As to the first sentence in paragraph 34, the Coalition is without sufficient information to determine how or why the Director "treated" the Coalition's request for water right administration and therefore denies the same. The second sentence in paragraph 34 is admitted.

19. As to the citation of Rule 42 in paragraph 35, the Coalition alleges the rule speaks for itself. The Coalition denies the remaining statements in paragraph 35.

20. Paragraph 36 is admitted to the extent there is no "effectively operating mitigation plan in place" to mitigate the injury to the members of the Coalition. The Coalition does not admit that the rules' provision for a "mitigation plan" is lawful or a substitute for proper water right administration pursuant to the prior appropriation doctrine.

21. As to paragraphs 37 through 44, the Coalition submits the sources cited speak for themselves and hereby denies any legal conclusions or interpretations made in the remaining statements in those paragraphs. As to paragraph 39, the Coalition affirmatively alleges that the

concept of "beneficial use" is not a variable in administration of water rights by the Department, the Director, or the watermasters of the respective water districts. As to paragraphs 40 through 44 inclusive, the Coalition denies the relevance of the same in the context of administration as set forth above. The Director misstates the policy contained in § 42-226, Idaho Code. This legislative enactment does not alter the appropriation of surface water by beneficial use in reasonable amounts, but conditions the "first in time is first in right" as it applies to ground water rights by adopting "reasonable ground water pumping levels" as an additional standard.

22. The Coalition denies paragraphs 45 through 51.

23. The Coalition admits that "material injury" is likely for 2005, but denies the Director's conclusions regarding injury set forth in paragraphs 52 and 53.

IV.

ADDITIONAL ISSUES RAISED BY ORDER

1. Although the Director has acknowledged that there is a direct hydraulic connection between the ESPA and the Snake River, and that ground water elevations control flows to the river from the ground water and from the river to ground water, he erroneously concludes that ground water withdrawals from only "certain portions" of the ESPA cause depletions to the flow of the Snake River by reduced reached gains or increased reach losses. (See paragraph 31 of Findings of Fact as compared to paragraph 24.)

2. Although the Director recognizes that ground water elevations in the ESPA control flows to the Snake River or from the Snake River to ground water, and that ground water pumping can cause depletions to the Snake River over time, the Director has failed to provide a delivery plan by which ground water elevations can be stabilized and returned to necessary elevations to insure flows to the Snake River. (See paragraphs 24 and 25 of Findings of Fact.)

3. Although conjunctive water right administration should be recognized under the laws of the State of Idaho, the interpretation and application of such conjunctive administration by the Director is not consistent with Idaho law, including but not limited to, in the following respects:

a. The Director refuses to recognize a material injury by interference with the use of water by a holder of a senior water right by ignoring injury until he has determined that all supplemental water sources of the senior appropriator have been depleted.

b. That supplemental water sources of a senior water right holder must be used to mitigate the out-of-priority diversions by ground water users in the ESPA.

c. The Director fails to recognize the property rights of the Surface Water Coalition members in their storage contracts by demanding that surface water users with senior surface water rights use this stored water acquired by the surface water users to insure a water supply in times of water shortages caused by natural conditions before the Director will recognize the impact upon the exercise of a senior surface water right caused by the use of ground water withdrawals under junior ground water rights as provided by the Director's own definition of material injury found in Rule 010.14.

4. Although the Director recognizes that the amount of storage required by each member of the Surface Water Coalition for irrigation of the lands of shareholders and landowners during any given irrigation season varies, based upon climatic conditions, he fails to recognize that he is attempting to impose additional obligations upon the senior surface water holders to use storage to mitigate the acknowledged diversion of natural flow rights and storage rights by junior ground water diverters of ground water in the ESPA.

5. The Director has failed to recognize that the storage water rights of various Coalition members are the primary source of water for the irrigation of lands by those members.

6. Although the Director has recognized that ground water diversions from the ESPA are the same as and constitute a diversion and use of storage releases, such diversions also constitute a diversion and use of natural flow rights to which senior surface water right holders are entitled. (See paragraph 82 of Findings of Fact.)

7. The Director has no legal authority to control lawful uses of stored water purchased by a surface water user by directing that said storage water must be used to mitigate depletions in river flows to which the surface water users are entitled under their senior rights for irrigation and storage, by junior ground water diverters.

8. The Director has equated "material injury to a senior priority surface water right" to a condition of reduced water supplies of a surface water right holder from all sources to an absolute minimum, using 1995 as a standard for A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, and North Side Canal Company, and 1993 as a standard for Twin Falls Canal Company.

9. The Director has attempted to meet his obligation to require the delivery of water to senior water right holders by the curtailment of junior rights by attempting to limit such senior rights to levels of beneficial use during irregular and unprecedented times of high natural precipitation (i.e. 1995). The policy of "first in time is first in right" is not a standard set forth in the Idaho Constitution that is dependent upon average uses. (See computation of uses based on 1995, and the lack of injury from ground water depletions in 1997, Findings of Fact 88 and 95.)

10. Irrigation demands by Coalition members for the irrigation of lands within their respective irrigation projects has varied from year to year, depending on precipitation,

temperatures, consumptive use and natural flow available. However, certain Coalition members have increased their reliance upon storage water in recent years due to reduced reach gains and natural flow diversions as a result of ground water depletions.

11. The Director has violated Idaho law in restricting injury to a water right to those instances where all storage has been used, notwithstanding the fact that this results in zero (0) carryover that would otherwise be available for use in future years and causes storage right holders to mitigate for water loss caused by junior ground water diversions.

12. The Director has failed to consider that carryover storage requirements vary significantly, depending upon the location of the carryover storage. The Director also fails to recognize that carryover storage in some reservoirs is a substantial benefit to spaceholders in other reservoirs which may assure the other spaceholders an adequate water supply in the coming irrigation season. Storage rights in Water District No. 1 are senior in right to most ground water rights, but decreased inflows to the Snake River have prevented Palisades Reservoir from acquiring any significant new storage water over the last few years, except those with winter water savings priority.

13. The Director, in setting forth requirements for "replacement water", fails to recognize that replacement water may be sufficient to mitigate losses for a particular irrigation season, but does not result in storage carryover except to the extent the carryover of storage of a surface water user is already in Palisades Reservoir, the most difficult and junior reservoir to be filled.

14. The Director has misstated irreparable damage to the crop production by landowners and shareholders served by members of the coalition who received less than a full water supply, resulting in some crops receiving less water than needed and he has failed to

recognize that crop rotations were required to be severely altered at planting when it was recognized that water supplies had been reduced in previous years and prior to 2005 there was no indication as to the amount of replacement water, if any was to be provided or could be relied upon. Curtailment and viable mitigation plans for 2006 must be adopted and put into effect immediately to insure senior water right holders the water to which they are entitled to divert under their senior water rights.

15. The Director erroneously concludes that increased reach gains in the Snake River between the near-Blackfoot gage and the Minidoka gage, over time, by full curtailment of all ground water diversions in Water Districts 120 and 130 would equate to and be equal to the increase in reach gains in the Snake River reach above described by curtailing all ground water diversions in Water Districts 120 and 130 for only one year, and such calculation is invalid.

16. The Director has relied upon generalizations of persons who do not have the qualifications of an expert to determine crop losses (including reduced yields and modified rotations) suffered by landowners and shareholders of members of the coalition because of water shortages, and has failed to recognize the costs incurred in renting additional water to reduce shortages caused by junior ground water diversions.

17. The Director, in determining the minimum amount of replacement water in 2005 to mitigate diversions by junior ground water diverters, has failed to recognize that replacement water will not contribute to carryover in a reservoir that has a junior right of refill if there is no carryover from previous years in that reservoir.

18. The Director has ignored the reach gain between Shelley and the Blackfoot Gage that is stored each year which affects the storage rights of members of the Coalition. (See paragraph 131 of Findings of Fact).

19. The Director has ignored the requirements of Rule 43 of the conjunctive management rules and the provisions of the Idaho Administrative Procedures Act by creating a new procedure for "replacement water plans" that is not authorized by statute, the conjunctive management rules, or any other rule of the Department.

REQUESTED RELIEF

Whereas, the Coalition herein requests the following relief:

1. A hearing on all aspects of the Director's May 2, 2005 *Amended Order* as contested above or on other issues as may hereafter be discovered.

2. Appointment of an independent hearing officer as provided for by Idaho Code § 42-1701A(2). The Coalition requests appointment of an independent hearing officer to ensure that a complete record is developed through this proceeding. Moreover, the Coalition requests an independent hearing officer for the following reasons. First, the Director was a personal participant in the meetings and workgroups that produced the recalibrated ESPA groundwater model. The Director has also supervised various model runs over the past year, including determining the procedures, factors, and assumptions for those model runs. In particular, the Director has set forth conclusions of certain model runs in his *Order* to which the Coalition is not aware of the underlying data or assumptions that were used. As such, the Director's involvement with the recalibration of the ESPA groundwater model and use of the model in response to the Coalition's request for water right administration makes him a likely fact witness in this proceeding. Second, the Director, or some other Department personnel at his direction, had conversations with various extension agents and farm service agency directors regarding crop losses and water shortages. *See Order* at 25, ¶¶ 110-114. These conversations raise issues of fact and make the Director a likely fact witness in this proceeding as well. Finally, the Director

personally participated in direct negotiations between members of the Coalition and junior ground water right holders (including IGWA) last year. Through those meetings, the Director and his representatives were made aware of certain positions on factual and legal matters taken by the parties. Now, the Director has assumed the role of presiding officer in this matter and has made "findings of fact" and "conclusions of law" with full knowledge of the parties' prior positions stated in those direct negotiations. Accordingly, given the Director's role in various aspects of this proceeding and prior negotiations between certain parties, the Coalition requests the Director appoint an independent hearing officer to preside over the hearing in this matter.

3. The Director modify or amend his *Order* consistent with the doctrine of prior appropriation as set forth in the Idaho Constitution and chapter 6, title 42, Idaho Code.

4. As to hydraulically connected ground water and surface water, the Director administers the same as set forth herein in accordance with the prior appropriation doctrine.

5. Junior ground water right holders within Water District Nos. 120 and 130 be required to show by clear and convincing evidence that water is available to them such that diversion of water by them from the aquifer is not an infringement upon or diminishment of the amount of water available to the Coalition members as set forth in the quantity amount and rate of diversion provided by their licenses or decrees.

6. To the extent that junior ground water right holders within Water District Nos. 120 and 130 are unable to meet the burden of proof set forth in the preceding request for relief (paragraph 5), the watermasters for Water District Nos. 120 and 130 be directed to curtail those junior ground water rights accordingly.

7. The Director comply with the SRBA District Court's Order Granting the State of Idaho's Motion for Interim Administration and order the watermasters of Water District Nos.

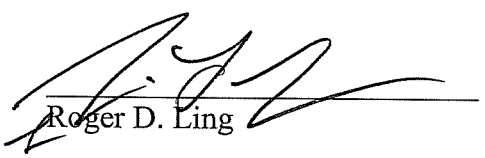
120 and 130 to curtail out of priority diversions consistent with the Director's Final Orders Creating Water District Nos. 120 and 130.

8. A declaration that the conjunctive management rules (IDAPA 37.01.03) are unconstitutional, both on their face, and as applied by the Director in the *Order*.

9. To the extent the conjunctive management rules are constitutional, the Director require that all mitigation plans submitted by junior ground water right users comply with the provisions of Rule 43.

DATED this 17th day of May 2005.

LING ROBINSON & WALKER



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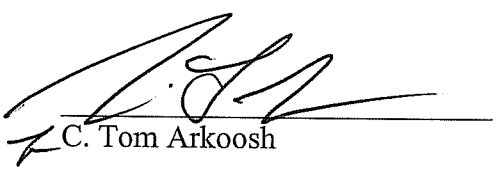

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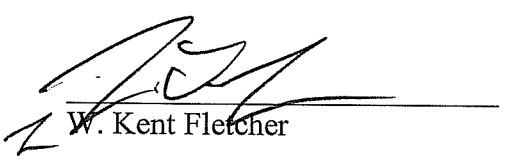

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May 2005, I served a true and correct copy of the foregoing *Petition Requesting Hearing on Director's May 2, 2005 Amended Order and Requesting Appointment of an Independent Hearing Officer* on the following by the method indicated:

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