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	)	**ORDER REGARDING WATER RESOURCE COALITION REPLACEMENT WATER PLAN**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of *Water Resource Coalition Application for Approval of a Mitigation Plan*, submitted to the Department on April 29, 2005, and amended on May 5, 2005, ("Application"), by Josephine P. Beeman, on behalf of the City of Pocatello, Basic American, Inc., Con Agra/Lamb Weston, and the J.R. Simplot Company (collectively referred to as the "Water Resource Coalition").

On April 19, 2005, the Director issued his order *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*, which was amended May 2, 2005, finding that senior natural flow and storage water rights are reasonably predicted to incur material injury by consumptive diversions of ground water under junior priority rights. As part of the Order, the Director required ground water districts representing certain holders of junior priority ground water rights to submit a plan for replacement water with the Department no later than April 29, 2005.

Based upon the Director's consideration of the documents in this matter, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

Procedural History

1. On January 14, 2005, the Surface Water Coalition ("Coalition")[1] delivered to the Director a letter ("Letter") regarding *Request for Water Right Administration in Water District 120 (portion of the Eastern Snake Plain Aquifer) / Request for Delivery of Water to Senior Surface Water Rights*. The same day, the Coalition also filed its petition ("Petition") captioned *Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area*. In the Letter and Petition, the Coalition stated that junior ground water diversions have caused material injury to its members' natural flow and storage water rights. Accordingly, the Coalition sought administration of junior ground water rights and delivery of water to its respective natural flow and storage water rights.

2. On February 3, 2004, IGWA filed two petitions to intervene. The first was filed to intervene in the request for administration and curtailment of ground water rights within Water District No. 120, and the second was filed to intervene in the request for administration and curtailment of ground water rights in the American Falls Ground Water Management Area and designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.

3. On February 11, 2005, Idaho Power Company ("Idaho Power") filed a letter in which it requested that the letter be treated as a motion to intervene should a contested case be initiated in response to the Letter and Petition filed by the Coalition.

4. On February 14, 2005, the Director issued his initial Order ("Initial Order") in this matter, responding to the Letter and Petition filed by the Coalition, designating the requested water right administration in Water District No. 120 and the American Falls Ground Water Management Area as contested cases, and granting the two petitions to intervene by IGWA. Pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, the Initial Order was an interlocutory order and not subject to review by reconsideration or appeal, with the exception of the portions of the Initial Order (1) determining certain water rights to be junior in priority for the purposes of distributing water to any decreed, licensed, or permitted water rights and (2) denying the portion of the Petition seeking designation of the Eastern Snake Plain Aquifer as a ground water management area. Those two portions of the Initial Order were final on March 7, 2005. The Coalition filed a petition with the Department seeking a hearing on the denial of designation of the Eastern Snake Plain Aquifer as a ground water management area.

5. On February 17 and March 7, 2005, respectively, the Idaho Dairymen's Association ("IDA") and the United States Bureau of Reclamation ("USBR") each filed petitions to intervene in the request for administration and curtailment of ground water rights within Water District No. 120.

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[1] The Coalition is composed 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.

6. On April 6, 2005, the Director issued an Order denying Idaho Power's February 14, 2005, petition to intervene; however, the Director granted intervention by the IDA and the USBR. *Order on Petitions to Intervene and Denying Motion for Summary Judgment; Renewed Request for Information; and Request for Briefs.*

7. On April 8, 2005, Ms. Beeman, on behalf of the Water Resource Coalition, filed *Notice of Intent to File Application for Approval of a Mitigation Plan* with the Department. On April 26, 2005, Ms. Beeman, on behalf of the City of Pocatello, filed a petition to intervene. *City of Pocatello's Petition to Intervene.*

8. On April 19, 2005, the Director issued his order *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*, which was amended May 2, 2005 ("Amended Order").

9. In the Amended Order, the Director found that consumptive ground water diversions under junior priority rights in Water Districts No. 120 and 130 are reasonably likely to cause material injury to senior natural flow and storage water rights during the 2005 irrigation year, which begins on November 1, 2004, and ends on October 31, 2005. As a result, the Director instructed the holders of junior ground water rights in Water Districts No. 120 and 130, "having priorities of February 27, 1979, and later . . . to either curtail the diversion and use of ground water for the remainder of 2005, provide replacement water to the members of the Surface Water Coalition as mitigation, or combination of both." *Amended Order* at p. 44, ¶ 53.

10. The Amended Order provides that no later than 5:00 p.m. on April 29, 2005, "the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts, and other entities seeking to provide replacement water or other mitigation in lieu of curtailment, must file a plan for providing such replacement water . . . ." *Id.* at p. 46, ¶ 9.

11. "The plan will be disallowed, approved, or approved with conditions by May 6, 2005, or as soon thereafter as practicable in the event an extension is granted as provided in the order granting the extension." *Id* at p. 47, ¶ 9.

12. Excluding in-house culinary uses, "consumptive ground water rights for agricultural, commercial, industrial, and municipal uses . . . are required to provide replacement water to the members of the Surface Water Coalition as mitigation for out-of-priority depletions, as provided herein, in amounts equal to the annual depletions to the reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage under their rights as determined using the Department's ground water model for the ESPA." *Id.* at p. 45, ¶ 1.

13. Holders of affected ground water rights where the purpose of use is irrigation "shall provide the required replacement water through the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, or Bonneville-Jefferson ground water districts [the "Districts"]. Holders of ground water rights for irrigation that are not members of one of these

ground water districts shall be deemed a nonmember participant for mitigation purposes . . . and shall be required to pay the ground water district nearest the lands to which the water right is appurtenant for replacement water as mitigation pursuant to Idaho Code § 42-5259." *Id.* at p. 45, ¶ 2.

14. "Holders of ground water rights affected by this Order where the purpose is commercial, industrial, or municipal may provide the required replacement water through a ground water district as a nonmember participant for mitigation or may separately or jointly provide the required replacement water." *Id.* at p. 45, ¶ 3.

15. The Director allocated replacement water between the North Snake Ground Water District (2,400 acre-feet), Magic Valley Ground Water District (17,800 acre-feet), Aberdeen-American Falls Ground Water District (58,700 acre-feet), Bingham Ground Water District (14,900 acre-feet), and Bonneville-Jefferson Ground Water District (7,200 acre-feet). *Id.* at p. 46, ¶ 4.

16. While the total amount of replacement water was calculated at 101,000 acre-feet, "[t]he total amount of replacement water provided for mitigation *in 2005 shall not be less than 27,700 acre-feet*, which equals the amount of the predicted shortage in 2005 . . . ." *Id.* at p. 46, ¶ 5 (emphasis added). "If at any time the mitigation for out-of-priority depletions is not provided as required herein, the associated water rights are subject to immediate curtailment, based on the priorities of the rights, to the extent mitigation has not been provided." *Id.* at p. 46, ¶ 8.

17. In stating his intent to "monitor water supply requirements and the water supplies available throughout the irrigation season [,]" *id.* at p. 47, ¶ 10, the Director also stated that the amount of mitigation for the 2005 irrigation season could vary, depending on "the final accounting for surface water diversions from the Snake River for 2005[,]" *id.* at p. 47, ¶ 11. "To the extent less mitigation is provided than was actually required, a mitigation obligation will carry forward to 2006 and be added to any new mitigation determined to be required for 2006. To the extent more mitigation is provided than was actually required, a mitigation credit will carry forward to 2006 and be subtracted from any new mitigation determined to be required for 2006." *Id*

18. The Director stated that he would continue to evaluate conditions in the Eastern Snake Plain Aquifer on an annual basis "after April 1, when the USBR and U[nited] S[tates] A[rmy] C[orp] [of] E[ngineers] release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 31, and require mitigation or curtailment as warranted without further demand by members of the Coalition until such time that a permanent mitigation plan may be approved." *Id.* at p. 47, ¶ 12.

19. "Mitigation debits and credits resulting from year-to-year mitigation will continue to accrue and carry forward until such time as the storage space held by the members of the Surface Water Coalition under contract with the USBR fills. At that time, any remaining debits and credits will cancel." *Id.* at p. 47, ¶ 13.

20. The Amended Order was a final order of the Department.

Application for Approval of Mitigation Plan

21. Before 5:00 p.m. on April 29, 2005, Ms. Beeman, on behalf of the Water Resources Coalition, filed the Application with the Department. An amendment to the Application was filed with the Department on May 5, 2005.

22. In addition to listing the names and addresses of the members of the Water Resources Coalition, the Application states that "Josephine P. Beeman will be acting as attorney at law on behalf of the Applicants." *Application* at p. 1, ¶ 2.

23. According to the Application, each member of the Water Resources Coalition diverts and uses ground water from the Eastern Snake Plain Aquifer, certain rights of which are subject to curtailment as a result of the Director's Amended Order. *Id.* at p. 2, ¶ 3.1.

24. The Application states that the City of Pocatello and Con Agra/Lamb Weston each operate ground water wells that are subject to curtailment. The City of Pocatello operates a well in the vicinity of the Pocatello Airport, which "is junior to the February 27, 1979 curtailment date and this well is included in the Plan." *Id.* at ¶ 3.2. Con Agra/Lamb Weston operates wells for "potato processing near American Falls in Water District 120 and one of its water rights is subject to the curtailment order and is covered by this plan." *Id.* at ¶ 3.4.

25. J.R. Simplot Company ("Simplot") also operates potato processing plants that use ground water that are subject to curtailment under the Amended Order. However, even though Simplot "is submitting a separate application for a mitigation plan for its water rights that are subject to the Curtailment Order. . . . Simplot has made available certain replacement supplies for use in this Plan." *Id.* at ¶ 3.5.

26. According to the Application, the duration of mitigation "shall be for one year from May 6, 2005 through May 5, 2006. The Plan may be extended beyond May 5, 2006 upon request by the Applicants at the discretion of the IDWR Director." *Id.* at p. 3, ¶ 5.

27. The amount of water provided under the Application for mitigation was arrived at based upon "the principals described in the Curtailment Order . . . and the April 27, 2005 and April 29, 2005 status conference held by IDWR and the May 2, 2005 Amended Order concerning matters related to the Curtailment Order. In accordance with these principals, the Applicants' total replacement obligation over time was determined based on the depletions to the Near Blackfoot to Minidoka reach of the Snake River resulting from curtailing use of the junior water rights in 2005 that are subject to the Curtailment Order." *Id.* at ¶ 6.2.

28. According to Exhibit A, which is attached to the Application, the City of Pocatello's water right that is subject to curtailment is identified as water right no. 29-7770. Water right no. 29-7770 has a priority date of May 21, 1984. Water right no. 29-7770 authorizes diversion of ground water for irrigation. The applicant estimates annual consumptive use of 715

acre-feet. The applicant also estimates total mitigation of 529 acre-feet, 200 acre-feet of which will be provided as mitigation in 2005.

29. Con Agra/Lamb Weston's water right that is subject to curtailment and listed in Exhibit A is identified as water right no. 35-8669. Water right no. 35-8669 has a priority of April 21, 1988, and is estimated to annually consume 3 acre-feet. The applicant estimates total mitigation of 3 acre-feet, and proposes one acre foot of mitigation in 2005.

30. The sources by which mitigation will be satisfied are identified in Exhibit B, which is attached to the Application. *Application* at p. 3, ¶ 7.1. Exhibit B identifies water from the Water District 01 Rental Pool, storage in Palisades Reservoir, and two water rights (45-2746 and 36-4179) as sources for mitigation.

31. According to Exhibit B, the City of Pocatello "has acquired 100 acre-feet of water from the 2005 small user pool within the Water District 01 Rental Pool. Additional amounts may be rented by the Applicants for mitigation depending on availability and need."

32. Exhibit B states that the City of Pocatello has contracted for "4.1667% of the active storage capacity of Palisades Reservoir. . . . The City's Palisades Reservoir storage space is currently filling and the final amount of stored water that will accrue and be available in 2005 for mitigation is unknown at the time of filing of the mitigation plan."

33. According to Exhibit B, water right no. 45-2746 has a priority of May 9, 1966, "was originally licensed for industrial use and was transferred to irrigation use in Transfer No. 3960 approved in 1996. The historic consumptive use for the water right was determined by IDWR during the transfer to be 642.7 acre-feet per year."

34. The Water Resources Coalition did not submit any documentation establishing the extent of beneficial use of water right 45-2746 in 2004 for the purpose of determining how much water is available for mitigation.

35. Exhibit B states that water right no. 36-4179 has a priority of August 9, 1959, and "was used for industrial process without land application as the method of industrial wastewater treatment at Simplot's Hayburn potato processing plan. Simplot retained this water right and 1723.11 af/y of the combined limit (for water right nos. 36-4179, 36-08154, 36-02648A, 36-04180 and 36-02729) when it conveyed the plant to the City of Burley in 2004. The consumptive use for this water right was estimated at 40% of the annual amount, or 689 af/y."

36. The Water Resources Coalition did not submit any documentation establishing the extent of beneficial use of water right 36-4179 in 2004 for the purpose of determining how much water is available for mitigation.

37. Holders of affected ground water rights where the purpose of use is irrigation "shall provide the required replacement water through the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, or Bonneville-Jefferson ground water districts. Holders of ground water rights for irrigation that are not members of one of these ground water districts

shall be deemed a nonmember participant for mitigation purposes . . . and shall be required to pay the ground water district nearest the lands to which the water right is appurtenant for replacement water as mitigation pursuant to Idaho Code § 42-5259." *Amended Order* at p. 45, ¶ 2. Therefore, the City of Pocatello must provide mitigation for its affected irrigation water rights through the ground water districts.

38. While the City of Pocatello must provide mitigation through the ground water districts for its irrigation water right, the storage water and ground water rights it offered for mitigation could be assigned to the ground water districts and credit given through the ground water districts to the City of Pocatello.

39. Department staff determined the depletions to the Near Blackfoot to Minidoka reach caused by pumping under the Con Agra/Lamb Weston (water right no. 35-8669), determined the reach gains in the Near Blackfoot to Minidoka reach caused by non-diversion of ground water under the Simplot water rights (water right nos. 36-4179 and 45-2746), and compared the respective depletions and gains. Department staff concluded that full non-diversion of the Simplot wells would not result in sufficient gains to the Near Blackfoot to Minidoka reach to offset the depletions to the reach caused by diversion of the Con Agra/Lamb Weston water right. The Simplot water rights are located far enough down gradient in the ESPA from Minidoka that the non-diversion does not contribute significant gain to the Near Blackfoot to Minidoka Reach.

40. Water right no. 36-4179 presently authorizes diversion of ground water, discharge of the ground water into the Snake River, and rediversion into the Milner Low Line Canal. Several members of the Surface Water Coalition injured by ground water pumping divert Snake River water at Milner Dam. Milner Dam is located below the point where ground water diverted under water right no. 36-4179 discharges into the Snake River. One acre foot of ground water could be pumped from ground water to the Snake River to fully mitigate for the depletions from the Snake River caused by the Con Agra/Lamb Weston diversion.

41. Water right no. 36-4179 could provide sufficient water for mitigation for the industrial use of Con Agra/Lamb Weston if the ground water is pumped directly to the Snake River. Diversion of ground water to the Snake River for mitigation will require approval of a transfer or a temporary transfer. Mitigation could also be provided by dedicating one acre foot of Snake River storage as replacement water.

42. If approved, the Application states that a report shall be submitted to the Department to indicate compliance. *Application* at p. 4, ¶ 8.1. If modification of the Application is necessary, and upon approval by the Director, the Application can be modified "to add junior ground water rights and wells, mitigation sources and make other appropriate modifications." *Id.* at ¶ 8.2.

CONCLUSIONS OF LAW

1. The Director of IDWR recognizes the importance under Idaho law of protecting the interests of a senior priority water right holder against interference by a junior priority right holder from a tributary or interconnected water source. Art. XV, § 3, Idaho Const.; Idaho Code §§ 42-106, 42-237a(g), and 42-607.

2. Idaho Code § 42-602 states:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in the water districts in accordance with the prior appropriation doctrine.

3. Idaho Code § 42-607 provides that the following shall apply during times of scarcity of water when it is necessary to distribute water between water rights in a water district created and operating pursuant to chapter 6, title 42, Idaho Code, in accordance with the priority of those rights:

> [A]ny person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such steam or water supply . . . .

4. In water districts, watermasters must summarily determine: (1) whether a water right holder calling for delivery of water is receiving the water authorized by the water users water right; (2) if not, what junior water right diversions must be curtailed; and (3) whether there are alternative means to provide the water to senior water rights to reduce or eliminate injury to the senior water rights.

5. Non-irrigation of one acre irrigated in 2004 with ground water diverted under water right no. 45-2746, and diversion from the point(s) of diversion for water right no. 45-2746 and discharge to the Snake River at the authorized point of injection to the Snake River will fully mitigate for ground water diverted under water right no. 35-8669.

ORDER

The Director enters the following Order for the reasons stated in the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED as follows:

That mitigation for depletions caused by diversion of water under water right no. 29-7770 must be provided by the ground water district within which the points of diversion for the water right are located or are most closely located.

IT IS FURTHER ORDERED that the temporary replacement proposal by the Water Resources Coalition for water right no. 35-8669 is APPROVED provided that the Water Resources Coalition: (a) identifies one acre irrigated during 2004 and described within the place of use for water right no. 45-2746 that will not be irrigated in 2005; (b) obtains the authority, through an approved transfer, to discharge one acre foot to the Snake River for mitigation at the point of injection identified by water right 45-2746; and (c) delivers one acre foot to the Snake River for mitigation during the irrigation season.

IT IS FURTHER ORDERED mitigation may also be provided by dedication of one acre foot of Snake River storage to mitigation.

IT IS FURTHER ORDERED that either (a) the acres that will not be irrigated under water right no. 35-8669 must be identified, or (b) storage water must be dedicated to mitigation on or before May 23, 2005.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, this is an interlocutory order and is not subject to review by reconsideration or appeal. The Director may review this interlocutory order pursuant to Rule 711, IDAPA 37.01.01.711.

DATED this 6TH day of May 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

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