Roger D. Ling, ISB #1018
LING ROBINSON & WALKER
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

Attorneys for A&B Irrigation District and
Burley Irrigation District

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
Twin Falls, Idaho 83301-6167
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Milner Irrigation District,
North Side Canal Company, and
Twin Falls Canal Company

C. Tom Arkoosh, ISB #2253
ARKOOSH LAW OFFICES, CHTD.
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for American Falls
Reservoir District #2

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

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 JOINT MEMORANDUM IN RESPONSE TO DIRECTOR'S APRIL 6, 2005 LEGAL QUESTION**

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 jointly responds to the Director's legal question posed in his April 6, 2005 *Order on Petitions to Intervene and Denying Motion for Summary Judgment; Renewed Request for Information; and Request for Briefs*.

ISSUE

In his April 6, 2005, *Order*, the Director requested simultaneous briefing upon, the issue of, "whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in proceedings(s) to which the ground water users were not a party."

LEGAL ARGUMENT

I. The Director's February 18, 2002 *Final Order Creating Water District 120* Requires Administration By Priority.

Since the Director requested legal briefing on the question of whether or not decreed water rights are entitled to have water distributed by priority (as against subsequently licensed or decreed rights), it is apparent the Director is questioning the Department's "authority" or "jurisdiction" to administer water rights within Water District No. 120. These same questions were raised in the fall of 2001, and consequently, the State of Idaho filed a motion with the SRBA District Court requesting authorization for interim water right administration. In that motion, the State of Idaho recognized that the water supply in the affected administrative basins (what are now Water District Nos. 120 and 130) was not "sufficient" to fulfill all water rights, including senior surface water rights:

> 2. Interim administration of water rights in Basins 35, 36, 41, and 43 is reasonably necessary because the available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights.

Exhibit A. *Motion for Order of Interim Administration and Motion for Order Expediting Hearing* at 2 (Subcase No. 92-00021).

The State of Idaho also filed a legal brief that urged the Court to grant the motion for the following reasons:

> On August 3, 2001, the Director established the American Falls Ground Water Management Area and the Thousand Springs Ground Water Management Area, pursuant to Idaho Code § 42-233b, due in part to the drought conditions being experienced across the Snake River Plain. After the Director stated his intent to curtail diversions under those water rights for ground water within the Ground Water Management Area causing the significant depletions to hydraulically connected surface water sources, affected ground water right holders entered into written stipulated agreements with certain senior priority surface water right holders. The senior surface water right holders agreed not to exercise their senior priorities against the junior ground water rights holders in exchange for commitments by the ground water right holders to provide replacement water during the term of the of the stipulated agreements equal to what would have resulted from curtailment of ground water diversions. In addition, the signatories to these agreements agreed not to oppose a motion by the State seeking an order from the SRBA District Court permitting interim administration of water rights within portions of the Eastern Snake Plain Aquifer (ESPA) in accordance with the provisions of Idaho Code § 42-1417. [FN 2].
>
> [FN 2] . . .While the stipulated agreements are for a two-year period, ***the parties understand that the water districts to be formed are being established on a permanent basis and will be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.***
>
> ***The purpose for seeking interim administration is to permit immediate administration of water rights[FN3] in the affected areas pursuant to chapter 6, title 42, Idaho Code***, and to enable the Director and participating water right holders to take further steps toward long-term administration of the resource.
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> * * *
>
> ***Upon completion of the SRBA, water districts will be created pursuant to chapter 6, title 42, Idaho Code, to, among other functions, protect senior water rights from injury caused by junior water rights diverting from hydraulically connected sources within the Snake River Basin in Idaho***. The legislature recognized, however, that there might be a need for earlier interim administration of water rights during the pendency of the general adjudication and, therefore, authorized the SRBA district court to "permit" the Director to "distribute water pursuant to chapter 6, title 42, Idaho Code" in accordance with applicable partial decree(s) and/or with Director's Report(s) upon a finding that such administration is reasonably necessary to protect senior water rights. Idaho Code § 42-1417.

> Recent events demonstrate the immediate need for water districts within portions of the ESPA in order to protect senior water rights. As a result of the drought over the past two years, ***the water supplies available for use under senior priority surface water rights relying on spring sources in the American Falls*** and Thousand Springs areas ***have diminished and are expected to continue to diminish in the coming year. . . .***
>
> ***Water flows from the American Falls*** and Thousand Springs ***reaches of the Snake River are insufficient, at times, to supply some senior surface water rights.*** *See* Attachment A, *Affidavit of Timothy J. Luke in Support of Motion for Order of Interim Administration*, at 3. Simulations using the Department's calibrated computer model of the ESPA show that ***ground water depletions from the ESPA for irrigation and other consumptive purposes***, which occur in relatively close proximity to the spring sources in the American Falls and Thousand Springs area, ***cause significant reductions in spring flows tributary to the Snake River within six (6) moths or less from the time the withdrawals occur. Thus, interim administration of water rights in all or portions of Basins 35, 36, 41, and 43 is reasonably necessary because the available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights.***

Exhibit B. *Brief in Support of Motion for Interim Administration* at 2-4 (Subcase No. 92-00021)(emphasis added).

The referenced senior surface water right holders that were parties to the Interim Stipulated Agreements included members of the Surface Water Coalition.[1] The State plainly recognized that water supplies were insufficient to satisfy their water rights and that interim administration was necessary to protect those senior surface water rights prior to the completion of the SRBA. Coincidentally, the same holds true today as it did back in 2001.

In addition, the State submitted the *Affidavit of Timothy J. Luke*, which included the following reasons why interim administration was then necessary, and what the functions of the water districts (120 and 130) would be:

[1] The State's motion for interim administration arose out of the Interim Stipulated Agreements which requested that the Director create water districts to effectuate administration consistent with the Director's creation of groundwater management areas where mitigation plans did not provide safe harbor. Those groundwater management areas clearly contemplated and recognized the Department's authority to administer ground water rights where such rights depleted the reach gains to the detriment of senior surface water rights.

8. The general reasons for the creation or enlargement of a water district are:

- ***Provide a mechanism for administration, regulation and enforcement of water rights***;
- Provide a means for regular measurement and reporting of diversions, including ground water diversions.
- Provide a more local and immediate response to general calls for water delivery;
- Provide for improved management of water rights and keeping water rights current with respect to ownership and water use;
- ***Provide a system whereby local watermasters or deputy watermasters can provide for local and timely response to general calls for water distribution***;

9. The specific reasons for creation or enlargement of water districts in Basins 35, 36, 41 and 43 are:

- ***The establishment of water districts will provide the watermasters with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law.***
- The available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights.

Exhibit C. *Affidavit of Timothy J. Luke* at 3 (Subcase No. 92-00021)(emphasis added).

As set forth above, the State of Idaho specifically sought authorization for interim administration and the creation of water districts in order to provide for an "immediate response to general calls for water delivery" and to provide a "mechanism for administration, regulation, and enforcement of water rights." *Id.* On the basis of the State's representations listed above, the SRBA District Court granted the motion and issued an order authorizing interim administration.

1. Interim administration in those portions of Administrative Basins 35, 36, 41, and 43 shown on Attachment 1 in accordance with the Director's Reports and the partial decrees for water rights is reasonably necessary ***to protect senior water rights in accordance with the prior appropriation doctrine as established by Idaho law.***

Exhibit D. *Order Granting State of Idaho's Motion for Order of Interim Administration* at 2. (Subcase No. 92-00021)(emphasis added).

The Court's authorization to administer water rights pursuant to chapter 6, title 42, expressly provides for water distribution by priority, including distribution to the Coalition members' senior water rights which were decreed decades ago. I.C. § 42-607. The statutes do not require that the Coalition members' water rights be decreed in the Snake River Basin Adjudication in order to be afforded the protection of priority distribution.

The question raised in the Director's April 6, 2005 *Order* is contrary to what the State represented to both the parties, including certain Coalition members, and the SRBA District Court, when it requested authorization for interim administration in the fall of 2001. Since the State of Idaho requested authority for interim administration to protect senior surface water rights during times of shortage, such as in 2005, there is no question that junior ground water right holders within Water District No. 120 are subject to curtailment in order to supply the prior rights.

Shortly after the SRBA District Court granted the State of Idaho's motion, the Director issued orders creating water districts to cover the respective administrative basins. Whatever doubts the Director may have with respect to being able to administer junior ground water rights to protect senior surface water rights, his order creating Water District No. 120 firmly establishes his "authority" and "duty" to administer junior ground water rights within the district. In other words, the Department is bound by the Director's *Final Order Creating Water District No. 120*, and the watermaster must administer all rights within the district by priority. Specifically, the Director's *Order* recognizes:

> 20. The available water supply in all or portions of Administrative Basins 35 and 41 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.

> 21. The administration of ground water rights within the portion of Administrative Basins 35 and 41 overlying the ESPA is necessary for the protection of prior surface and ground water rights.

Water District 120 Order at 4.

The Director clearly contemplated administration of both senior surface water rights and junior ground water rights when Water District No. 120 was created. Nothing in the *Order* indicates that senior surface water rights, decreed in earlier adjudications, would not be recognized for purposes of water right administration. To the contrary, the *Order* expressly states that the Director will immediately administer those rights for which priorities have been adjudicated:

> 3. The Director has responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.
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> 4. The Director is authorized to establish water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. See Idaho Code § 42-604.
>
> * * *
>
> 8. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights . . ., is necessary for the protection of prior surface and ground water rights.

Water District 120 Order at 4, 5.

The *Order* does not qualify the administration of water rights on the basis of whether or not a senior water right has been recommended or partially decreed in the Snake River Basin Adjudication. Instead, the Director plainly acknowledges that "immediate administration" is necessary to protect "prior surface and ground water rights." *Id.* at 5. Effective administration of junior priority ground water rights would be rendered meaningless under this *Order* if "prior

surface water rights" only included water rights that have been decreed by the SRBA District Court.[2] In other words, the Director's legal issue seems to imply that prior decreed rights, such as those held by the members of the Surface Water Coalition, were powerless to prevent interference by junior ground water rights until a general stream adjudication, involving all affected parties, was completed.[3] Such a result is contrary to Idaho law and would render Idaho's water right administration statutes meaningless. Accordingly, based on the SRBA District Court's order granting the Department authority to administer water rights in Water District No. 120, and the Director's order creating the water district, there is no question that the watermaster has a duty to administer the source by priority and distribute water to the Coalition members' senior water rights.

II. Idaho Law Requires Watermasters to Administer All Water Rights Within Organized Districts, Regardless of the Status of a General Stream Adjudication.

The Director's legal question further implies a concern that enforcement and administration of a decree arising from a proceeding in which water right holders against whom the decree is enforced did not participate impinges upon due process rights. The Idaho Supreme Court directly addressed this issue in *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d (1977) and determined, first, that all recorded rights are to be administered together by the Director as he finds them; and, secondly, that such administration does not violate fairness and due process.

The manner in which the Director's *Order* states this issue evinces a divergence from the Coalition's understanding of the Coalition's request, or water delivery call, made to the Director.

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[2] This point is particularly relevant when the water rights in Water District No. 1, the "prior surface water rights" that rely upon tributary groundwater supplies located in Water District No. 120, had not been reported and were projected to be some of the final rights reported to the SRBA District Court toward the end of the adjudication.

[3] The Director's question seems to imply that new water rights appropriated after the completion of the SRBA may not be subject to priority administration to protect senior surface or ground water rights that are partially decreed in the SRBA. Such a result is not contemplated under Idaho law and would require countless future adjudications to accomplish complete administration of the resource.

The Coalition should not be required to pursue, or prosecute, a delivery call.[4] A delivery call merely constitutes an administrative demand upon personnel of the Department to perform their clear duty of administering water rights by distributing water pursuant to priority, i.e., "first in time is first in right." *Musser v. Higginson*, 125 Idaho 352, 871 P.2d 809 (1994); I.C. §42-106 (first in time is first in right); I.C. §42-602 (Director's duty to enforce priority principle); I.C. §42-607 (the various watermasters shall enforce this principle among decreed and licensed rights).

To the extent the issue inquires whether the Director may enforce the priority doctrine among various licenses, various decrees from different private adjudications, and claims of rights neither licensed nor decreed, the summary answer is yes: water users not party to a former decree are subject to administrative enforcement of the decree by the Director, whether such administration arises from a call or from the Director's initiative; but, water users not party to a decree are not bound by the decree as *res judicata* in a subsequent adjudication by a court of competent jurisdiction.

The Idaho Supreme Court has addressed these two recurring scenarios concerning enforcement of competing rights involving a decree originating from a proceeding in which the other competing rights had not participated.

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[4] Indeed, the watermaster within Water District No.120 has a duty to distribute water according to priority, with or without a water right delivery call. *See Order on Cross Motions for Summary Judgment; Order on Motions to Strike Affidavits* at 31 (In re SRBA Case No. 39576, 5th Jud. Dist)(Subcase No. 91-100005, Basin-Wide Issue 5)("this Court agrees with the cross-movants that a general provision on conjunctive management needs to include language that clarifies that the prior appropriation doctrine is not subordinated to the concept of conjunctive management. ***Implicit in the efficient administration of water rights is the recognition that a senior should not be required to resort to making a delivery call against competing junior rights in times of shortage in order to have the senior right satisfied. The Idaho Supreme Court made this pointedly clear in the Musser case. Instead, IDWR should look to the respective decrees on a common source and if necessary, curtail junior rights or make other delivery adjustments to satisfy rights in a manner that is not inconsistent with the prior appropriation doctrine.***")(emphasis added).

The first scenario involves administrative enforcement of competing rights by the Department, very like the current call now before the Director. In that instance, by operation of I.C. §§ 42-602 and 607, the Court requires the Director to list and sort all permits, licenses and decrees by priority date, and administer them accordingly. The Court categorizes these rights as "recorded rights." Unrecorded appropriations are assigned a junior priority in administration even though they may ultimately prove to be valid and senior in an adjudication by a court considering the various competing rights.

The second common scenario concerns competition between a decreed right and a non-decreed right in an adjudication before a court. In that instance, the Idaho Supreme Court has concluded that the prior adjudication in which the non-decreed right did not participate does not bind the holder of the non-decreed right. Three of the cases cited by the Director in the April 6, 2005 *Order* stand for this proposition. *See Mays v. District Court*, 34 Idaho 200 (1921); *Scott v. Nampa Meridian Irr. Dist.*, 55 Idaho 672 (1934); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736 (1997).

Thus, in an administrative setting, the Idaho Supreme Court requires the Department to administer and enforce water rights according to the tenor of the right as presented on its face. In an adjudication, however, the Court does not bind a party until that party has had its "day in court." As explained below, the understandable difference arises from the different jobs to be performed by the executive and the judicial branch. The legislature has charged the executive branch to enforce recorded water rights in priority of time as property rights, and abjures the Director not to undertake litigation of the elements of the various rights.[5] If litigation of elements of a water right becomes necessary in order to protect a water right holder's property

[5] In some administrative contexts other than enforcement, such as a change in place of diversion or use (I.C. §42-222) or licensing (I.C. §42-203), the legislature does require the Director to investigate elements of the water rights under consideration.

interest in the water right, the Idaho Supreme Court directs this be done by a court in an adjudication.

In *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d (1977), a water right holder asserted an unadjudicated constitutional claim to water in Upper Reynolds Creek. In an administrative enforcement proceeding, the Director lumped this claim with decrees from Lower Reynolds Creek and administered them all together. The decrees arose from a proceeding in which the plaintiff had not participated. The plaintiff sued, claiming the Department violated his right to due process to enforce decrees against him unless he had participated in the litigation giving rise to the decrees. The Supreme Court rejected this position, and allowed the Director to get on with his job. With apologies, the Court's analysis of the due process issue is here extensively quoted because this integrated overview answers not only the issue framed by the Director, but also other issues that have arisen in these proceedings.

> Appellant assigns error to the lower court's failure to find the provisions of I.C. s 42-607 in violation of his constitutional rights.[FN1] His challenge is threefold: first, that the statutory preference for 'adjudicated, decreed, permit, or licensed right(s)' over the so-called unadjudicated 'constitutional use' water rights in times of water scarcity is a deprivation of property without due process (Idaho Const. Art. I, s 13; U.S. Const. Amend. XIV, s 1); second, that said statute is a denial of equal protection under the laws (U.S.Const. Amend. XIV, s 1; and finally, I.C. s 42-607 authorizes a taking of property for a public use without payment of just compensation (Idaho Const. Art. 1, s 14).
>
> We first consider appellant's contention that the statute amounts to a deprivation of property without due process of law. We agree that individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state. Idaho Const. Art 15, s 4; Anderson v. Cummings, 81 Idaho 327, 340 P.2d 1111 (1959); Follett v. Taylor Brothers, 77 Idaho 416, 294 P.2d 1088 (1956).
>
> The constitutional guarantee of procedural due process applies to governmental taking of legitimate property interests within the meaning of the Fifth or Fourteenth Amendments. It demands that if such a deprivation takes place, it must be accompanied by some type of notice and hearing. The United States Supreme Court, in Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32

L.Ed.2d 556 (1972), held that except in 'extraordinary circumstances' where some valid governmental interest justifies the postponement of notice and hearing, due process requires an adversary proceeding before a person can be deprived of his property interest.

The appellant, however, in order to invoke the protection of the Due Process Clause, must have a 'significant property interest' which is being deprived by the state's actions pursuant to I.C. s 42-607. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The difficulty appellant has in this case is apparent. His claimed property interest is that of a 'constitutional use' water right, such right being created simply by diverting unappropriated waters and putting those waters to beneficial use. I.C. s 42-103 et seq. Such a right, unless adjudicated, is an unproven right, i.e. no formal proceeding, neither judicial nor administrative, has established said right. Until such a water right is adjudicated, the only evidence that the right exists are the declarations of the claimant himself. Even if upon investigation by the Water Resources Board or some interested person a means of diversion, as claimed by appellant, is discovered, there still remains the unanswered questions concerning the date such diversion of water was put into operation; the amount of water being diverted; the use for which the water is being diverted; and the continuity in time of appellant's diversion of water. Thus, this Court, in considering appellant's due process argument, faces the same problem[FN2] that the watermaster faces when attempting to distribute the waters in times of scarcity-i. e. determining which claimed 'constitutional use' rights are valid and which are unwarranted and unjustified claims for water under the guise of a 'constitutional use right.'

FN2. While it is noted by the Court that both parties have stipulated, for the purposes of this case, that appellant owns a valid unadjudicated constitutional use right, such stipulation is not proof of his property interest.

But even if the appellant has sufficiently substantiated the existence of this claimed property interest so as to invoke the protections of the Due Process Clause, there are other reasons for rejection of this constitutional challenge. Justice Powell, in a concurring opinion in Mitchell v. W. T. Grant Company, 416 U.S. 600, 91 S.Ct. 1895, 40 L.Ed.2d 406 (1974), notes that the determination of what due process is required in a given context requires a balancing of both the nature of the governmental function involved and the private interests affected. 416 U.S. at 624-25, 94 S.Ct. 1895. It is well-settled that the water itself is the property of the state, which has the duty to supervise the allotment of those waters with minimal waste to the private appropriators. I.C. s 42-101; Poole v. Olaveson, 82 Idaho 496, 356 P.2d 61 (1960); Walbridge v. Robinson, 22 Idaho 236, 125 P. 812 (1912). In addition, the state's authority to regulate the distribution of the water is constitutionally based:

> 'The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.' Idaho Const. Art. 15, s 1.

The governmental function in enacting not only I.C. s 43-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources. As to the private interests affected, it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation, i. e. first in time is first in right. However, as stated earlier, it is the state's duty to supervise the distribution of the waters through the Water Resource Board and its watermasters. In DeRousse v. Higginson, 95 Idaho 173, 505 P.2d 321 (1973), the dissent aptly considered the practical difficulties facing the watermaster:

> 'It is to be kept in mind that the authority of the watermaster in his district is to control the delivery to the water from the source of supply * * * into the respective ditches or canals leading from the main stream. The watermaster is confronted by two significant problems when delivering water within his water district: first, he must maintain the constitutional requirement of priority of water rights among the various users; second, he is confronted with the practical problem of delivering water to the correct point of diversion. When one considers the magnitude of the watermaster's problem of water delivery in his water district, it is evident that a proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion. * * *
>
> 'Only by having a specific list reciting the names of the water users, with their dates of priority, amounts, and points of diversion can such a system be administered. Since the so-called 'constitutional use right' is unrecorded in respect to priority, amount and point of diversion, the whole system of delivery in a water district would be endangered if such a right were recognized. * * *
>
> '* * *. . . ***All those individuals that enjoy the use of water by reason of having their rights adjudicated, or that have the use of water by reason of permits or licenses issued from the department of (water resources), are entitled to expect the state, which has granted them the right to the use of water, to protect them in their established rights.***
>
> 'If (appellant's) interpretation (of the constitutionality) of I.C. s 42- 607 is (followed), the validity of any decreed right or water permit or license

> would be placed in jeopardy. If anyone claimed a constitutional 'use right,' and took the water from the stream, the watermaster charged with the responsibility of administering the stream would be powerless to act. Consequently, a person enjoying a prior right established by a decree, permit or license, would be subject to losing his use of the water by anyone claiming a 'constitutional use right' without regard to its priority.' 95 Idaho at 180, 181, 505 P.2d at 329.

The requirement of procedural due process is satisfied by the statutory scheme of Title 42 of the Idaho Code. Our holding is supported by a comparison of the state's duty as mandated by Article 15, s 1 of the Idaho Constitution with the appellant's ability, under I.C. s 42-1405,[FN3] to at any time verify his 'constitutional use right,' thereby reaping the protective benefit of I.C. s 42-607 himself. Granted that when action is taken pursuant to I.C. s 42-607 there is no notice or hearing prior to the shutting off of the unadjudicated water rights, but as the United States Supreme Court noted in Fuentes v. Shevin, supra, there are extraordinary situations when postponement of notice and a hearing is justified. It is justified when:

> 'First * * * the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.' 407 U.S. at 91, 92 S.Ct. at 2000.

We find the above three requirements to be met in the present case and find no procedural due process violation in the actions of the watermaster pursuant to I.C. s 42-607.

Appellant further contends that I.C. s 42-607 denies him equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. He claims that the statute discriminates against constitutional use appropriators in an arbitrary and capricious manner.

The state has a legitimate purpose in enacting I.C. s 42-607, that purpose being to protect all private water rights in times of water shortage. Since the classes involved in I.C. s 42-607 are non-suspect, i. e. those with recorded water rights and those without, we need only find a rational relationship between the state's purpose and the enactment of the statute to uphold its constitutionality. State v. Cantrell, 94 Idaho 653, 496 P.2d 276 (1972). Considering the problems of a 'constitutional use' appropriation discussed earlier, the legislature and this Court recognize that we cannot adequately protect these rights unless the state's agent, the watermaster, has a specific record of the users' priority dates, use and points of diversion. We find that the legislative classification is rationally related to the

state's purpose; and as it operates equally, uniformly and impartially on all persons within the same class, we find no denial of equal protection.

Appellant's final constitutional challenge is that I.C. s 42-607 would constitute a taking of private property for public use without just compensation contrary to Idaho Constitution, Article 1, s 14. We do not agree with this argument. The right of appropriation does not carry with it an unconditional guarantee of water regardless of the supply of water available. In times of shortage one holding an unadjudicated water right stands in a position similar to he who holds the 'recorded' water right of the lowest priority date. The fact that his diversion must be shut off to allow those with an earlier priority to receive water cannot be complained of as being a violation of Article 1, s 14 of the Idaho Constitution.

Next, the appellant argues that the respondent had no authority to create water districts on Reynolds Creek. The parties have stipulated that no combination of decrees includes every constitutional-use right on Reynolds Creek. Under I.C. s 42-604 a water district cannot be created on streams whose 'priorities of appropriation have not been adjudicated by the courts.' It is appellant's contention that the statute requires every constitutional-use water right to be adjudicated before a water district can be created.

The stipulation fails to raise an issue of fact as to the validity of the creation of the water districts. Both Upper and Lower Reynolds Creek were originally created as one water district sometime prior to 1915.[FN4] The validity of the creation of that district depends upon the number of unadjudicated constitutional-use rights at that time, not at the present. Even assuming that there were some unadjudicated constitutional-use rights when the original district was formed, we do not construe I.C. s 42-604 as requiring that every such right must be adjudicated.

FN4. The official records of the Department of Water Resources, of which we take judicial notice, indicate that the original district was created prior to 1915, but they do not contain the exact date thereof.

Although there is neither case law nor legislative history on this point, some legislative intent may be gleaned from the existence of I.C. ss 42-607 and 42-1405. The first section authorizes the watermaster of a district to shut off the diversion of those having unadjudicated rights in times of water scarcity. The latter allows for supplemental adjudication proceedings against the district watermaster by one whose water rights were not adjudicated in an earlier proceeding. The existence of these two statutes shows that the legislature recognizes that a water district may be validly created even though not all users within said district have had their rights adjudicated.

We must presume that the district was validly created. Without evidence as to the number of unadjudicated constitutional-use rights in existence at that

time, the appellant has failed to create any factual issue as to the validity of the district.

The original Reynolds Creek water district was split into two districts in April, 1916. Appellant contends that the creation of two districts on Reynolds Creek violated I.C. s 42-604. Under that statute a single stream may be divided into two or more water districts

> 'When the distance between the extreme points of diversion thereon is more than forty miles * * * provided, that any stream may be divided into two or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district * *.'

Appellant relies for this argument upon the parties' stipulation that the distance between the extreme points of diversion from the whole of Reynolds Creek has never exceeded forty miles. Appellant has presented no evidence, however, that in 1916 the use of the water by appropriators in one district affected or conflicted with the use by those in the other. The mere fact that there is a conflict almost sixty years later is not sufficient to show that there was a conflict in 1916.

Another of appellant's major assignments of error is that the Department of Water Resources has directed the watermaster for the Upper Reynolds District to distribute the waters within both Upper and Lower Reynolds District in accordance with priorities established by both the 1911 Gifford decree (Upper Reynolds) and the 1973 Benson decree (Lower Reynolds). Appellant claims that since he was not a party to the action resulting in the 1973 decree he is not bound by it. To support his argument, appellant relies upon Scott v. Nampa & Meridian Irr. Dist., 55 Idaho 672, 45 P.2d 1062 (1934).

The Court in Scott merely held that the consumers who were not parties to a prior action involving the canal company which supplied them with water were not bound by that decree in the sense of res judicata. They could therefore bring an action to determine their relative priorities to the water furnished by the canal company.

We fail to understand how the directive from the Department of Water Resources could be construed as having a res judicata effect on appellant's water rights. It in no way attempts to prohibit him from challenging the priorities established in the Benson decree. Whenever he desires, he may bring an appropriate action to do so. ***Until then both the Benson and Gifford decrees may be used by the state to provide a basis for the orderly distribution of irrigation water.***

Nettleton v. Higginson, 98 Idaho 87, 89-91 (1977)(emphasis added).

The Court solidifies, and finalizes, its impetus to insist upon administration and enforcement of all "recorded rights" in administrative proceedings in *R.T. Nahas Co. v. Hulet*, 114 Idaho 23 (1988):

> It is the long-standing rule in Idaho that, as between competing appropriators of water, "the first in time is first in right." I.C. § 42-106. *See also Beecher v. Cassia Creek Irrigation Company, Inc.*, 66 Idaho 1, 154 P.2d 507 (1944); *Nielson v. Parker*, 19 Idaho 727, 115 P. 488 (1911). Each junior appropriator is entitled to divert water only when the rights of previous appropriators have been satisfied. *Beecher v. Cassia Creek Irrigation Company, Inc., supra.* The right to divert and use the unappropriated water of any natural stream is guaranteed by the Idaho Constitution in article 15, § 3. Until the law was changed in 1971, *see* 1971 Idaho Session Laws, ch. 177 at 843, a person desiring to appropriate the water of a stream could do so either by actually diverting the water and applying it to a beneficial use or by pursuing the statutory method, which entailed an application to the Department of Water Resources for a permit and then fulfilling the requirements of the permit. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964). Since 1971 the exclusive way to acquire a water right has been by the permit method. Nevertheless, those rights acquired by the so-called constitutional method prior to that time are still valid. I.C. §§ 42-103, 42-201. Thus, an appropriator, whose right is based upon a valid, although unadjudicated, constitutional method of appropriation, retains a senior claim in relation to a person holding a later issued permit. *See State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968).
>
> ***Idaho Code § 42-607 does not alter the doctrine of prior appropriation as applied to private water right disputes. Rather, the statute, in clear and unambiguous terms, governs the duties of the state's agent--the watermaster. It directs the watermaster to prefer rights of record when he is distributing water within his district in times of scarcity.*** *See, e.g., Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977) and *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973). The *Nettleton* opinion reveals that the preference which I.C. § 42-607 gives to decreed rights and to rights evidenced by permits and licenses (recorded rights) reflects the Legislature's awareness of the difficulties facing a *watermaster* in the exercise of his duties in times of water scarcity. The statute obviously is intended to make the authority of the watermaster more certain, his duties less difficult and his decisions less controversial. However, nowhere in *Nettleton* is there a hint that I.C. § 42-607 applies outside its own language to subordinate constitutional water rights for all purposes. It does not authorize one water user unilaterally to interfere with another's superior rights. The statute is not applicable to private disputes such as the present case. Such disputes remain controlled by the doctrine of prior appropriation.

> Here it is uncontroverted that Hulet's water right was junior to that of Nahas and that Hulet's impoundment of water interfered with Nahas' senior entitlement. Accordingly, Hulet is liable for any damages caused by the wrongful interference. *Beecher v. Cassia Creek Irrigation Company, Inc., supra.*

R.T. Nahas Co. v. Hulet, 114 Idaho 23, 26-27 (1988)(emphasis added).

The Court thus makes apparent several fundamental rules arising from the Idaho Constitution:

First, the Department has the duty to administer the allotment of water with minimal waste to private appropriators.

Secondly, the state has constitutionally adopted the priority doctrine as the means of securing the maximum use and benefit of our water resources. Thus, maximum use and benefit means adherence to the priority doctrine.

Thirdly, in the Department's administration and enforcement of the priority doctrine, it is obvious that in times of shortage, someone is not going to receive water.

Fourthly, enforcement of the priority doctrine to assure maximum use and benefit of the state's water resources is so very vital to the general weal that neither enforcement of all "recorded rights" together nor shutting off water supplies without notice or hearing violates due process.

Thus, enforcement of all recorded rights not only can occur in a combined process, but the state statutes, as interpreted by the Idaho Supreme Court, conclude that it must occur in a combined process. Further, during this enforcement process, the Director must strictly adhere to the priority doctrine to serve the constitutionally mandated maximum use and benefit of water resources.

Much has been written in this proceeding, and in related proceedings, concerning how to maintain the maximum use and benefit of water during times of scarcity by evading, rather than

enforcing, the priority doctrine. The Director suggests at Paragraph 35 of the February 14, 2005, *Order* that in performing his duties to assure maximum use and benefit of the state's water resources, he must investigate the "total supply of water needed for the beneficial uses authorized under the water rights held by" members of the Coalition. To the extent this anticipates reducing the quantity stated in Coalition water rights, the Director may not do so.

> Finality in water rights is essential. "A water right is tantamount to a real property right, and is legally protected as such." Crow v. Carlson, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property. Olson v. Idaho Dept. of Water Resources, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983). Additionally, pursuant to Idaho Code section 42-220, all rights that are decreed pass with conveyance of the land and therefore the land could be sold with the certainty that the water would be distributed as decreed. Further, these General Provisions describe common practices in the Big Lost which are unique and sometimes contrary to general water distribution rules.
>
> A decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for instructions as to the source of the water. Stethem v. Skinner, 11 Idaho 374, 379, 82 P. 451, 452 (1905). ***If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree. I.C. § 42-607 (1997).***

State v. Nelson, 131 Idaho 12, 16 (1998)(emphasis added).

Further, any effort to add the extent of beneficial use as an element of a water right has been specifically rejected by the Supreme Court in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743 (1997) wherein the Supreme Court specifically held that the quantity element of a water right cannot be reduced absent forfeiture, abandonment, or adverse possession. The Court proceeded on to note:

> To interpret references to "beneficial use" throughout Title 42 as providing the means by which a water right may be statutorily lost or reduced regardless of the length of time the non-application continues would render the five-year period set forth in I.C. §42-222(2) meaningless and neglect clear direction from the legislature.

Hagerman Water Right Owners, Inc., 130 Idaho at 743.

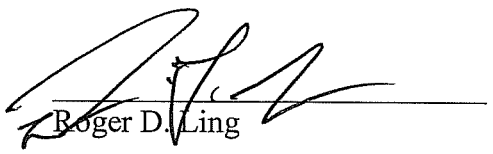
Enforcement of water rights to maximize economic use and benefit, therefore, cannot be transmuted from the constitutional priority doctrine into reducing deliverable water quantities from whatever quantities are stated as an element of Coalition's water rights. This would ironically result in taking water from a senior user for the benefit of a junior user, in direct contravention of the priority doctrine. This may not be done under the guise of a beneficial use analysis, or an injury analysis. To the extent that the conjunctive management rules conflict with the constitutional tenant of the priority doctrine as the means to assure maximum economic use and benefit, the rules cannot abide.

CONCLUSION

The concluding answer to the Director's issue is the Coalition's senior water rights, whether they are decrees or licenses, must be enforced in priority against junior users according to their terms. Idaho law, including the Director's prior orders, plainly requires the Director to distribute water within Water District No. 120 according to the prior appropriation doctrine. Finally, it is important to remember that the State of Idaho and the Department represented that the Coalition members' senior water rights would receive the protection of Idaho's water distribution statutes when it sought authority for interim administration in 2001. The SRBA District Court's order granted the State's motion upon those representations, and the Director created Water District No. 120 for the very purpose of administering junior ground water rights together with senior surface water rights. Accordingly, there is no question the Director has the authority and jurisdiction to respond to the Coalition's water right administration request.

DATED this 13th day of April 2005.

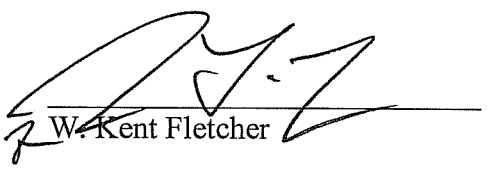
LING ROBINSON & WALKER



Roger D. Ling

Attorneys for A & B Irrigation District
and Burley Irrigation District

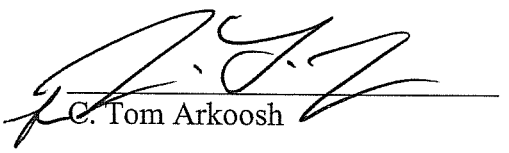
FLETCHER LAW OFFICES



W. Kent Fletcher

Attorneys for Minidoka Irrigation District

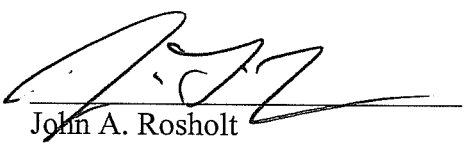
ARKOOSH LAW OFFICES CHTD.



C. Tom Arkoosh

Attorneys for American Falls
Reservoir District #2

BARKER ROSHOLT & SIMPSON LLP



John A. Rosholt
John K. Simpson
Travis L. Thompson

Attorneys for Milner Irrigation District,
North Side Canal Company, and
Twin Falls Canal Company

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April 2005, I served a true and correct copy of the foregoing *Surface Water Coalition's Joint Memorandum in Response to Director's April 6, 2005 Legal Question* on the following by the method indicated:

Via Email and U.S. Mail

Director Karl Dreher
Idaho Department of Water Resources
322 E. Front St.
Boise, Idaho 83720-0098
victoria.wigle@idwr.idaho.gov

IDWR – Eastern Region
900 N. Skyline Dr., Suite A
Idaho Falls, Idaho 83402-1718

Via U.S. Mail

Jeffrey C. Fereday
Michael C. Creamer
Givens Pursley LLP
601 Bannock St., Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720

IDWR – Southern Region
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380

James C. Tucker
Idaho Power Company
1221 West Idaho St.
Boise, Idaho 83702

Kathleen Marion Carr
U.S. Department of Interior
550 West Fort St., MSC-020
Boise, Idaho 83724

James S. Lochhead
Adam T. DeVoe
Brownstein, Hyatt & Farber P.C.
410 17th St., 22nd Floor
Denver, Colorado 80202

Scott L. Campbell
Moffatt Thomas Chtd.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701

Travis L. Thompson

EXHIBIT "A"

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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED RA

ALAN G. LANCE
Attorney General

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General
Office of the Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-4124
Fax: (208) 334-2690
ISB # 2207

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA Case No. 39576	))))))	**Subcase No. 92-00021** **MOTION FOR ORDER OF INTERIM ADMINISTRATION AND MOTION FOR ORDER EXPEDITING HEARING**

DESCRIPTIVE SUMMARY

This document is the State's motion requesting the Snake River Basin Adjudication ("SRBA") District Court to authorize the Director of the Idaho Department of Water Resources ("Director") to implement interim administration of water rights in all or parts of Basins 35, 36, 41 and 43 in accordance with the most current Director's Reports for Basins 35, 36, 41 and 43, or in accordance with partial decrees that have superseded the Director's Reports. This document further requests the District Court to provide an expedited hearing for this motion with a hearing set for January 8, 2002.

MOTION FOR INTERIM ADMINISTRATION

The State of Idaho moves this Court for an order of interim administration of water rights[1] in all or parts of Basins 35, 36, 41 and 43 of the Snake River Basin pursuant to Idaho Code § 42-1417, in accordance with the most current Director's Reports for Basins 35, 36, 41 and 43 filed with the Court, or in accordance with partial decrees that have superseded the Director's Reports. The grounds for this motion are as follows:

1. Idaho Code § 42-1417 provides that the SRBA district court may, by order, permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, through water districts in accordance with the Director's Reports and the partial decrees for water rights acquired under state law or established under federal law. Section 42-1417 provides that the district court may enter the order after notice and hearing, if the SRBA district court determines that interim administration of water rights is reasonably necessary to protect senior water rights.
2. Interim administration of water rights in Basins 35, 36, 41 and 43 is reasonably necessary because the available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights.
3. In accordance with Idaho Code § 42-1417(2)(b), notice of this motion is being provided to all affected claimants in Basins 35, 36, 41 and 43 by mailed notice.

---

1 The State of Idaho's motion for interim administration does not seek administration of domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

MOTION FOR ORDER TO EXPEDITE HEARING

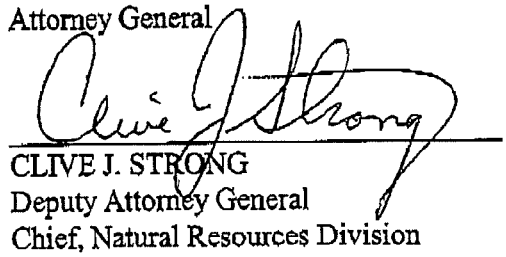
The State of Idaho further moves the court for an order to expedite the hearing for consideration of the MOTION FOR ORDER OF INTERIM ADMINISTRATION. The grounds for this motion are as follows:

1. SRBA ADMINISTRATIVE ORDER 1 ("AO1") governs notice of documents filed in the SRBA. Under AO1, this MOTION FOR ORDER OF INTERIM ADMINISTRATION will first appear on the docket sheet issued December, 2001, and, thus, this motion would come on for hearing in February 2002, if heard without an expedited hearing schedule.
2. AO1 also provides that the court may order an expedited hearing. This motion requests the court to shorten the time for the hearing date on the State's MOTION FOR ORDER OF INTERIM ADMINISTRATION to January 8, 2002.
3. As the BRIEF IN SUPPORT OF MOTION FOR ORDER OF INTERIM ADMINISTRATION demonstrates, the need for interim administration of the water rights is pressing and immediate. Expedited consideration of this motion, with a hearing set for January 8, 2002, will provide sufficient time for interested parties to respond.

THEREFORE, the State respectfully moves this Court for an order shortening time for consideration of this matter and for an order permitting interim administration of water rights in all or parts of Basins 35, 36, 41 and 43 in accordance with the most current Director's Reports for these Basins, or in accordance with partial decrees that have superseded the Director's Reports. The Affidavit of Timothy J. Luke and a brief in support of these motions are submitted herewith. Oral argument on this motion is requested.

DATED this 19th day of November 2001.

ALAN G. LANCE
Attorney General



CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

EXHIBIT "B"

LODGED

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

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By _____ Clerk
Deputy Clerk

ALAN G. LANCE
Attorney General

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General
Office of the Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-4124
Fax: (208) 334-2690
ISB # 2207

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Subcase No. 92-00021**
	)	**BRIEF IN SUPPORT OF MOTION FOR**
Case No. 39576	)	**ORDER OF INTERIM ADMINISTRATION**
	)	
	)	

DESCRIPTIVE SUMMARY

This document is the State of Idaho's brief in support of its Motion for Order of Interim Administration, which seeks authorization for distribution of water rights pursuant to chapter 6, title 42, Idaho Code, in all or parts of Basins 35, 36, 41 and 43 in accordance with the most current Director's Report for Basins 35, 36, 41 and 43,[1] or in accordance with partial decrees that have superseded the Director's Reports.

---

[1] The Director's Report for Basin 35 was filed with the SRBA district court in three parts: Part I was filed on June 6, 1998, Part II on September 15, 1998, and Part III on January 29, 1999. The Director's Report for Basin 36 was filed on November 2, 1992. The Director's Report for Basin 41 was filed on November 2, 1999, and the Director's Report for Basin 43 was filed on September 28, 2001.

BRIEF

I. INTERIM ADMINISTRATION OF WATER RIGHTS IN PORTIONS OF THE SNAKE PLAIN AQUIFER IS REASONABLY NECESSARY TO PROTECT SENIOR WATER RIGHTS.

A. Introduction

On August 3, 2001, the Director established the American Falls Ground Water Management Area and the Thousand Springs Ground Water Management Area, pursuant to Idaho Code § 42-233b, due in part to the drought conditions being experienced across the Snake River Plain. After the Director stated his intent to curtail diversions under those water rights for ground water within the Ground Water Management Areas causing the significant depletions to hydraulically connected surface water sources, affected ground water right holders entered into written stipulated agreements with certain senior priority surface water right holders. The senior surface right holders agreed not to exercise their senior priorities against the junior ground water right holders in exchange for commitments by the ground water right holders to provide replacement water during the term of the stipulated agreements equal to what would have resulted from curtailment of ground water diversions. In addition, the signatories to these agreements agreed not to oppose a motion by the State seeking an order from the SRBA District Court permitting interim administration of water rights within portions of the Eastern Snake Plain Aquifer (ESPA) in accordance with the provisions of Idaho Code § 42-1417.[2] The purpose

[2] The stipulated agreements recognize that interim administration will extend to all or portions of Basins 25, 27, 29, 35, 36, 37, 41, 43 and 45. Because Director's Reports have not been filed with the SRBA District Court for Basins 25, 27, 29, 37 and 45 , the State of Idaho is limiting its current motion for interim administration to Basins 35, 36, 41 and 43. As Director's Reports are filed for Basins 25, 27, 29, 37 and 45, the State of Idaho will file motions for interim administration for water rights within those basins, as appropriate.

While the stipulated agreements are for a two-year period, the parties understand that the water districts to be formed are being established on a permanent basis and will be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by state law.

for seeking interim administration is to permit immediate administration of water rights[3] in the affected areas pursuant to chapter 6, title 42, Idaho Code, and to enable the Director and participating water right holders to take further steps toward long-term administration of the resource.

B. There Is An Insufficient Water Supply Available to Satisfy Senior Surface Water Rights Supplied By Springs In The American Falls and Thousand Springs Reaches of the Snake River.

The ESPA underlies much of the Eastern Snake River Plain. Natural discharge from the ESPA occurs primarily proximate to American Falls Reservoir, and through the Thousand Springs. The spring discharges have fluctuated significantly over time. The major factor in this fluctuation in spring discharges is irrigated agriculture.

Because of the hydrogeology of the ESPA, the impacts of changes in aquifer recharge and pumping are often not apparent in aquifer discharge and river flows for periods of years, or decades in some cases. This delayed and dispersed effect makes administration of the water rights from the hydraulically connected ground water and surface water sources extremely complex. Resolving this legal relationship was one of the main reasons for commencement of the SRBA. "In fact, the Snake River Basin Adjudication was filed in 1987 pursuant to I.C. § 42-1406A, in large part to resolve the legal relationship between the rights of ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam." 1994 *Interim Legislative Committee on the Snake River Basin Adjudication* at 36. Upon completion of the SRBA, water districts will be created pursuant to chapter 6, title 42, Idaho Code, to, among other functions, protect senior water rights from injury caused by junior water rights diverting from hydraulically connected sources within the Snake River Basin in Idaho. The legislature

[3] The State of Idaho's motion for interim administration does not seek administration of domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

recognized, however, that there might be a need for earlier interim administration of water rights during the pendency of the general adjudication and, therefore, authorized the SRBA district court to "permit" the Director to distribute "water pursuant to chapter 6, title 42, Idaho Code" in accordance with applicable partial decree(s) and/or with Director's Report(s) upon a finding that such administration is reasonably necessary to protect senior water rights. Idaho Code § 42-1417.

Recent events demonstrate the immediate need for water districts within portions of the ESPA in order to protect senior water rights. As a result of the drought over the past two years, the water supplies available for use under senior priority surface water rights relying on spring sources in the American Falls and Thousand Springs areas have diminished and are expected to continue to diminish in the coming year. As a result, the Director designated Ground Water Management Areas encompassing portions of the ESPA along the American Falls and Thousand Springs reaches of the Snake River.

Water flows from the American Falls and Thousand Springs reaches of the Snake River are insufficient, at times, to supply some senior surface water rights. *See* Attachment A, *Affidavit of Timothy J. Luke In Support of Motion for Order of interim Administration*, at 3. Simulations using the Department's calibrated computer model of the ESPA show that ground water depletions from the ESPA for irrigation and other consumptive purposes, which occur in relatively close proximity to the spring sources in the American Falls and Thousand Springs areas, cause significant reductions in spring flows tributary to the Snake River within six (6) months or less from the time the withdrawals occur. Thus, interim administration of water rights in all or portions of Basins 35, 36, 41 and 43 is reasonably necessary because the available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights.

C. Creation Of Water Districts In All Or Parts Of Basins 35, 36, 41 And 43 Is Reasonably Necessary to Protect Senior Surface Water Rights.

"Administration of water rights" is the distribution of water to water users in accordance with the prior appropriation doctrine as set forth in Idaho law. Chapter 6, title 42, Idaho Code, sets forth the provisions of law that govern such administration in Idaho. Chapter 6 assigns to the Director the responsibility for supervising the distribution of water from all natural water sources. Chapter 6 provides that the Director will exercise this duty through the creation and function of water districts.

As Tim Luke, Section Manager for the Water Distribution Section for IDWR, states in his affidavit, the existing water districts in Basins 35, 36, 41 and 43 include only part of the rights from surface sources and none of the rights from ground water sources. *See* Attachment A, *Affidavit of Timothy J. Luke In Support of Motion for Order of interim Administration*, at 3. While IDWR has created water measurement districts in these areas, the measurement districts' authority is limited to measurement and reporting of diversions and does not include authority for the administration of water rights, or the enforcement of water right conditions. *Id.* at 3. The formation of water districts will allow water to be distributed in accordance with the prior appropriation doctrine as established by Idaho law.

The creation of water districts is an important step in the administration of water rights. Water districts provide mechanisms for administration, regulation, and enforcement of water rights. *Id.* They also provide a means for incorporating regular measurement and reporting of diversions, including ground water diversions. *Id.* In addition, water districts provide for local and timely response to general calls for water distribution and provide a system whereby a local watermaster can provide timely assistance and expertise to water users and respond to their complaints. *Id.* Furthermore, water districts provide for improved management of water rights

records, specifically maintaining current ownership information. *Id.* Creation of water districts provides an equitable funding mechanism for these services. *Id.* The water users will fund the costs of the watermasters as provided for by Idaho Code §§ 42-605A and 42-612.

Because of the shortage of water to satisfy senior water rights in Basins 35, 36, 41 and 43, when water rights from the springs are considered and because all of the water rights in these basins are partially decreed in the SRBA or recommended in Director's Reports, it is appropriate that water districts be established to administer the water rights within Basins 35, 36, 41 and 43. Establishment of water districts also will enable the Director and participating water right holders to take further steps toward long-term administration of the resource.

The watermaster duties in the new water districts will be to (1) curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right); (2) measure and report the diversions under water rights; (3) enforce the provisions of the stipulated agreements; and (4) curtail out-of-priority diversions determined by the Director to be causing injury to senior water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

II. THE DIRECTOR'S REPORTS AND PARTIAL DECREES PROVIDE AN ADEQUATE LIST OF WATER RIGHTS FOR PURPOSES OF INTERIM ADMINISTRATION.

Chapter 6 recognizes that distribution of water requires an accurate listing of water rights. Idaho Code § 42-604, providing for the creation of water districts, applies only to "streams or water supplies" whose priorities of appropriation have been adjudicated by courts having jurisdiction thereof. The Idaho Supreme Court has recognized the importance of an accurate list containing the description of the water rights to be administered. In *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977), the Idaho Supreme Court stated: "Only by having a specific list reciting the names of water users, with their dates of priority, amounts, and points of diversion

can a system be administered." *Id.* at 91, 558 P.2d at 1052, quoting *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973).

Before the court can issue the order of interim administration, the court must find that the individual partial decrees that supersede the Director's Report for individual recommendations and the latest filing of Director's Reports where partial decrees have not been issued are an adequate listing of the owners of and the elements of the water rights for the purposes of interim administration of a water source. Idaho Code § 42-1417 contemplates that the Director's Reports constitute an adequate listing, since all the claims have been investigated by state officials and reported to the court. The statute assures procedural due process by requiring notice to the claimants and by allowing the court to modify the Director's Report for purposes of interim administration. The statute also contemplates that the partial decrees provide an adequate listing of water rights for purposes of interim administration because these rights have not only been investigated by state officials, but have also withstood the scrutiny of court review. Thus, the Director's Reports and the partial decrees meet the need for administration pending the completion of the adjudication. Upon entry of an order for interim administration, the creation of water districts and the distribution of water thereunder will occur in accordance with the normal administrative mechanism created by chapter 6, title 42, Idaho Code.

III. NOTICE IS BEING PROVIDED TO EACH CLAIMANT THAT WILL BE SUBJECT TO THE INTERIM ADMINISTRATION ORDER.

Idaho Code § 42-1417 requires that notice be given to "each claimant of water from the water system or portion thereof that could reasonably be determined to be adversely affected by entry of the order . . . ." The State of Idaho is mailing notice of this motion to all claimants who will be subject to interim administration if this motion is granted. Therefore, the notice provisions of Idaho Code § 42-1417 are satisfied.

EXHIBIT "C"

ALAN G. LANCE
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
Office of the Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208)334-4124
Fax: (208)334-2690
ISB # 2207

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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Subcase No. 92-00021**
	)	
Case No. 39576	)	**AFFIDAVIT OF TIMOTHY J. LUKE**
	)	**IN SUPPORT OF MOTION FOR ORDER**
	)	**OF INTERIM ADMINISTRATION**
	)	

STATE OF IDAHO)
) ss.
County of Ada)

Timothy J. Luke, being first duly sworn upon oath deposes and states as follows:

1. My name is Timothy J. Luke. I am the Section Manager for the Water Distribution Section for the Idaho Department of Water Resources (IDWR). My work address is Idaho Department of Water Resources, 1301 North Orchard, Boise, Idaho 83706. I reside in Boise, Idaho.

2. My education background includes a Bachelor of Arts degree in Geography from West Virginia University in 1982 and a Master of Science degree in Geography and Natural Resource Management from the University of Idaho in 1992. My education/training since college has included, but is not limited to, participation in seminars and courses

related to water management such as Ground Water and Surface Water Relationships, Hydraulics, Water Management Workshop, Field Hydrogeology, Irrigation System Design and several water law workshops.

3. I worked from September 1988 to August 1991 for IDWR as a Senior Water Rights Agent. My duties included, but were not limited to the review, analysis, recommendation and processing of water right transfers, and the review and processing of applications to reallocate water held in trust under the Swan Falls agreement.

4. From September 1991 to February 1992, I worked for IDWR as a Hydrologist-in-Training, in the Water Permits Section. My duties included, but were not limited to water district assistance, field inventory and measurement of diversions, and water right analysis.

5. I worked from March 1992 to February 1997 for IDWR as a Hydrologist in the Water Permits and Water Distribution Sections. My duties included, but were not limited to, assisting in the implementation of the water measurement program, field inventory and measurement of diversions, water district assistance, water right analysis, reduction and analysis of hydrologic data and preparation of reports, and investigation of water distribution complaints and water right disputes.

6. From March 1997 to the present, I have served as the Section Manager for the Water Distribution Section. My primary responsibilities are the implementation and management of the water measurement program, provide assistance to water districts, periodic training of watermasters, and assistance or resolution of water distribution/water right disputes.

7. I have personal knowledge of the water supply conditions and water rights in Basins 35, 36, 41 and 43 through my work with IDWR's Water Distribution Section.

8. The general reasons for the creation or enlargement of a water district are:

- Provide a mechanism for administration, regulation and enforcement of water rights;
- Provide a means for regular measurement and reporting of diversions, including ground water diversions.
- Provide a more local and immediate response to general calls for water delivery;
- Provide for improved management of water rights and keeping water rights current with respect to ownership and water use;
- Provide a system whereby local watermasters or deputy watermasters can provide for local and timely response to general calls for water distribution; and
- Water district administration and regulation can be accomplished by assessing water users directly through the districts.

9. The specific reasons for creation or enlargement of water districts in Basins 35, 36, 41 and 43 are:

- Existing water districts in these basins are limited to surface water sources and do not include ground water sources. Additionally, some surface water sources in these basins are not included in any water district.
- All of the water rights claimed in Basins 35, 36, 41 and 43 have been reported or partially decreed in the SRBA as required under I.C. § 42-1417.
- IDWR has already created Water Measurement Districts in these areas, but the Measurement Districts' authority is limited to measurement and reporting of water use and does not include authority to regulate water rights, including enforcement of water right conditions.
- The establishment of water districts will provide the watermasters with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law.
- The available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

TIMOTHY J. LUKE

SUBSCRIBED AND SWORN to before me this 19th day of November, 2001.

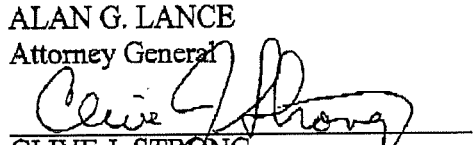
Notary Public for Idaho
Residing at: Boise, Idaho
My commission expires: 12/5/06

CONCLUSION

Interim administration, as requested in the State's motion, is reasonably necessary to prevent injury to senior water rights in Basins 35, 36, 41 and 43 as required by Idaho Code § 42-1417. The Director's Reports for Basins 35, 36, 41 and 43 and the partial decrees that supersede the Director's recommendations are based on examination of the claims and the water system as required by Idaho Code § 42-1411. As such, the Director's Reports and the partial decrees constitute an adequate listing of water rights for purposes of administration of water rights pending entry of a final decree of the water rights. Therefore, the State requests that the Court enter an order permitting the administration of water rights pursuant to chapter 6, title 42, Idaho Code, in Basins 35, 36, 41 and 43 in accordance with the definition of water rights listed in the Director's Reports and, where superseded, in accordance with the partial decrees.

DATED this 19th day of November 2001.

ALAN G. LANCE
Attorney General



CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

EXHIBIT "D"

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Subcase 92-00021**
	)	**(Interim Administration)**
Case No. 39576	)	
	)	**ORDER GRANTING STATE OF IDAHO'S**
	)	**MOTION FOR ORDER OF INTERIM**
	)	**ADMINISTRATION**

On November 19, 2001, the State of Idaho filed a *Motion for Order of Interim Administration and Motion for Order Expediting Hearing*, pursuant to I.C. § 42-1417, seeking administration of water rights located in all or portions of Administrative Basins 35, 36, 41, and 43, in accordance with the Director's Reports for those water rights or in accordance with partial decrees that have superseded the Director's Reports.

On November 19, 2001, the Court issued its *Order Setting Hearings on State of Idaho's Motion for Order of Interim Administration and Motion for Order Expediting Hearing; I.C. § 42-1417, AO1 6f(2)* (Subcase 92-00021), which established the service procedures and hearing schedule for the State of Idaho's *Motion*.

On November 23, 2001, the State of Idaho served copies of the *Motion* and supporting briefing and affidavits and the *Order Setting Hearings on State of Idaho's Motion for Order of Interim Administration and Motion for Order Expediting Hearing; I.C. § 42-1417, AO1 6f(2)* (Subcase 92-00021) on all affected parties by U.S. Mail.[1] The State of Idaho filed the Certificate of Service with the Court on November 26, 2001.

[1] The "affected parties" are claimants in Basins 35, 36, 41, and 43 with water rights within the area shown on Attachment 1, other than small domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

On January 8, 2002, the Court held a hearing on the State of Idaho's *Motion*.

This Court, having heard the *Motion* and reviewed the pleadings, makes the following findings of fact and conclusion of law and enters its ***Order*** as follows:

A. FINDINGS OF FACT

1. The State of Idaho has complied with the service requirements of I.C. § 42-1417(2)(b) and this Court's *Order Setting Hearings on State of Idaho's Motion for Order of Interim Administration and Motion for Order Expediting Hearing; I.C. § 42-1417, AO1 6f(2)* (Subcase 92-00021) (Issued November 19, 2001).
2. The available water supply in all or portions of Administrative Basins 35, 36, 41, and 43 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.

B. CONCLUSION OF LAW

1. Interim administration in those portions of Administrative Basins 35, 36, 41, and 43 shown on Attachment 1 in accordance with the Director's Reports and the partial decrees for water rights is reasonably necessary to protect senior water rights in accordance with the prior appropriation doctrine as established by Idaho law.

C. ORDER

The State of Idaho's *Motion for Interim Administration* is hereby GRANTED. Pursuant to Idaho Code § 42-1417, the Court authorizes distribution of water pursuant to chapter 6, title 42, Idaho Code in accordance with the Director's Reports and the partial decrees that have superseded the Director's Reports, in those portions of Administrative Basins 35, 36, 41, and 43 shown on Attachment 1.

This ***Order*** shall continue in force and effect until modified or dissolved by this Court.

DATED this 8th day of January, 2002.

/s/Roger Burdick
ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication