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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF 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 HEARING ON DIRECTOR'S MAY 2, 2005 AMENDED ORDER	**SURFACE WATER COALITION'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

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 Company (hereinafter collectively referred to as the "Surface Water Coalition" or "Coalition"), by and through counsel of record, and pursuant to the Director's May 2, 2006 *Order Inviting Responses to Motions for Changes in Scheduling Order* hereby files this reply in support of its *Motion for Partial Summary Judgment* submitted ("*Motion*") on January 23, 2006. This *Reply* addresses *IGWA and Pocatello's Joint Response to the Surface Water Coalition's Motion for Partial Summary Judgment* ("*Response*") filed on April 28, 2006.[1]

STANDARD OF REVIEW

IGWA admits the facts presented in the Coalition's *Motion*. Indeed, IGWA specifically references the fact that the Director issued an amended order on May 2, 2005 ("May 2005 Order") which contained "findings of fact and conclusions of law." *Response* at 2. The Coalition identified the relevant findings and conclusions from the May 2005 Order in its *Motion*. *See Motion* at 3-5. Unless IGWA claims that the Director's May 2005 Order does not contain the statements and findings cited by the Coalition, which it does not, there are no disputed facts and the Coalition's *Motion* can be decided as a matter of law.

ARGUMENT

I. Administration is Ministerial and the Director or Watermaster Cannot Re-Determine Water Rights Through Administration.

Contrary to IGWA's claim, water right administration is ministerial in Idaho. *See Jones v. Big Lost Irr. Dist.*, 93 Idaho 227, 229 (1969) ("The duties of a water master are to determine decrees, regulate flow of streams and to transfer the water of decreed rights to the appropriate

[1] Although IGWA and Pocatello share common interests in this proceeding and have filed a *Joint Response* to the Coalition's motion for partial summary judgment, the Coalition will hereinafter refer to both responding parties as "IGWA" for the reader's convenience.

diversion points, I.C. § 42-607. The watermaster is . . . a ministerial officer."). The Director and the watermasters are bound to follow prior decrees and have no authority to re-determine water rights every time administration takes place.

Consequently, section 42-607 is clearly "self-executing" and places an affirmative duty on the watermaster to distribute water by priority in times of shortage. Nothing in the statute provides for delayed "determinations" by the Director before water is distributed to senior rights. On the contrary, the statute requires the watermaster to monitor the water supply along with the list of water rights that are diverting from that supply and curtail rights in priority when the supply is insufficient to fill all rights. *See Jones*, 93 Idaho at 229; *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20 (1935) ("The defendant water master is only an administrative officer and has no interest in the subject of the litigation - his only duty is to distribute the waters of his district in accordance with the respective rights of appropriators").

The statute is not open for the strained interpretation offered by IGWA. Instead, the "statute obviously is intended to make the authority of a watermaster more certain, his duties less difficult and his decisions less controversial." *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988). IGWA twists the statute's plain meaning, claiming that the phrase "in times of scarcity of water it is necessary so to do in order to supply the prior rights of others" somehow opens the door for "preliminary determinations" by the Director that equate to contested cases with an indefinite timeline for resolution while senior water rights suffer the lack of administration. The Director and watermasters do not have the unfettered discretion claimed by IGWA. The Idaho Supreme Court has expressly held that section 42-607 "in clear and unambiguous terms, governs the duties of the state's agent-the watermaster." *R.T. Nahas v. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988). Where a statue is clear, the law as written must be

followed and the expressed intent of the legislature must be given effect. *Hayes v. Kingston*, 140 Idaho 551, 553 (2004). IGWA's interpretation threatens the authority of the watermaster, makes his job more difficult and uncertain, and his decisions subject to inevitable controversy. Indeed, under IGWA's theory the State has no need for watermasters since the open-ended decisions of water right administration must all be based on determinations made by the Director.

Since the Director cannot "re-determine" water rights in administration it follows that the May 2005 Order violates Idaho law since it completely ignores the decreed and licensed quantities set forth in the Coalition members' water rights. As explained below, the Director has no authority to create a "minimum full supply" benchmark for purposes of water right administration. The State's watermasters have a duty to distribute water by the decrees and licenses. The watermaster's list of rights does not contain a "minimum full supply" element for his review. Accordingly, the Director's May 2005 Order plainly interferes with that legal duty by providing "guidelines" or "injury determinations" that conflict with Idaho law.

Finally, IGWA further asserts that nothing in the statutes is directed toward the "timing" of administration. Although ground water users may not realize the significance due to the historic lack of regulation of their rights, timing is critical for purposes of water right administration throughout an irrigation season. If the water supply is short, and a senior is not delivered water on the basis the watermaster is waiting for the resolution of a contested case before the Department, it is obvious that the delay itself becomes the decision. Fortunately, section 42-607 protects against this scenario and requires the watermaster to actively administer rights in priority when the water supply is insufficient to fill all rights. To claim, as IGWA does, that the statute does not provide for timely or immediate administration during times of water

shortage completely disregards the law of priority and how water must be distributed in Idaho.[2] Moreover, the lack of timely administration is simply an administrative shield to be enjoyed by junior priority ground water rights.

If a watermaster is administering the rights properly, senior rights will be filled first and juniors will be curtailed as the supply diminishes over the irrigation season. This is what the Idaho Constitution and water distribution statutes expressly require. Accordingly, IGWA's argument that the May 2005 Order is consistent with Idaho's water distribution statutes fails, and the administration provided by the order, which re-determines the Coalition's water rights under various "determinations", should be set aside as a matter of law.

II. The Concepts of "Beneficial Use", "Optimum Use", "Reasonable Use", and "Waste" Do Not Allow the Director to Take Water From Senior Surface Water Users for the Benefit of Junior Ground Water Users.

The Director, like the Department of Water Resources, has "only such powers as the statute or ordinance confers." *Beker Industries Inc. v. Georgetown Irrigation District*, 101 Idaho 187, 191 (1980). First, the Director "shall distribute water in water districts in accordance with the prior appropriation doctrine."[3] I.C. § 42-602. The watermaster has the "duty" to distribute water "according to the prior rights" of the various users in a water district, and to "shut or fasten" diversion facilities "when in times of scarcity it is necessary so to do in order to supply the prior rights of others in such stream or water supply." I.C. § 42-607. Contrary to IGWA's

[2] I.C. § 42-602 expressly requires the Director to "distribute water in water districts in accordance with the prior appropriation doctrine." The statute's language creates a "clear legal duty." *Musser*, 125 Idaho 392, 395 (1994). Inherent in the Director's and watermaster's service is the duty to protect senior rights from unlawful diversions by juniors. Priority administration under I.C. § 42-607 anticipates water shortages by requiring the watermaster to constantly monitor the water supply and curtail juniors by priority as the supply dictates. In other words, a watermaster who is properly performing his job will administer the rights by priority and protect the seniors from "injury" caused by juniors. The Idaho Supreme Court has repeatedly affirmed the watermaster's administrative role and statutory duty to prevent "injury" to seniors: "By providing for controlled delivery of water, the statutory scheme protects and implements established water rights." *Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972).

[3] The failure to distribute water by priority is grounds for a writ of mandate against the Director. *See Musser*, 125 Idaho 392.

arguments, the Idaho Constitution and water distribution statutes clearly define and limit the Director's and a watermaster's authority in distributing water within water districts. The Director cannot, as was done in the May 2, 2005 Order, usurp this constitutional and statutory mandate by subjective determinations that flatly ignore prior decreed and licensed water rights.

A. "Beneficial Use" Does Not Reduce Decreed and Licensed Water Rights.

IGWA wrongly claims that the concept of "beneficial use" limits a senior's water right to quantities less than what was previously decreed or licensed. *Response* at 5. IGWA fails to recognize the distinction between a beneficial use determination at the time a water right is decreed and the effective re-adjudication of a water right through the administration provided under the Director's May 2005 Order.

Idaho law is clear that "beneficial use" is determined at the time a water right is decreed or licensed. For instance, Idaho's water appropriation law demands that a license cannot reflect an amount of water "in excess of the amount that has been beneficially applied." I.C. § 42-219. Once a license is issued, it is "binding upon" the Department for purposes of administration. *See Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* at 15 (Fifth Jud. Dist., Twin Falls County District Court, In Re SRBA: Subcase No. 36-02708 et al., December 29, 1999).

Similarly, when a court decrees a water right, such as the Coalition's rights, the Department is bound to accept the court's findings as to the quantity element that the right holder is entitled to divert and beneficially use. I.C. §§ 42-1401A(5), 1420(1); *Crow v. Carlson*, 107 Idaho 461, 465 (1984) ("The [ ] decree is conclusive proof of diversion of the water, and of application of the water to beneficial use, i.e., the decree is *res judicata* as to the water rights at issue herein."); *see also*, *Order on Motion to Enforce Order Granting State of Idaho's Motion for*

Interim Administration at 8 (Fifth Jud. Dist., Twin Falls County District Court, In Re SRBA: Subcase No. 92-00021, November 17, 2005).

When a decree is granted, the issue of reasonableness of diversion and use is therefore settled. The Director may not re-examine the issue of reasonableness of use under the guise of a "material injury" determination. While IGWA's argument essentially restates the Director's erroneous position in the May 2005 Order (¶ 45), the Idaho Supreme Court expressly rejected the same in *State v. Hagerman Water Right Owners, Inc.*:

> Following that decision and during the course of the proceedings before the special master, the IDWR stated that the Director's recommendation was based on current non-application to "reasonable beneficial use." ***The IDWR stated that the concept of beneficial use allows for constant re-evaluation of whether the water is being used beneficially.***
>
> ...
>
> ***The special master determined*** that absent a claim of forfeiture, abandonment, adverse possession, or estoppel, ***a reduction in beneficial use after a water right vests is not a basis upon which a water right may be reduced.***
>
> ...
>
> Although the doctrine of beneficial use is a concept that is constitutionally recognized and that permeates Idaho's water code, the Idaho Constitution does not mandate that non-application to a beneficial use, ***for any period of time no matter how small***, results in the loss or reduction of water rights.

130 Idaho 736, 738-39 (1997) (emphasis added).

The above decision leaves no doubt that the Director is without authority to administratively "reduce" senior surface water rights based upon subjective "need", or "beneficial use" determinations, including the time of the year water use occurs and whether or not it may be raining on a particular day.[4] In addition, a "beneficial use" theory does not "follow

[4] The SRBA Court has similarly adopted this rule of law. *See Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* at 17 (Fifth Jud. Dist., Twin Falls County District Court, In Re SRBA: Case No. 39576, Subcase No. 36-02708 et al., December 29, 199)(the Department has no authority to

the water" as a method to justify reducing licensed and decreed water rights. Section 42-110 plainly states that irrigation entities, like the Coalition members, whose rights have been licensed or decreed, "shall be entitled to such quantity" at their points of diversion, and once that water is lawfully diverted it is their private "property." Accordingly, IGWA's arguments plainly fail to justify the Director's errors of law in the May 2005 Order which purport to reduce vested water rights and the entitlements under those rights through administration pursuant to a "beneficial use" theory.

Finally, contrary to IGWA's misinterpretation, *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383 (1930), supports the Coalition's *Motion* and forecloses the theory that the Director has "discretion" to ignore decreed water rights and reduce those rights through administration. IGWA relies upon *Arkoosh* to allege that the Director has the authority to determine the amount of water to which the water right holder may be entitled to receive, without regard to the decreed amount of said water right. *Response* at 14-15. *Arkoosh* does not support this position. In discussing the statutory authority of the Director to provide the immediate direction and control of the distribution of water from all of the streams to the canals and ditches diverting therefrom, the *Arkoosh* Court stated that the action referred to is the "action of the [Director] in determining when water may be ***first*** beneficially used . . ." 48 Idaho at 396 (emphasis added). In fact, the Court acknowledged the following:

> The water user is acquainted with his land and his crops and should be in better position to determine when water should be applied than any other person. Various provisions of our statutes recognize his right to demand water. The respondents are entitled to apply water to their lands for the purpose of irrigation as early as it may be beneficially applied.

Id. at 395.

"limit 'the extent of beneficial use of the water right' in the sense of limiting how much (of a crop) can be produced from that right . . .").

Where, as in *Arkoosh*, the commencement of the irrigation season was not identified in the decree being reviewed, the Court recognized that the commencement of the irrigation season could be determined by the Director. This holding did not infer that the Director could determine the amount of water that one should receive during the irrigation season, while ignoring the amount to which a water user was entitled under his decreed right.

Indeed, a watermaster has no authority to adjust headgates and pumps based upon climatic conditions or refuse to deliver water based upon some arbitrary decision that a senior does not "need" his full decreed water right on a particular day. Such administration undermines the "certainty" and "finality" provided by water right decrees and leaves water districts in a state of never-ending chaos. Fortunately, Idaho's constitution and water distribution statutes forbid the "perceived need" based system of administration set forth in the Director's May 2005 Order, and instead requires watermasters to honor decrees and distribute water in accordance with their terms. *See State v. Nelson*, 131 Idaho 12, 16 (1998) ("Finality in water rights is essential. . . . the watermaster is to distribute water according to the adjudication or decree."); *Stethem v. Skinner*, 11 Idaho 374, 379 (1905) ("[W]here the decree upon its face is explicit as to the stream from which the waters are to be distributed, that the water-master cannot be required to look beyond the decree itself.").

B. "Optimum Use" or "Maximum Economic Use" Does Not Reduce Decreed or Licensed Water Rights.

Similar to the "beneficial use" argument, IGWA wrongly claims that an "optimum use" policy allows the Director to reduce senior surface water rights for the benefit of junior ground water rights. Such an argument is simply another way of claiming that the Director is authorized to "re-allocate" water rights based upon an "economic utilization" policy. To the contrary, the Director is bound by the mandate of the Idaho Constitution and the water distribution statutes.

Moreover, the policy to "maximize the beneficial use and economic development" of the state's water resources does not authorize the Director to decide which irrigation use, i.e. a junior ground water right versus a senior surface water right, makes the "better" use of the water. As explained above, the law expressly requires the Director and the respective watermasters to distribute water "in accordance with the respective rights of appropriators." *Nampa & Meridian Irr. Dist.*, 56 Idaho at 20.

Despite IGWA's strained interpretation of Idaho's water distribution statutes they cannot escape the plain and unambiguous language that requires a watermaster to supply senior water first in times of shortage. Any "supervision" or "direction" by the Director that interferes with this "clear legal duty", whether in the name of "maximum use" or not, exceeds the Director's authority and violates the statutes and the Idaho Constitution. The May 2005 Order is such an example since the Director refused to distribute water to the Coalition based upon their decreed and licensed water rights. If the Director was free to re-determine a water right holder's "beneficial use" at any time, or assert a "maximum use" policy, and use that determination to reduce or limit senior water rights in favor of juniors, then there would be no need for Idaho's water right adjudications, including the SRBA. Idaho precedent forbids this type of "re-allocation" from seniors to juniors for the "maximum benefit of all" in the name of "administration". Indeed, the Idaho Supreme Court flatly rejected such an approach to administration in *Kirk v. Bartholomew*, 3 Idaho 367 (1892):

> The court failed to determine the priority of right of any of the parties litigant, but, on the unstatutory theory of the use of water being a common right, decrees, by a sliding scale, the amount of water which each shall be entitled to at specified periods of the irrigating season, and, by some abstruse mathematical calculation, reduces, as the supply decreases, one party's amount one-third and another two-thirds for the same dates. . . . "As between appropriators, the one first in time is the first in right." The law is thus written. The law-making power,

> only, has the power to repeal or amend it. It cannot be repealed or amended by the court, but must be enforced as long as it remains the law, even if harsh and unjust.

3 Idaho at 372.

Accordingly, IGWA's reference to an "optimum use" policy does not support the errors of law in the Director's May 2005 Order.

C. "Waste" Does Not Reduce or Limit Decreed or Licensed Water Rights.

Finally, the rule against "waste" does not authorize the Director to reduce previously decreed or licensed water rights through administration. Contrary to IGWA's assertions, the Supreme Court has repeatedly rejected the argument:

> [T]he court's conclusion that the best use of the water was the use made of it by defendant [the junior appropriator], is immaterial and lends no support to the judgment. ***The policy of the law against the waste of irrigation water cannot be misconstrued or misapplied in such manner as to permit a junior appropriator to take away the water right of a prior appropriator***. So long as the water from the springs and swamps, flowing in its natural channels, would reach Spring Creek in usable quantities, plaintiffs are entitled to enjoin defendant's interference therewith. The fact that some of the water would be lost by evaporation or percolation would not afford this defendant any right to divert it. . . . ***As between two appropriators, both using the water for irrigation, neither has a better use or preference over the other***. Idaho Constitution, art. 15, § 3.

Martiny v. Wells, 91 Idaho 215, 219 (1966) (emphasis added); *see also Gilbert v. Smith*, 97 Idaho 735, 739 (1976).[5]

Accordingly, the Director cannot use the policy against waste as a justification to allow junior ground water rights to divert water that would otherwise be available for diversion and use by a senior surface water right.

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[5] The *Gilbert* court stated:

> As a rule, the law of water rights in this state embodies a policy against the water of irrigation water. *Ward v. Kidd*, 87 Idaho 216, 392 P.2d 183 (1964). Such policy is not to be construed, however, so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the point of downstream diversion.

97 Idaho at 739.

Under Idaho law, the Department has no authority to collaterally attack decreed and licensed water rights through administration, or under the guise of any of the above referenced policies. Refusing to deliver water to a senior in times of shortage while a junior is permitted to divert without a similar reduction in supply (based on the junior's need, the weather and the crop grown on the junior's field) is unconstitutional and works a clear diminishment to the senior's right. *See Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) (to "diminish one's priority works an undeniable injury to that water right holder"). Whereas the May 2005 Order effected administration without adhering to the Coalition members' water rights, it plainly violates Idaho law and must be set aside.

III. Idaho Law Requires Each Water Right to Be Honored in Administration, Not Combined For the Benefit of Junior Ground Water Users.

IGWA wrongly claims that the Coalition is demanding that their natural flow rights be filled at all times of the year. To the contrary, the Coalition is simply requesting lawful water right administration that protects their senior rights against interference from junior ground water rights. Whereas junior surface water rights across the state are routinely curtailed during the irrigation season to satisfy senior surface water rights, Idaho law requires the same of junior ground water rights. Just because the interference takes place underground does not insulate that water right from regulation. Moreover, just because administration involves junior priority ground water rights does not mean that the Director is free to invent a new system of water distribution that erroneously "combines" a senior's water rights and reduces the vested entitlements under those rights.[6] Tellingly, IGWA provides no support, in statute or case law, for the Director's novel "combined" administration theory.

[6] The fact the Director did not regulate ground water users, who may hold more than one right for a particular parcel, under this same "combination" theory, is further evidence that the administration under the May 2005 Order fails as a matter of law. If a "minimum full supply" replaces a water right, then the Director should have evaluated

The Coalition members' water rights, including other natural flow rights to the Snake River, typically exceed the flow of the river during times of the irrigation season. The watershed does not support all of the natural flow rights all of the time, hence the law of priority determines which rights are satisfied and which are not. Just because their natural flow rights are not satisfied at all times during the year does not give junior priority ground water rights a free pass to interfere with and take water that would otherwise be available for the Coalition members' diversion and use. IGWA's argument regarding the Coalition members' storage water rights, however, seeks that result.

Although various Coalition members secured storage water rights to firm up water supplies for their projects, some members completely rely upon those storage supplies given the priority of their natural flow rights. Regardless, each water right stands on its own and is entitled to priority administration under Idaho law. The Coalition members' storage water rights can be used for any lawful purpose and the Director has no authority to force the Coalition members to release and divert that water to mitigate for shortages in the natural flow caused by junior ground water diversions. Moreover, the storage rights represent vested property right interests, and once the water is stored it becomes private water no longer subject to diversion and appropriation. *See Washington Cty. Irr. Dist. v. Talboy*, 55 Idaho 382, 389 (1935); *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208 (1945). Accordingly, the storage rights are not subject to re-allocation by the Director under any theory of administration, including the "combined" and "minimum full supply" criteria used in the May 2005 Order.

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individual ground water users that hold multiple water rights and limited those users to a "minimum full supply" after combining those rights and reducing the decreed or licensed amounts. Whereas the May 2005 Order plainly provides for a system of administration that benefits junior ground water rights by taking water from senior surface water rights, there is no question that it violates Idaho law.

Idaho law prohibits junior ground water right holders from taking water that is destined to fill the Coalition's natural flow or storage water rights. By erroneously "combining" the Coalition's water rights for water right administration, the Director's May 2005 Order plainly violates the Idaho Constitution and water distribution statutes. IGWA's argument, including the information provided in the Brendecke Affidavit, does not justify the Director's errors of law.[7] Moreover, the fact that some junior surface water rights are able to divert water at various times in the year does not justify permitting ground water rights, junior to those same surface water rights, from taking additional water that would have been available to fill the surface water rights.

Finally, IGWA attempts to justify the Director's "combined" administration theory by claiming the Coalition is seeking "enhanced conditions" in the river. *Response* at 20-21. Seeking lawful administration of junior priority ground water rights that take water from senior surface water rights does not equate to asking juniors to artificially "augment" the water supply. To the contrary, the Coalition is requesting that the Director prevent junior ground water rights from interfering with the natural condition of the river which, but for those ground water diversions, would have spring flows and reach gains available for diversion and use under senior surface natural flow and storage water rights.

In summary, the law is clear and strictly prohibits the Director and watermasters from taking two separate water rights with differing priority dates and combining them into one for purposes of administration. The Director's May 2005 Order unlawfully combines the Coalition

[7] The Coalition disputes the Brendecke Affidavit as well as the other affidavits (Scott King, Brad Sneed) submitted with IGWA's *Response*. However, these affidavits are of no relevance for disposition of the Coalition's *Motion*. Importantly, none of the affidavits dispute the fact the Director's May 2005 Order employed the procedures cited and contained the statements and findings cited by the Coalition.

members' vested water rights for administration and therefore must be set aside as a matter of law.

IV. The Director's May 2005 Order Violates the Conjunctive Management Rules.

In Part VIII of its *Response*, IGWA continues to rely upon the arguments relating to "beneficial use", "maximum utilization," "futile call" and "waste" to justify the Director's errors in the May 2005 Order wherein the Department's conjunctive management rules ("Rules") were violated.

Since the Rules prohibit junior ground water rights from "hindering" or "interfering" with senior surface water rights, the Director must apply the "material injury" definition under his administration analysis. *See* Rule 37.03.11.010.14 (definition of "material injury"). Depleting water that would otherwise be available for diversion and use under a senior right equates to an interference or impact upon that right. Instead of following the Rule, the Director expressly rejected the same and stated that "depletion does not equate to material injury." May 2005 Order at 43, ¶ 47. IGWA asserts this finding is justified by the various concepts identified above as well as the Rule 42 analysis. As explained earlier, the concepts of "beneficial use", "maximum utilization", and "waste" do not authorize the Director to reduce previously licensed or decreed water rights. Moreover, whereas Rule 42 contains various factors for the Director to consider, they do not alter the definition of "material injury" or replace a defined water right for administration.

IGWA admits that the Rules do not even contain the "minimum full supply" benchmark that was invented by the Director's May 2005 Order. Instead, IGWA sidesteps the errors in the order and claims that the "minimum full supply" concept is an "amalgamation" of the Rule 42 considerations. Again, Rule 42 does not provide an avenue for the Director or watermasters to

distribute water based upon some unwritten standard or some new concept that conflicts with defined ***water rights***. Courts do not decree "minimum full supplies", and the Department has never licensed a "minimum full supply." Water rights contain defined elements, including express diversion rates that must be honored in administration.

Rule 40 plainly requires watermasters to regulate the diversion and use of water "in accordance with the priorities of rights" and "in accordance with the rights thereto." Rule 40.01.a and 02.b. The watermasters must therefore distribute water based upon the respective "water rights", not upon some "minimum full supply" as may only be determined by the Director. The Director has no authority to ignore the Rules under which he is purporting to act. *See Lindstrom v. District Bd. of Health Panhandle Dist. I*, 109 Idaho 956, 961 (Ct. App. 1985) ("A governmental entity cannot act arbitrarily and capriciously in enforcing its legitimate regulations.").[8] Since the May 2005 Order uses a "minimum full supply" standard for administration, and that fact is undisputed by IGWA, the Director violated the plain terms of the conjunctive management rules as a matter of law.

Finally, IGWA shrugs off the May 2005 Order's unprecedented criteria of "total crop loss" and "land fallowing" for water right administration by asserting they simply relate to "beneficial use" determinations. In addition, IGWA does not address the total supply "shortage" criteria that apparently stems from the "total crop loss" and "land fallowing factors." The Director's May 2005 Order impermissibly turns the "shortage" analysis from the water source to the senior surface water right holder's total supply. A watermaster regulates water rights and monitors the source to determine which rights must be curtailed. Idaho law forbids the Director

[8] The Coalition does not admit that the Department's conjunctive management rules are "legitimate". Notably, the validity of the rules is currently at issue in pending court case. *AFRD #2 et al. v. Dreher, et al.* (Case No. CV-2005-600, Fifth Jud. Dist, Gooding County District Court). However, assuming for argument's sake that the rules were valid, the Director is bound to follow them.

and watermasters from administering water according to subjective determinations regarding their opinion of what a water right holder "needs" and distribute the remainder to juniors. *See e.g. Lockwood v. Freeman*, 15 Idaho 395, 398 (1908) ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to another person. Vested rights cannot thus be taken away.").

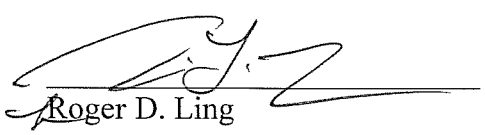
As previously described in the Coalition's *Motion*, the Director has no authority to prevent lawful administration by applying the new criteria contained in the May 2005 Order as conditions for administration of junior ground water rights.

CONCLUSION

The Director's 2005 Order, as admitted by IGWA, made several findings of fact and conclusions of law which served as the basis for the Director's administration of junior priority ground water rights in Water Districts 120 and 130. The Director unlawfully ignored the Coalition members' previously decreed and licensed water rights and instead created a "minimum full supply" standard to regulate junior ground water rights by. In completing this "re-adjudication" of the Coalition members' water rights, the Director violated Idaho's constitution and water distribution statutes. Finally, the May 2005 Order even contains criteria and procedures that violate the Department's own rules. For these reasons the Coalition respectfully requests an order granting partial summary judgment on these issues.

DATED this 12th day of May, 2006.

LING ROBINSON & WALKER



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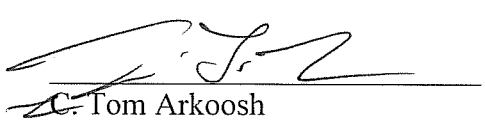

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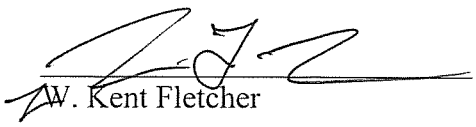

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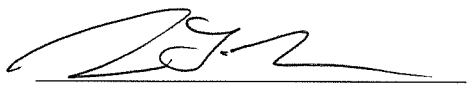

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2006, I served a true and correct copy of the foregoing *Surface Water Coalition's Reply in Support of Motion for Partial Summary Judgment* on the following by the method indicated:

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