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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	**PETITIONERS' JOINT RESPONSE TO IGWA'S MOTION FOR ORDER AUTHORIZING DISCOVERY (WD 120)**

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 "Petitioners"),

and hereby files this response to the Idaho Ground Water Appropriators, Inc.'s *Motion for Order Authorizing Discovery*. Petitioners oppose IGWA's motion for an order authorizing discovery in the above entitled matter. The basis for Petitioners' opposition is set forth as follows:

1. Idaho law prohibits IGWA's contemplated actions. Distribution of water among water rights within an organized district pursuant to Idaho Code § 42-601 *et seq.* does not provide for discovery or the initiation of an administrative contested case. The watermasters of the respective districts have an unqualified duty to distribute water according to priority, and must curtail junior diversions "when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others . . ." Idaho Code § 42-607.

2. The Department's own rules prohibit IGWA's contemplated actions. The conjunctive management rules detail different procedures for responding to water delivery calls depending upon the location of a junior priority ground water right: Rule 30 (not within an organized water district); Rule 40 (within an organized water district); and Rule 41 (within a ground water management area).[1] Rule 40 does not provide for a contested case or discovery. Specifically, Rule 40 requires the Director to immediately respond when a senior priority water right holder makes a delivery call against one or more junior priority ground water right holders. IDAPA 37.03.11.40. Upon the Director's finding that "material injury" is occurring, the watermasters are required to regulate water uses within the district. IDAPA 37.03.11.40.02.

3. The process under Rule 40 differs from the procedures outlined in Rules 30 and 41. For example, in response to a water delivery call against junior priority ground water rights outside of a an organized district, Rule 30 specifically provides that the "Department will consider the matter as a petition for a contested case . . ." IDAPA 37.03.11.30.02. In response to a water delivery call against junior priority ground water rights within a ground water

[1] Petitioners do not concede the conjunctive management rules are constitutional or consistent with Idaho law.

management area, Rule 41 provides that the "Director shall conduct a fact-finding hearing on the petition . . ." IDAPA 37.03.11.41.01.b. These options are not available in responding to a water delivery call under Rule 40. The Department employed the different process provided by Rule 40 in response to a water delivery call against junior priority ground water rights in Water District No. 130 that was made in 2003. *See* Director's March 10, 2004 *Amended Order* (In the Matter of Distribution of Water to Water Right Nos. 36-15501, 36-02551, and 36-07694). Accordingly, any discovery activities are contrary to the Department's rules and are unnecessary.

4. The Director has already requested certain information from Petitioners in order to determine the "likely extent of injury" for the 2005 irrigation season. As set forth above, the Director must respond to the water delivery call pursuant to Rule 40 and has requested information from Petitioners. Petitioners are presently preparing their responses to the Director's request. Once the Director has all necessary and relevant information, water distribution by priority can commence within the organized districts.

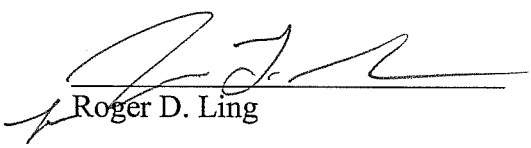
5. IGWA's contemplated discovery is prohibited by Idaho law. IGWA's motion lists several "example" discovery requests that are irrelevant to the distribution of water among water rights within an organized district according to priority. Even by Idaho's Rules of Civil Procedure these example requests exceed the scope of permissible discovery. Any discovery, if it could be had, must be "relevant to the subject matter in the pending action." I.R.C.P. 26(b)(1). Distribution of water according to priority must proceed according to the face of licensed and decreed water rights. Moreover, since these discovery actions would result in "annoyance, embarrassment, oppression, or undue burden or expense" to Petitioners, they would be prohibited by Idaho's Rules of Civil Procedure. *See* I.R.C.P. 26(c). Given the irrigation season

is now only weeks away, IGWA's discovery actions would only result in delay and render efficient water right administration meaningless.

7. In the event the Director grants IGWA's motion, in part or in whole, Petitioners would request an immediate status conference with all parties to outline the scope and schedule of discovery.

DATED this 7th day of March 2005.

LING ROBINSON & WALKER



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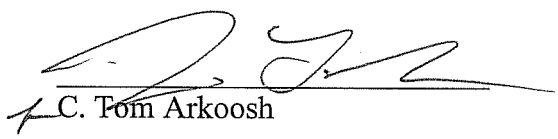

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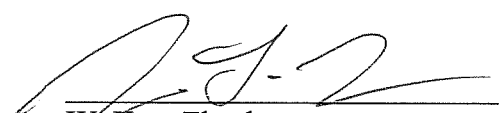

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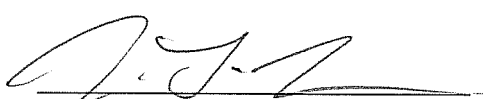

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CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of March, 2005, I served a true and correct copy of the foregoing *Petitioners' Joint Response to IGWA's Motion for Order Authorizing Discovery (WD 120)* on the following by the method indicated:

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