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May 12, 2006

Karl J. Dreher, Director
ATTENTION: Victoria Wigle
Department of Water Resources
State of Idaho
The Idaho Water Center
322 E. Front Street
P. O. Box 83720
Boise, ID 83720-0098

RE: **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**

Dear Ms. Wigle:

With reference to the above matter, please find enclosed our *Reply Memorandum in Support of Motion in Limine* for filing on behalf 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. Thank you.

Sincerely,

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BEFORE THE DEPERTMENT 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.	**REPLY MEMORANDUM IN SUPPORT OF MOTION IN LIMINE**

I. INTRODUCTION

Idaho Ground Water Appropriators, Inc., (IGWA) has attempted to shape the

Surface Water Coalition's (Coalition) Request for Administrative Relief in Water District 120 as a battle of economic impacts to determine who will be injured more; junior ground water users if their rights are curtailed or Coalition members if junior rights are not curtailed. The *Expert Report of John Church* (Report) is nothing more than an attempt to shift the issue from the priority of senior water rights and lawful water right administration to an unprecedented system of water distribution that hinges on a debate over who makes the best use of the water and whether "economic forces unrelated to water supply are the major determinates of the state of Idaho's agricultural economy". *IGWA's Memorandum is Opposition*, p. 3; *citing Church Report*, ¶ 16. The balancing of economic interests should not be a deciding factor in determining whether Coalition members are entitled to protection of the water they are entitled to divert and use under their senior water rights.

IGWA states at page 9 of its *Memorandum in Opposition to SWC's Motion in Limine* that Idaho law requires that its water resources be put to their maximum use and benefit and encourages the full economic development of Idaho's ground water resources. However, this is not to be accomplished at the expense of senior surface water rights. The Conjunctive Management Rules define the full economic development of ground water rights such as those represented by IGWA as:

> The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42.

Rule 37.03.11.010.07. The full economic development of ground water is subject to the prior

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appropriation doctrine just as every other water use is in the state of Idaho.

II. ARGUMENT

A. EVIDENCE OF ECONOMIC IMPACT SHOULD NOT BE CONSIDERED

IGWA is correct when it states that it is a policy of the laws of Idaho to secure the maximum use and benefit of its water resources. *IGWA's Memorandum in Opposition to SWC'S Motion in Limine*, p. 4. This does not mean that senior appropriators can be prevented from using their decreed and licensed amounts of water to which they are entitled, and this does not mean that economic development trumps priority administration mandated by the Idaho Constitution. Contrary to IGWA's novel claims, Idaho case law and the Department's conjunctive management rules ("Rules") have not so eroded the prior appropriation doctrine as to make it subservient to the economic interests of junior ground water users.

The phrase "full economic development," as found in Idaho Code § 42-226, actually supports reasonable ground water pumping levels and not the reduction in water available to divert under a senior right. As stated in I.C. § 42-226:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, <u>a reasonable exercise of this right shall not block full economic development of underground water resources</u>. <u>Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels</u> as may be established by the director of the department of water resources as herein provided.

Based on the above, the concept of full economic development is not a sword that junior ground

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water users can wield to exert more rights than they hold under Idaho law. Rather it is the idea that ground water users may not protect water tables above reasonable pumping levels from the depletion of ground water supplies and not that senior surface water users are prohibited from receiving water they are entitled to divert and use pursuant to their senior rights. The Idaho Supreme Court has ruled that it sometimes may be necessary to modify private property rights in ground water in order to promote full economic development of ground water. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973). Property rights in ground water, not surface water rights, may be modified to protect ground water appropriators.

Under Idaho Code § 42-602, "[t]he director of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine." Junior appropriators are entitled to divert water only when the rights of senior appropriators have been satisfied. *R.T. Nahas Co. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988)(surface water users on same stream). There is no case law that forbids a lawful senior appropriator from beneficially using the water he is entitled to because of potential adverse impact to a junior appropriator, nor have the Rules so eroded the prior appropriation doctrine that other factors may allow junior appropriators equal or better water rights than senior users. *Martiny v. Wells*, 91 Idaho 215, 419 P.2d 470 (1966)(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).

IGWA relies heavily on the idea that the prior appropriation doctrine in Idaho encompasses some undefined concept of full economic development. They claim that the policy

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of the State of Idaho is to secure the maximum use and benefit, and the least wasteful use, of its water resources. *IGWA's Memorandum is Opposition*, p. 3; *citing State v. Hagerman Water Rights Owners,* 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). However, there is no case law that stands for the proposition that injury or harm to junior appropriators justifies depriving senior appropriators of water they are lawfully entitled to divert and use. As the Supreme Court stated on 1892: "As between appropriators, the one first in time is 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." *Kirk v. Bartholomew*, 3 Idaho 367, 369, 29 P. 40, 42 (1892)(emphasis added); *Beecher v. Cassia Creek Irr. Co., Inc.*, 66 Idaho 1, 154 P.2d 507 (1944)(it is the unquestioned rule that priority of appropriation shall give the better right between those using a shared water source).

The *Kirk* case originated when five senior appropriators sued to establish the priority of their right to divert water from Raft River and to restrain forty-five defendants from interfering with the plaintiff's rights to the use of the water of said river to the extent of their several prior appropriations. The trial court, instead of determining the priorities of the various rights to divert water from the river, simply allotted to each party a certain number of inches of water every season up to June 15th, and a certain number of inches to each from June 15th to July 15th of each year, and a certain number of inches to each party every year after July 15th, by a decreasing scale, regardless of the amount of water actually appropriated by each party and regardless of priority of appropriation. *Kirk*, 3 Idaho 368, 29 P. at 41. The trial court supported his decision with the following reasoning:

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> I also find that said appropriations and use, as herein stated, were not only according to the custom of the place, but were each and all of them reasonable and just to the public, and to all claimants of water from Raft river, and that a greater claim by each would be unreasonable and unjust; also, that a claim of the same amount of water at all times of the year, or in years of extraordinary drought, would be unreasonable, not according to said customs or laws, and unjust to other settlers on or claimants to the use of the waters of said stream or streams. I further find that the volume of water which is the subject of these findings should be and is hereby held to be a common right in those so accustomed and entitled to their use, in the proportions herein declared.

Id. Following the statutes of the Territory of Idaho, the Supreme Court overturned the trial court's decision and held:

> The court below should have determined the amount of water appropriated for a useful or beneficial purpose by each of the parties, and, in case any of the parties were not the original appropriators, the court should have determined the amount of water appropriated by the party from whom he deraigned title; should also have determined the date of each appropriation, and the priority of right of each of the parties, as the statute directs, to-wit: "As between appropriators, the one first in time is the first in right." In determining the amount of water appropriated for a useful or beneficial purpose, it is proper for the court to take into consideration the number of acres of land susceptible of irrigation by the water so appropriated, claimed, or owned by each of the parties, and the amount of water necessary to irrigate the same.

Kirk, 3 Idaho 369, 29 P. at 42

The holding and rationale of *Kirk* have not been overruled. Even if harsh and unjust, the prior appropriation doctrine is still the law in Idaho.

IGWA cites Rules 20.02 and 20.03 to support its position that the Director "should hear evidence of the relative economic harms and benefits resulting from potential curtailment of ground water pumping on the ESPA in order to take into account all of the

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elements of the prior appropriation doctrine, including 'full economic development as defined by Idaho law.'" Rule 020.03 states:

> These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

Again, the concept of full economic development does not allow IGWA to make an end run around the prior appropriation doctrine and trump this fundamental tenement of Idaho water law. IGWA references the Idaho Constitution article XV, section 7, for the concept that there is a state policy of securing "optimum development of water resource in the public interest. *IGWA's Memorandum in Opposition to SWC'S Motion in Limine*, p. 4.

This section does not grant the Director authority to act in any way, let alone use a policy of "optimum development" to eviscerate priority water right administration. Section 7 of Article XV was enacted as a way to ward of the State of California's interest in diverting Snake River water from southern Idaho in the early 1960s. The provision authorizes for the State Water Resource Agency (now the Idaho Water Resource Board) to "formulate and implement a state water plan for optimum development of water resources in the public interest." Idaho Const. Art. XV, § 7. The Idaho Water Resource Board has the exclusive authority to formulate

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the state water plan. *Idaho Power Co. v. Sate*, 104 Idaho 570, 661 P.2d 736 (1983). However, neither Section 7 nor the state water plan calls for senior water users to suffer water shortages at the hands of junior appropriators. Optimum development is a concept in Idaho water law but should remain within the Board's purview. Section 7 does not support the idea that "full economic" or "optimum" development factors into priority water right administrations. Just the opposite, the Director is expressly prohibited from taking water from seniors for the benefit of juniors, under any analysis, economic or otherwise. *See Kirk*, 3 Idaho at 369; *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908).

The Director's authority for promulgating the Rules directly acknowledges the following:

> Chapter 52, Title 67, Idaho Code, the Idaho Administrative Procedure Act, and Section 42-603, Idaho Code, which provides that the Director of the Department of Water Resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources <u>as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof</u>. These rules are also issued pursuant to Section 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department (emphasis added).

Rule 11. As evidenced by the Rule, the Director is limited in his authority by the qualification that priorities of water rights must be respected and followed in conjunctive administration.

There has been no claim that the Coalition members are not reasonably using water. This rule further states that priority in time and superiority in right is subject to conditions of reasonable use and among other things, full economic development. Nevertheless, full

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economic development is different than economic harm to junior ground water users, which IGWA is clearly attempting to make the center of their objection to SWC's delivery call.

B. THE CHURCH REPORT AND MATERIAL INJURY

IGWA wrongly cites Rule 30 for the proposition that "the Church Report is relevant, admissible evidence that must be heard by the Director in evaluating SWC's asserted material injury." *IGWA's Memorandum in Opposition*, p. 6. First, the Coalition's request for water right administration concerns ground water rights in organized water districts and therefore is not governed by the procedures in Rule 40, nor Rule 30. Accordingly, IGWA's argument fails. However, assuming for argument's sake the Rule 30 did apply in some manner, the rule provides that the petitioner shall provide all information, measurements, and data or study results available to petitioner to support the claim of material injury. This has nothing to do with potential subsequent injury to junior appropriators. On the same page of IGWA's Memorandum, IGWA mentions the Director's May 2, 2005 Order and the sections that discuss IDWR staff contacting agricultural extension agents and Farm Service Agency Directors to glean information about recent crop production and yield numbers in certain counties where water users of the Coalation irrigate. This is cited for IGWA's conclusion that "the Director believes such information is necessary to a determination of material injury." *Id.* All this request by the Director demonstrates is that the Director is interested in determining whether in fact a full allotment of their water is unavailable to the Coalition. Crop yields are not the only means of demonstrating that Coalition members are entitled to make a delivery call; there are other factors such as the crops grown as a result of water shortages and their ability to utilize their full storage

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rights that must also be considered by the Director.

Material injury as defined by Rule 11.14 is the "[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42." The process of determining a material injury and the factors found in Rule 42 does not require a balancing of economic harm between the junior and senior users There is no balancing against the junior appropriators, just a determination of material injury.

C. THE IDAHO RULES OF EVIDENCE

IGWA maintains that the Idaho Rules of Evidence do not apply to this contested case. However, IGWA does admit that the standard for the admission of evidence in contested cases before the Department is governed by the Department's Rules of Procedure, IDAPA § 37.01.01.600. Rule 600 provides in part that:

> The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence. (Emphasis added).

The Rules plainly provide that the Director can use any "evidentiary privilege" recognized by Idaho courts. It follows the rules of evidence used by Idaho courts should similarly be followed, i.e. the Idaho Rules of Evidence. Even if the Director determines that the Idaho's evidentiary rules do not apply to this contested case, the standard of what may be admitted under Rule 600 is

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nearly the same. Irrelevant evidence should be excluded, as should unduly repetitious evidence. This rule is permissive but allowing speculative economic opinions regarding the effects of a delivery call is not relevant to the Coalition members' request for water right administration, and whether junior ground water users are illegally taking water that would otherwise be available for diversion and user under their senior natural flow and storage water rights.

D. CONJUNCTIVE MANAGEMENT RULES

Pursuant to Rule 42, the Director must find that material injury is occurring. The Rule 42 factors do not include an "economic" analysis that determines who makes the better use of the water. But what the IGWA asks the Director to consider as a factor is the opinion of an economist that "a curtailment of ground water irrigation...would have an immediate, and large, negative economic impact on the economy of South Central Idaho and ultimately the State." *Church Report*, ¶ 36.

In the next paragraph of his *Report*, Church states that:

> [E]ven assuming that South Central Idaho's surface-irrigated agricultural economy is suffering due to insufficient water supplies...the slow accumulation of additional surface water supplies to the Coalition members...would not be enough to overcome the macroeconomic forces that been troubling Idaho's agricultural economy over the last fourteen years in both wet and dry year.

Church Report, ¶ 37. This statement is a capsulation of why the *Report* is irrelevant to the Coalition's delivery call. The overall economic impact should not be a factor in the Director's enforcing the Coalition's call. This same scare tactic is obviously an attempt to distract the Director from the relevant issues before him, including whether junior ground water users are

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taking water destined for diversion and use under senior rights. Whether the Coalition is not efficiently using water would be a valid factor as would the amount of water available or whether alternate means of diversion exist. The consideration in this case should begin with whether the Coalition faces a shortage of water to fill its lawfully issued rights. Any depletion to the Coalition members' senior rights caused by junior ground water diversions constitutes a material injury. Consideration of the overall economic health of southern Idaho's ground water pumpers should not be done at the expense of the Coalition members who have valid senior priority water rights that the Department and the Director are bound to honor in administration. This issue was resolved in 1892.

E. IDAHO CODE § 67-5242 PROVIDES THAT PARTIES SHALL BE PERMITTED TO PRESENT EVIDENCE ON ALL ISSUES INVOLVED, WITH LIMITED EXCEPTIONS.

IGWA states that Idaho Code § 67-5242(3)(b) allows the Report to be admissible. Idaho Code § 67-5242(3)(b) does "afford all parties the opportunity to respond and present evidence on all issues involved." However, Idaho Code § 67-5242(3)(a) states that at the hearing the presiding officer "[s]hall regulate the course of the proceedings to assure that there is a full disclosure of all relevant facts and issues." Based on this section and in conjunction with Rule 600 of the Department's procedural rules, the presiding officer is to act as the gatekeeper as to what facts are relevant and the issues to be resolved. Idaho Code § 67-5242(3)(a) therefore gives the presiding officer the tools to prevent all non-relevant issues from being presented. Given the Church report is irrelevant, the parties should not be forced to waste time and resources conducting additional discovery or have to address the issues at hearing. The

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economic impact to junior appropriators is such a non-relevant issue to the Coalitions delivery call. Idaho Code § 67-5242(3)(a), therefore, prevents parties from presenting non-relevant facts and issues under Idaho Code § 67-5242(3)(b).

III. CONCLUSION

The *Expert Report of John Church* and its accompanying documents should be excluded from evidence, as it is irrelevant to the Coalition's delivery call. The focus of any admitted evidence should aid the Department and Director in determining whether junior ground water appropriators are preventing senior appropriators from exercising their full water rights, and will curtailing the junior appropriators allow the senior appropriators their full allotment of water even if the result may appear to be harsh and unjust to the junior ground water users. The Department cannot deny a lawful senior appropriator their rights to the waters of the State because a junior appropriator may be adversely economically affected. If that is the case, the prior appropriation doctrine is dead in Idaho and delivery calls have become moot. It is clear that some party is going to suffer economically from a delivery call; this is the very reason senior water rights are sought after and defended so vigorously.

IDWR and the Director are obligated to follow the provisions of the Idaho Administrative Code, the Idaho Code and Idaho case law regarding appropriation of water rights. That body of law does not permit IDWR or its Director to consider economic injury when reviewing the possible curtailment of junior appropriators. Therefore, the *Expert Report of John Church* should be excluded from any consideration or hearing on the Coalition's Request for Administration.

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Respectfully submitted this 12th day of May, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2006, the above and foregoing was served by the method indicated below, and addressed to the following:

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