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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)
_____)

**SURFACE WATER COALITION'S
COMMENTS ON DIRECTOR'S
2007 INJURY CALCULATIONS AND
APRIL 14, 2008 MEMORANDUM**

COME 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 Company (collectively hereafter referred to as the “Surface Water Coalition”), by and through counsel of record, and hereby submit their *Comments on Director’s 2007 Injury Calculations and April 14, 2008 Memorandum* as provided for at the meeting held by the Director on Tuesday April 15, 2008 at the State IDWR Office. The Coalition further incorporates and adopts the statements and comments made in person at the April 15, 2008 meeting.

INITIAL ISSUES

The Coalition recognizes the following issues are outstanding and have to be determined by the Hearing Officer. Nonetheless, the Coalition readopts its prior positions since the determination of 2007 injury is tied to the *May 2, 2005 Order* “minimum full supply” procedure (as well as the *Seventh Supplemental Order’s* new interpretation of that procedure) as well as the “reasonable carryover” provisions.

I. 2007 “Minimum Full Supply”

First, the Coalition reserves all rights and arguments regarding the Director’s use of a “minimum full supply” for purposes of water right administration in 2007. The Coalition adopts the positions it has offered through the hearing process, including prior briefing and evidence submitted in this matter. Whereas the Director is now proceeding to finalize the outstanding obligations of junior priority ground water right holders for 2007 pursuant to the Director’s *Seventh Supplemental Order* issued on December 20, 2007, the Coalition maintains that additional injury was suffered and not mitigated pursuant to the proper legal standards. Moreover, since no water was actually provided to Coalition members in 2007, the untimely and unlawful system of administration that began in 2005 was simply continued last year. Finally, the Coalition maintains that the Director even failed to follow the system provided by the

original *May 2, 2005 Order* in that AFRD #2, NSCC, and TFCC were not allowed to deliver their landowners and shareholders “full headgate deliveries” of 5/8”, 5/8”, and 3/4” in 2007 set forth in the *May 2 Order*, and no mitigation from junior ground water right holders was provided during the 2007 irrigation season.

II. Determination of 2007 Carryover Injury

As indicated by the Director at the meeting, resolution of the issue of 2007 “carryover storage” injury was deferred until after issuance of the Hearing Officer’s Recommended Order in this matter. The Coalition hereby readopts its prior position that carryover storage must be provided in the year that injury is determined. Although the Director preliminarily determined that AFRD #2 suffered a carryover shortfall of 19,891 acre-feet and TFCC suffered a carryover shortfall of 38,000 acre-feet, no water was ordered to be provided to supply the entities with this carryover last fall heading into the storage season. *See Seventh Supp. Order* at 6, ¶ 13. Moreover, although NSCC carried over less than its 83,300 acre-feet “reasonable carryover” as provided by the *May 2 Order*, the Director did not find a carryover shortfall for NSCC. *See id.* at 6, ¶ 11. The Coalition disputes these findings and the failure to provide timely carryover storage in 2007.

Whereas the determination of carryover injury has been deferred, presumably to see if the reservoir space of the Coalition fills in 2008, there is no question that Coalition members, and other senior surface water right holders have been injured by the failure of timely administration. Notably, had AFRD #2 been provided with the 19,891 acre-feet carryover injury in 2007 the district could have made a decision to use that water in 2007, instead of being forced to deliver only 1/2” to its landowners during the hot and dry season. In addition, although IGWA’s members received the benefit of pumping out of priority and not having to provide the carryover

shortfalls in 2007, that action equated to a larger deficit in the Coalition members' storage space heading into the 2008 storage season. Had that water been provided, the Coalition members' space would have had a greater opportunity to fill and junior storage space in the system would have benefited. Instead, junior priority ground water right holders were authorized to deplete the resource with no consequence and receive the benefit of not having to provide the carryover shortfall in a timely manner.

The Director should order an accounting run to determine had the carryover shortfall been provided in 2007, which storage and/or natural flow rights would have benefited in 2008. In other words, the failure to provide carryover shortfall in 2007 causes further injury to senior storage and natural flow water rights by creating a deficit in the Coalition members' senior storage space that had to be made up with water that could have helped fill other senior storage and natural flow rights. Analysis using the accounting model should determine that injury.

ISSUES REGARDING 2007 INJURY CALCULATIONS AND 4/14/08 MEMO

III. IGWA's Remaining 2007 Injury Obligation

The April 14, 2008 Memorandum¹ analyzes the Water District 01 Final Accounting for 2007 and identifies a "final" 2007 in-season injury for the Twin Falls Canal Company of 21,811 acre-feet. In addition, the memo states that IGWA still owes 7,466 acre-feet from the 2007 in-season injury.

According to the method used in the *Seventh Supp. Order*, and the identified carryover in TFCC's storage account as of March 3, 2008 (based upon Water District 01 records), IGWA's outstanding obligation for 2007 is **9,966.3 acre-feet**. The Director's *Seventh Supp. Order* calculated in-season injury to TFCC as follows:

¹ The document labeled as a draft Memorandum from Steve Burrell to Dave Tuthill dated April 14, 2008 in reference to Surface Water Coalition Call 2007 Final Injury and 2008 Predicted Injury was provided to the parties at the Director's April 15, 2008 meeting at the IDWR State Office in Boise.

Thus, the remaining total material injury to TFCC is the difference between the preliminary 2007 carryover as set forth in Finding 10 and the 40,000 acre-feet of rental water, as shown below in acre-feet:

Rental by TFCC:	40,000
Remaining at End of Season:	<u>-22,655</u>
2007 Predicted Material Injury:	17,345

Seventh Supp. Order at 6, ¶ 12.

While the above numbers were based upon the preliminary accounting, Water District 01's final accounting (after taking into account USGS gauge shifts) revealed that less natural flow was available for diversion by TFCC than what the Director previously calculated. Accordingly, TFCC was forced to divert more of its storage than it would have otherwise had to use. Based upon the final accounting and the end of season storage remaining in TFCC's account (see Attachment D to April 14, 2008 memo), the above calculation should be modified as follows:

Rental by TFCC:	40,000
Remaining at End of Season:	<u>-18,189</u>
2007 Predicted Material Injury:	21,811

If TFCC had 18,189 acre-feet remaining at the end of the 2007 irrigation, adding the 14,345 acre-feet IGWA was ordered to provide in January 2008 should leave 32,534 acre-feet in TFCC's account as of March 3, 2008. However, the *Draft Water District 1 Storage Report* states that TFCC only has 30,033.7 acre-feet in its storage account for carryover as of March 3, 2008, a difference of 2,500.3 acre-feet. See **Exhibit 1**. Accordingly, this amount (2,500.3 acre-feet) should be added to the outstanding amount still owed that is identified in the April 14, 2008 memo (7,466 acre-feet) for a total of 9,966.3 acre-feet (the total of 2,500.3 + 7,466).

IGWA's outstanding obligation can be repaid in one of two ways, reimbursement for the rental made by TFCC in 2007 or through provision of additional storage water for 2008. Either

way, since IGWA's members were authorized to pump out-of-priority for the 2007 irrigation season to the detriment of TFCC's senior surface water rights, they must mitigate for the benefit they received last year.

A. Reimbursement of Rental Option

First, IGWA can, and in fact previously committed to, pay for the reimbursement of TFCC's rental of the 40,000 acre-feet from the Water District 01 Rental Pool in 2007. *See Ground Water Districts' Joint Replacement Water Plan for 2007* at 8 ("If the above-described sources are inadequate to off-set the water debt and to the extent necessary, the Ground Water Districts will reimburse Twin Falls Canal Company the cost of the 40,000 acre-feet of storage water which it has proposed to lease from the Water District 1 Rental Pool for the 2007 season.") (emphasis added). As emphasized at the April 15th meeting by TFCC representatives, IGWA can pay for the rental of the outstanding obligation that it still owes for the 2007 injury. In this case, the Director can order IGWA to pay TFCC a total of \$199,125.78² (plus interest) to cover the 9,966.3 acre-feet of outstanding 2007 injury. As committed to in its Replacement Water Plan, IGWA should pay for the outstanding obligation it owes TFCC. Moreover, it is clear that IGWA did not have adequate storage water to mitigate TFCC's in-season in 2007 as evidenced by its *Addendum to Water Rights Lease Agreement* with the City of Pocatello entered into on January 9, 2008.³ Whereas IGWA leased an additional 14,345 acre-feet from Pocatello on January 9, 2008 and only has 6,097 acre-feet remaining in the water it leased from Aberdeen-Springfield Canal Company (see April 14, 2008 memo Table 1), it's clear that IGWA did not have 21,811 acre-feet to provide TFCC with during the 2007 irrigation season. Nonetheless, IGWA's members received the benefit and were authorized to pump out-of-priority the entire

² This amount equals 9,666.3 multiplied by the 2007 rental rate TFCC paid Water District 01 (\$20.60 per acre-foot).
³ *See IGWA's Compliance With Seventh Supplemental Order and Assignment of Leased Replacement Water* filed on January 9, 2008.

2007 irrigation season without having to provide timely mitigation. Accordingly, IGWA should be required to reimburse TFCC for the rental of the outstanding obligation that has yet to be paid (\$199,125.78, plus interest).

B. Additional Storage Water for 2008 Option

Alternatively, IGWA can provide TFCC with 9,966.3 acre-feet for TFCC's use in addition to TFCC's storage fill in 2008. While admittedly untimely, this method was previously used by former Director Dreher in 2006, in order to mitigate for IGWA's failure to provide replacement water in-season in 2005, the same situation we have here. In the *Third Supplemental Order* the Director determined:

5. IGWA should be required to provide the Twin Falls Canal Company with the remainder of the 27,700 acre-feet of minimum replacement water (27,006 acre-feet) that was to have been provided by the May 15, 2006, pursuant to the *Order Staying Proceedings and Amended Scheduling Order* issued on February 10, 2006, described in Finding 35." *Third Supp. Order* at 21, ¶ 5.

6. The Twin Falls Canal Company is entitled to the benefit of the remaining 27,006 acre-feet of minimum replacement water that has not yet been provided.

Third Supp. Order at 21.

The 2005 minimum replacement water was ordered to be provided to TFCC in 2006 as additional storage. *See also Fourth Supplemental Order*. This outstanding obligation was ordered to be provided separate and apart from the storage fill of TFCC's own storage space. *See Third Supp. Order* at 22, ¶ 9 ("The provision of 27,006 acre-feet of replacement water by IGWA for its remaining 2005 obligation will reduce the likelihood of material injury occurring during the 2006 irrigation season to the Twin Falls Canal Company"). Stated another way, IGWA was ordered to lease the storage water from other spaceholders and provide it to TFCC as a supply in addition to TFCC's own storage fill.

Since IGWA currently has secured at least 6,097 acre-feet held in Aberdeen-Springfield's storage account, as represented by ASCC's Manager Steve Howser at the April 15th meeting, IGWA can readily provide that water in 2008. In addition, Mr. Howser further represented that ASCC has agreed to lease IGWA additional storage water in 2008. Accordingly, the Director can order IGWA to provide TFCC with the outstanding obligation of 9,666.3 acre-feet to be used in 2008. This storage water, held in ASCC's storage space (or others), can be ordered to be provided to TFCC for its use in 2008, in addition to the storage held by TFCC, consistent with the method and procedures followed by the Director in 2006.

IGWA must repay its outstanding injury obligation, through reimbursement of TFCC's 2007 rental, or through additional storage water in 2008. Regarding this remaining obligation, the Director specifically held in the *Seventh Supp. Order* the following:

After final accounting, the Director will order Idaho Ground Water Appropriators, Inc. to provide any balance remaining to the account of Twin Falls Canal Company.

Seventh Supp. Order at 9.

Given the 2008 irrigation season has arrived, the Director should order IGWA to provide the remaining obligation (either through reimbursement or additional storage for 2008) immediately.

IV. 2008 Injury / Attachment I to April 14, 2008 Memo

The Coalition reserves all rights regarding the 2008 irrigation season and the standards and procedures for predicted injury pending the issuance of the Hearing Officer's Recommended Order. The Coalition disputes the continued use of the "minimum full supply" standard and the unlawful and untimely administration provided by the *May 2 Order* (including the new interpretation used in the *Seventh Supp. Order*). Nonetheless, the Coalition offers the following

comment on the April 14, 2008 memo's use of predicted runoff at Heise compared to TFCC natural flow diversions.

Attachment I to the April 14, 2008 memo shows a correlation between TFCC natural flow diversions and the April to July Heise discharge. The correlation is shown to be 0.5675 indicating over half the annual variability in the diversion of natural flow by TFCC can be attributed to the variability of the flow at Heise. The attached charts as **Exhibit 2** (created by Dave Shaw of ERO Resources) show the relationship if the years of higher discharge are removed from the correlation. The first chart shows the correlation if the 20% exceedence years are removed. As shown, the correlation decreases to 0.2074 with the 20% exceedence years removed for the period of 1990 through 2007. The second chart shows the correlation to be 0.2389 if all above average years are removed. The results demonstrate that less than 25% of the annual variability in the TFCC natural flow diversion can be explained by the variability of the Heise April – July discharge. Accordingly without the extremely wet years, as included in Attachment I of the April 14, 2008 memo, it is clear that the correlation offered by IDWR is not a reliable estimating tool for water availability for TFCC.

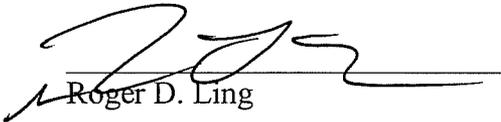
CONCLUSION

As explained at the April 15th meeting, IGWA has two options to repay the outstanding mitigation obligation it owes for the final 2007 in-season injury to TFCC, reimbursement of the rental or payment of storage to TFCC in 2008. While either option still does not excuse the untimely administration that occurred last year, it still must be provided since IGWA's members received the benefit of out-of-priority diversions (without mitigation) in 2007. Moreover, the carryover shortfall injury must still be addressed. The fact that reservoir space may fill does not excuse failing to mitigate in-season. Therefore the Director should order IGWA to provide

monetary reimbursement (as committed by IGWA in its replacement water plan) or storage water in addition to TFCC's storage fill in 2008 (as provided by the procedures used by the Director in 2006). The Coalition reserves the right to address additional issues, including the carryover shortfall, as continued by the Director.

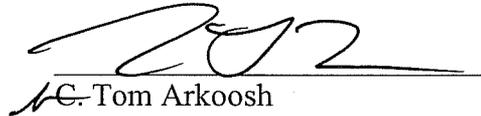
DATED this 22nd day of April, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2008, I served a true and correct copy of the foregoing *Surface Water Coalition's Comments on Director's 2007 Injury Determination and April 14, 2008 Memorandum* on the following by the method indicated:

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 Travis L. Thompson

Exhibit

1

DRAFT WATER DISTRICT 1 STORAGE REPORT

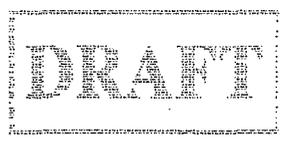
2007 IRRIGATION SEASON

This document summarizes the storage fill, usage, and carryover for all diversions listed in the Water District 1 water-right accounting program for the 2007 irrigation season. *Part 1* lists the reservoir storage account space assigned to each diversion. *Part 2* lists the storage allocated to each reservoir storage account (fill) in 2007. *Tables 19 through 26* show the storage allocated, rental pool transactions, private leases, adjustments, and carryover for each diversion. Immediately following *Table 26* is a summary of rental pool purchases and private leases for 2007. The final section lists the carryover remaining in each reservoir storage account on October 31, 2007. If you have any questions concerning this document, please contact Tony Olenichak, Joe Kaufman, or James Cefalo at Water District 1 by phone (208-525-7171) or by email (tony.olenichak@idwr.idaho.gov).

DRAFT

TABLE 21. 2007 STORED WATER ACCOUNTS - BLACKFOOT TO MILNER (ACRE-FEET)

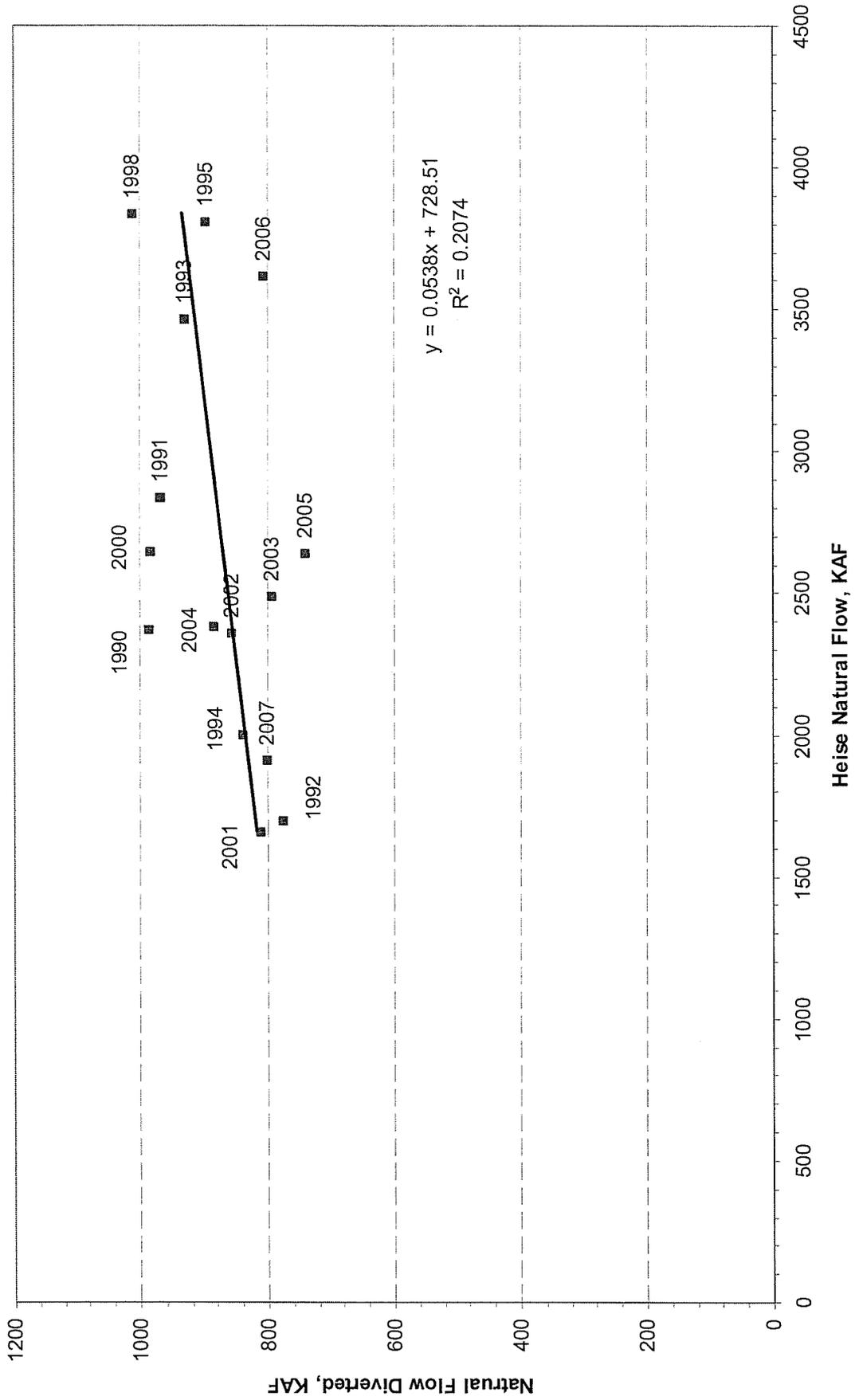
NUMBER	NAME	STORAGE OR		REVERIED TO SPACEHOLDER		RETURN TO		ADJUST- MENT	EXCESS USED	CARRY- OVER
		STORAGE PURCHASE, ALLOCATED SUPPLY (-)	RENTAL POOL	RENTAL POOL PURCHASE, RENTAL POOL FROM	RENTAL POOL FROM	BALANCE	RENTAL POOL			
13075900	FI HALL MCHAUD	114646.3	-25000.0	40012.7	0.0	0.0	49633.6	-1777.6 e)	0.0	47856.0
13076400	FALLS IRRIG	55934.2	0.0	24427.6	0.0	0.0	31506.6	0.0	0.0	31506.6
13077652	M OSBORN	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
13077755	CALL FARMS	741.5	0.0	351.6	0.0	0.0	389.9	0.0	0.0	389.9
13077775	R EVANS	0.0	0.0	34.9	0.0	0.0	-34.9	0.0	34.9	0.0
13080000	MINIDOKA NIH S	337201.9	-10000.0	273492.3	0.0	0.0	53709.6	8034.8 f)	0.0	61744.4
13080500	MINIDOKA S	215307.7	9399.0	194015.9	0.0	0.0	30690.8	3947.6 g)	0.0	34638.4
13084590	E HERBERI	0.0	0.0	124.6	0.0	0.0	-124.6	124.6 g)	0.0	0.0
13084598	MID MISC	0.0	0.0	133.3	0.0	0.0	-133.3	133.3 f)	0.0	0.0
13084599	MILNER MISC	0.0	0.0	233.2	0.0	0.0	-233.2	0.0	233.2	0.0
13084610	LAW-KER FARMS	0.0	0.0	201.9	0.0	0.0	-201.9	201.9 f)	0.0	0.0
13084640	BURLEY GC	0.0	0.0	245.2	0.0	0.0	-245.2	245.2 g)	0.0	0.0
13084650	CITY OF BURLEY	0.0	0.0	180.3	0.0	0.0	-180.3	180.3 g)	0.0	0.0
13084655	SIMPLOI FILZR	2048.3	0.0	0.0	0.0	0.0	2048.3	0.0	0.0	2048.3
13084690	AMALGA SUGAR	0.0	0.0	67.6	0.0	0.0	-67.6	67.6 g)	0.0	0.0
13084710	R TILLEY PUMP	0.0	0.0	74.3	0.0	0.0	-74.3	74.3 g)	0.0	0.0
13084720	COORS BREW	0.0	0.0	206.7	0.0	0.0	-206.7	206.7 g)	0.0	0.0
13084725	K SANDMANN	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
13085270	H SCHODDE	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
13085275	BAR-U-RANCH #1	41.0	0.0	46.9	0.0	0.0	-5.9	5.9 g)	0.0	0.0
13085300	BAR-U-RANCH #2	41.0	0.0	218.8	0.0	0.0	-177.8	177.8 g)	0.0	0.0
13085390	M HOBSON	0.0	0.0	100.0	0.0	0.0	-100.0	100.0 g)	0.0	0.0
13085400	V HOBSON	245.8	0.0	146.1	0.0	0.0	99.7	0.0	0.0	99.7
13085500	A & B IRR DISI	120197.0	0.0	57457.7	0.0	0.0	62739.3	0.0	0.0	62739.3
13085800	PA LAJERAL (9)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
13086000	MILNER IRRIG	81525.8	5899.0	52122.9	0.0	0.0	35301.9	1218.0 h)	0.0	36519.9
13086510	A LAJERAL (9)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
13086512	J BRUNE	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
13086520	NS XCUI GD (9)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
13086530	RES DISI #2	384940.7	8500.0	386478.4	0.0	0.0	6962.3	1000.0 m)	0.0	7962.3
13087000	NRHSDE IWIN P	796113.1	56500.0	761272.2	0.0	0.0	91340.9	-7750.0 m)	0.0	83590.9
13087500	TWIN FALLS SIH	232308.8	56614.1	254257.2	0.0	0.0	34665.7	-4632.0 l)	0.0	30033.7
TOTAL		2341293.0	101912.1	2045902.3	0.0	0.0	397302.8	1558.4	268.2	399129.3



Exhibit

2

Twin Falls Canal Co



Twin Falls Canal Company

