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Department of Water Resources

**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 RESPONSE TO POCATELLO'S MOTION TO BIFURCATE THE HEARING INTO INJURY AND MITIGATION PHASES**

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, referred to as the Surface Water Coalition (SWC), respond to Pocatello's Motion to Bifurcate the Hearing into Injury and Mitigation Phases as follows:

BACKGROUND

The SWC requested administration of junior ground water rights in Water District 120 on January 14, 2005. The Director treated the request as a "delivery call" under the Department's "conjunctive management rules". To the extent the conjunctive management rules are constitutional, the initial procedure was governed by IDAPA 37.03.11.040 (for the purposes of this response, a citation to a "Procedure Rule" or "Rule" shall refer to the applicable conjunctive management rule - IDAPA 37.03.11.000 *et seq.*). Apparently in response to Orders issued by the Director, Pocatello, as a member of the "Water Resource Coalition", filed the Water Resource Coalition Application for Approval of a Mitigation Plan dated April 29, 2005, which was subsequently amended (Pocatello Petition). The Department did not notice up the Pocatello Petition as a "mitigation plan" under Procedure Rule 43 or allow any opportunity to file protests to the plan as required by the Rule. Petitions seeking approval of mitigation plans were also filed by J.R. Simplot Company, Idaho Ground Water Appropriators, Inc. (IGWA) and A & B Irrigation District.

The Director issued an Amended Order on May 2, 2005. In response, the SWC filed the Surface Water Coalition's Petition Requesting Hearing on May 17, 2005.

Mitigation plans are governed by Procedure Rule 43. However, the Director apparently believed that the Pocatello Petition, even though the title to the Petition refers to a "mitigation plan", fell within the Procedure Rule 40 proceeding, and on May 6, 2005 issued an Order

Regarding Water Resource Coalition Replacement Plan (changing Pocatello's designation of a "mitigation plan" to a "replacement water plan"). The SWC has filed numerous objections, protests, and motions concerning the Director's "replacement water plan" concept. To date, the Director has completely ignored the SWC objections and motions.

IGWA recognized the procedural issue recreated by the "mitigation plan" versus "replacement water plan" concept, and filed a Motion seeking to consolidate its application for a mitigation plan with A & B's application and the delivery call. The Director denied that request in his Order dated September 13, 2005.

As a result of the Director's Orders, there are no Procedure Rule 43 mitigation plans before the Director in the proceeding regarding the petitions challenging the May 2, 2005 Amended Order. Pocatello has not initiated a mitigation plan proceeding under Procedure Rule 43, or if it did, it has not requested that the mitigation petition be consolidated with the call proceeding. Moreover, as discussed above, the Department never treated the Pocatello Petition as a Rule 43 mitigation plan and failed to notice up the plan for protest and hearing as required by the Rule, as was done with IGWA's mitigation plan filed in February 2005. Finally, the only request to consolidate a "mitigation plan" proceeding with the present proceeding on the Director's May 2, 2005 Order, filed by IGWA, was denied by the Director

At the time of scheduling in this matter, the SWC, and other participants in the call, requested that issues involved in the proceeding on the Director's May 2, 2005 Amended Order be identified and discovery scheduled accordingly. This concept was strongly opposed by Pocatello, and eventually the Director. As a result, the SWC has gone to great expense to attempt to comply with the Director's Scheduling Orders, as amended, even though the

Department has not turned over information in a timely manner and even though the SWC experts believe that the Scheduling Orders do not provide adequate time for any of the experts to analyze all of the information that has been turned over.

Pocatello now files a Motion seeking to bifurcate the hearing into "injury" and "mitigation" phases, acknowledging that "this case is complicated" and "the experts on all sides of this case must have sufficient time to investigate and analyze relevant information", requesting that the Director only consider "injury" at the hearing scheduled in March and leave any determination of a remedy until some future unidentified date.

RESPONSE TO MOTION

The SWC opposes Pocatello's Motion to Bifurcate for several reasons: 1) The SWC has already expended significant attorney's fees and experts fees in addressing all issues raised by the Orders entered in the matter, and created by the time frames set forth in the Scheduling Orders that were initially supported by Pocatello - at this late date there would be little cost saving resulting from a bifurcation of issues; 2) It is the SWC's position that any mitigation plans filed by parties affected by the Director's May 2, 2005 Amended Order, including the Pocatello Petition, are not properly before the Director in the proceeding on the May 2, 2005 Amended Order, based upon the conjunctive management rules. Any mitigation plan, to be properly considered pursuant to the conjunctive management rules, must be filed pursuant to Procedure Rule 43 and noticed for protest and hearing pursuant to that rule; 3) By bifurcating the proceeding as requested by Pocatello, once injury is determined, the SWC would be left without a remedy (i.e. water) until another hearing could be scheduled, compounding the injury resulting to the SWC without any ability to recover losses occurring during the delay in the proceedings;

4) The attempt to force the SWC to accept some form of mitigation in the current proceeding is contrary to law. In proceedings before the SRBA Court, the Department has admitted that senior water right holders cannot be compelled to accept mitigation in the event of a water delivery call. The SRBA Court has stated that IDWR has no authority to compel mitigation. See *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcases Nos. 36-02708 *et seq*. (December 29, 1999) (an action involving a challenge by the North Snake Ground Water District to elements of senior surface water rights, which was decided after the adoption of the conjunctive management rules). 5) The Director should consider all issues set before him in the various petitions filed challenging the May 2, 2005 Amended Order, not just issues regarding "material injury" as suggested by Pocatello. Those issues do not include separate Rule 43 "mitigation plan" proceedings.

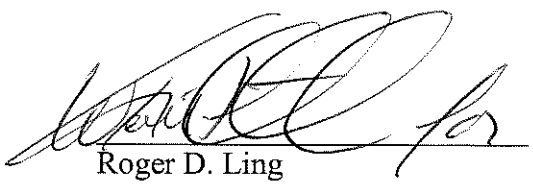
I.R.C.P. 42 (b) allows a court "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy" to order separate trials of claims or issues. In this action it will not be more convenient to bifurcate, there is no allegation of prejudice by Pocatello, and at this late date it is the position of the SWC that bifurcation will not significantly result in expedition or economy. It is the position of the SWC that to bifurcate issues at this late date would prejudice the ability of the SWC to properly frame all issues for the hearing on the Director's May 2, 2005 Amended Order (and for purposes of any subsequent judicial review), and would result in further prejudice in the ability of the SWC to obtain redress for the injury caused by junior water right holders diverting out of priority and taking water that rightfully should be delivered to fulfill the senior water rights of the SWC.

It would be in the interest of administrative economy and justice to hear all of the issues

raised in the petitions requesting a hearing on the Director's May 2, 2005 Amended Order in one proceeding. The SWC requests that the Motion to Bifurcate filed by Pocatello be denied.

DATED: November 10, 2005.

LING ROBINSON & WALKER



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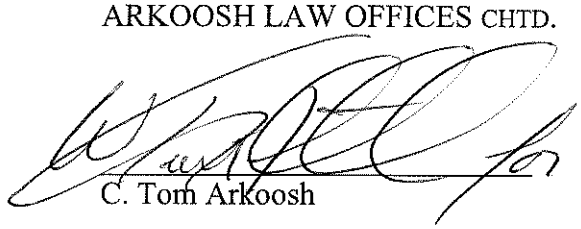

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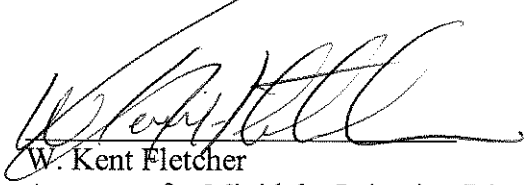

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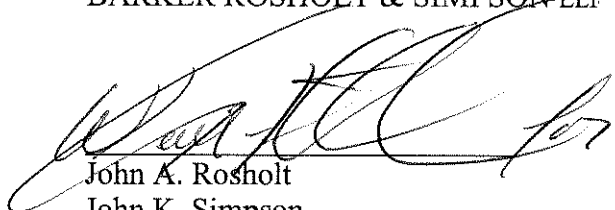

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CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of November, 2005, I served a true and correct copy of the foregoing **SURFACE WATER COALITION'S RESPONSE TO POCATELLO'S MOTION TO BIFURCATE AND RESTATED MOTION TO CONTINUE** on the following by the method indicated:

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