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April 22, 2005

Via Email & U.S. Mail

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

Re: IGWA's Motion for Status Conference on Director's April 19, 2005 Order (Request for Water Right Administration in Water District 120)

Dear Director Dreher:

This letter is being filed on behalf of members of the Surface Water Coalition[1]. Late yesterday, counsel for the Coalition received a formal *Motion for Status Conference* filed by the Idaho Ground Water Appropriators, Inc. ("IGWA"). According to the *Motion*, IGWA purportedly seeks a "status conference" in order to obtain some "clarification" of the Director's

[1] The Coalition consists 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.

April 19, 2005 Order. IGWA further seeks to "understand how the Director intends to implement" the order. *Motion* at 2. These questions, among others, are squarely aimed at the merits of the Director's order and it is obvious IGWA seeks a forum whereby it might receive an improper verbal advisory opinion regarding the order and its contents. Therefore, the Coalition objects to IGWA's *Motion* on several grounds.

First, it is the Coalition's understanding that the "contested case" regarding the request for water right administration in Water District No. 120 is now a "formal" proceeding. *See* Director's April 6, 2005 Order at 3 ("Once the Director has issued a further order addressing the merits of the delivery call, the parties will have an opportunity to request a hearing and engage in the normal steps of a contested case provided for under the Department's Rules of Procedure."). None of the Department's rules provide for the "status conference" of the type sought by IGWA.[2] To hold such a status conference where parties could question the decisionmaker on his order, including what the order "means", would in effect allow the parties to discuss the merits of the decision and would amount to an improper attempt to have the order modified or amended in an informal setting, without a formal record being established. Such a process would raise serious due process concerns, particularly where the order is subject to further judicial review.

Moreover, since the Director's order has been designated as "final", certain administrative and judicial review remedies have already been triggered. For example, the order states that parties may file a petition for reconsideration (within 14 days) or a request for hearing (within 15 days).[3] If IGWA seeks "clarification" of any issue in the order, it may file one of these formal requests.[4]

Alternatively, IGWA can file a mitigation plan as provided by the conjunctive management rules. IDAPA 37.03.11.043. If IGWA has any concerns about interpreting the Director's order and what it means, those issues can be addressed in the mitigation plan application. The application would then follow the normal procedures, including published notice of the receipt of the application and setting a protest deadline, as well as a hearing.

In summary, IGWA's *Motion* should be denied since the "status conference" it seeks is not provided for by the Department's rules or any other provision under Idaho law. In addition, since the Director's order has been designated as "final", the questions IGWA seeks to have answered may be addressed by any number of formal filings. Finally, holding an informal "status conference" off the record at this stage in the proceeding, and allowing the parties and/or their experts to question the Director on the meaning of the order, is contrary to established

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[2] IDAPA 37.01.01.510 through 513 discuss "pre-hearing conferences" and the purposes of those conferences, which is primarily aimed at setting procedure at a hearing. No rule permits a party to request a "status conference" on a "final order" for the purpose of obtaining further information on how that order should be interpreted.

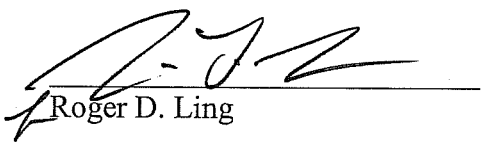
[3] The Coalition does not claim these are the only remedies available under the Idaho Administrative Procedures Act or other provisions of Idaho law, but only cites them as examples from the Director's order.

[4] Pursuant to IDAPA 37.01.01.057, the deadline for these requests is as follows: 1) petition for reconsideration, Friday May 6, 2005 (14 days plus 3 days); 2) request for hearing, Monday May 9, 2005 (15 days plus 3 days, deadline falls on Saturday so it is moved to Monday pursuant to IDAPA 37.01.01.056).

procedures and threatens the parties' rights to due process. The Coalition respectfully requests the Director to deny IGWA's *Motion for Status Conference*.

DATED this 22nd day of April 2005.

LING ROBINSON & WALKER



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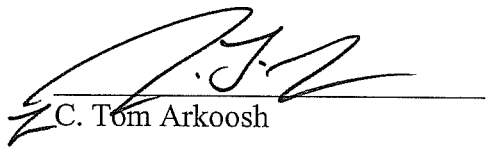

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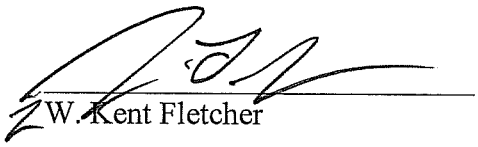

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