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DEPARTMENT OF  
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS FOR  
PERMITS FOR DIVERSION AND USE OF  
SURFACE AND GROUND WATER WITHIN  
THE SNAKE RIVER BASIN UPSTREAM  
FROM MILNER DAM

**PETITION TO RENEW  
MORATORIUM ORDER FOR NON-  
TRUST WATER AREA**

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  
CANAL COMPANY (herein collectively referred to as the "Surface Water Coalition" or  
"Coalition"), by and through their undersigned attorneys of record, and move the Director of the  
Idaho Department of Water Resources ("IDWR" or "Department") for an order renewing and  
extending the January 6, 1993 *Moratorium Order* halting the processing and approval of  
applications for permits from all surface and ground water sources in the "non-trust water area."

## INTRODUCTION

Since 1993, a moratorium has generally prevented the processing and approval of all applications for new consumptive uses of water within the Eastern Snake Plain Aquifer (“ESPA”). The *Amended Moratorium Order* recognized that water supplies were stressed – to the extent that wells “used for domestic and municipal water supply purposes [were] becoming unusable” and that “lowed ground water levels ... reduce spring and base flow discharge needed to maintain stream and river flows.” *Thompson Aff.* at Ex. A. This “ESPA Moratorium” is perpetual in nature and remains in place, as the same – if not worse – water conditions continue to be prevalent across the ESPA in southern Idaho.

The *Amended Moratorium Order* did not apply to the area generally referred to as the “non-trust water area.” *Id.* at 1. Rather, the Director issued a separate *Moratorium Order*, dated January 6, 1993. *Thompson Aff.* at Ex. B. That *Moratorium Order* found that “flows in many streams, springs and rivers in the non-trust water area were at or near record low levels.” Ground water levels were “stressed” – resulting in unusable wells and “reduce[d] spring discharge[s] needed to maintain stream and river flows.” In other words, the water supply issues prevalent in the non-trust water area were identical to those in the ESPA Moratorium area. However, this “Non-trust Moratorium” expired on December 31, 1997.

The same, if not worse, water supply conditions that gave rise to the 1993 moratoriums exist today. Ground water levels are stressed and lowered, and spring discharges are increasingly inadequate to maintain stream and river flows. Yet, since 1997, there has been no moratorium on new consumptive uses of water within the non-trust water area. It is undisputed – in fact judicially confirmed through the Snake River Basin Adjudication (“SRBA”) – that all of this area is tributary to the Snake River, the water source for the Coalition’s natural flow and storage water rights. Any new consumptive diversion or appropriation from the Non-trust Moratorium area will have the same

impacts on the stressed water supply as a new consumptive diversion or appropriation from the ESPA Moratorium area. As such, the Non-trust Moratorium should be immediately renewed and should be extended indefinitely – like the ESPA Moratorium.

### **PROCEDURAL HISTORY**

On May 15, 1992, the Director entered a *Moratorium Order* regarding applications for permit within the Snake River Basin upstream from the USGS gauging station on the Snake River near Weiser. This original order included the non-trust water area.

On January 6, 1993, the Director amended the May 1992 *Moratorium Order* to remove the non-trust water area.

On that same date, January 6, 1993, the Director entered a *Moratorium Order* specifically addressing the non-trust water area – i.e. the Non-trust Moratorium. By its own terms, the Non-trust Moratorium was set to expire on December 31, 1997. The Non-trust Moratorium was entered pursuant to a settlement agreement with the North Side Canal Company and Twin Falls Canal Company. That agreement called for “additional technical studies” to resolve “substantial factual disputes” relating to the impact of diversions under new applications permits on existing water supplies. However, the Non-trust Moratorium has not been extended or renewed at any time since 1997.

On April 30, 1993, the Director entered the *Amended Moratorium Order* relating to the ESPA – i.e. the ESPA Moratorium. There is no term limit for the ESPA Moratorium – which remains in effect today.

### **LEGAL AUTHORITY TO ISSUE A MORATORIUM ORDER**

Under Idaho law, the Director is statutorily mandated to protect the ground water resources of the State. *See* I.C. § 42-237a (providing powers to the Director to effectuate “the policy of this state to conserve its ground water resources”). All new appropriations require application with the

Department. I.C. § 42-202 (any person desiring to make a new appropriation must, “before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation”); I.C. § 42-229 (applications for permit required for new ground water appropriations).

For all diversions within water districts, the Director must direct and control the distribution of water based on priority. I.C. § 42-602 (“the director ... 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”); *see also* I.C. § 42-237a(g) (Director must “supervise and control the exercise and administration of all rights hereafter acquired to the use of ground waters”).

One tool that the Director has to ensure that existing water rights and water supplies are protected is the authority to enter a moratorium to “suspend the issuance or further action on permits or applications.” I.C. § 42-1805(7). Particularly:

After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

*Id.* IDWR regulations further discuss the Director’s authority to enter a moratorium and confirm that the authority extends to permits that have not yet been developed:

## **055. MORATORIUM (RULE 55).**

### **01. Applications for Permit.**

a. The Director may cease to approve applications for permit in a designated geographical area upon finding a need to:

i. Protect existing water rights;

ii. Insure compliance with the provisions of Chapter 2, Title 42, Idaho Code; and

iii. Prevent reduction of flows below a minimum stream flow which has been established by the Director or the board pursuant to applicable law.

b. Notice of the Director's action to cease application approval will be by:

i. Summary Order served by certified mail upon the then existing affected applicants; and

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected.

c. Objections to the Director's action shall be considered under the department's adopted Rules of Procedure and applicable law.

## **02. Permits.**

a. To the extent a permit has not been developed, the Director may cancel, or modify permits for which proof of beneficial use has not been submitted in a designated geographical area as an extension of Subsection 055.01.

b. Notice of the Director's action to cancel or modify permits shall be by:

i. Summary Order served by certified mail upon the affected permit holders in the designated area.

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area.

c. Objections to the Director's action shall be considered under the department's adopted Rules of Procedure and applicable law.

IDAPA 37.03.08.055 (bold in original).

### **RENEWAL OF THE NON-TRUST WATER MORATORIUM IS NECESSARY TO PROTECT THE WATER RESOURCES OF THE STATE OF IDAHO**

Southern Idaho's water resources are stressed and depleted compared to pre-moratorium conditions. This fact was recognized in the early 1990's, when the moratorium orders were originally entered by IDWR. Today, the conditions are still prevalent, if not worse, across the

ESPA. These conditions are not based on any trust water/non-trust water area distinction. Rather, continued depletions throughout the ESPA have caused, and will continue to cause, impacts on the overall water supply and existing water rights.

These concerns have been in the public eye over the last 8 years, as the Department has been addressing calls for administration by senior priority water users throughout the lower ESPA.

Water calls by the Surface Water Coalition, A&B Irrigation District, and several Spring Users in the Thousand Springs area have illuminated the impacts of continued depletions on the water supplies. In the case of the Coalition, Blue Lakes Trout, and Clear Springs Foods' water delivery calls, the Director found that junior groundwater pumping caused material injury to their senior priority surface water rights. Importantly, this material injury was caused by diversions located within both the ESPA Moratorium and the Non-trust Moratorium areas. Since the water supplies in these areas are hydraulically connected, it is appropriate to renew the Non-trust Moratorium.

**I. Renewal of the Non-trust Moratorium is Necessary to “Protect Existing Water Rights.”**

IDWR Rule 55.01.a provides that a moratorium is appropriate when necessary to “protect existing water rights.” In the Non-trust Moratorium order, at page 5, the Director found that a moratorium was necessary:

A moratorium on issuance of permits to divert and use water from the Snake River basin upstream from Milner Dam in the non-trust water area for new consumptive uses should be established to protect existing water rights and established minimum stream flows because of the need to conduct studies regarding the interrelationship between the Snake Plain Aquifer and the Snake River and because of the present drought emergency.

*See also Amended Moratorium Order* at 4 (“A moratorium on issuance of permits to divert and use surface and ground water from the Eastern Snake River Plain Area and tributary drainages ... should be established to protect existing water rights”). These conditions remain today. In fact, the ESPA Moratorium remains in place and prevents any processing of new consumptive use water

rights within the ESPA Moratorium Area.

Since 1993, there have been substantial legal and scientific advancements in the understanding of the connectivity of the surface and ground water resources in the Snake River Plain. Most recently, the Department completed the Eastern Snake Plain Aquifer Model (“ESPAM”) 2.1, which provides further scientific confirmation of the connection of the water sources. ESPAM 2.1’s boundary encompasses both the ESPA Moratorium area and portions of the Non-trust Moratorium area. The model shows that ground water diversion from the ESPA Moratorium area impact flows in the Snake River.

Likewise, ground water diversion from the Non-trust Moratorium area impact flows of the Snake River. In fact, from a point on the Snake River north of Idaho Falls, to a point south of American Falls, the Non-trust Moratorium Area straddles the Snake River – buffering the ESPA Moratorium Area from the Snake River. Indeed, American Falls Reservoir lies entirely within the Non-trust Moratorium area. In these areas, any diversions in the Non-trust Moratorium area will have greater impacts on natural flows than diversions from the ESPA Moratorium Area.

Furthermore, in the February 27, 2002 *Connected Sources General Provision; Memorandum Decision & Order of Partial Decree*, the SRBA Court held that the ESPA and Snake River are connected sources. The connected sources order provided that all waters within the boundary of the SRBA are presumed to be “connected sources of water in the Snake River Basin” unless there is a specific finding by the SRBA Court to the contrary. That order did not distinguish between groundwater within the ESPA Moratorium and Non-trust Moratorium areas. In fact, there are tens-of-thousands of acre feet of water rights within basins 25, 27 and 29, for example, that are within the Non-trust Moratorium area and were partially decreed as connected to the Snake River Basin water supplies. *See, e.g.*, Water Right 27-2091 (authorizing ground water diversions of 1,396 AFA within the Non-trust Moratorium area); Water Right 27-7001 (authorizing ground water

diversions of 4,160 AFA within the Non-trust Moratorium area); Water Right 29-7276 (authorizing ground water diversions of 3,482.5 AFA within the Non-trust Moratorium area); Water Right 25-14066 (authorizing ground water diversions of 1,790 AFA within the Non-trust Moratorium area); *see also* Water Right 25-7494C (license authorizing ground water diversions of 9,140 AFA within the Non-trust Moratorium area).

The Department has determined that the ESPA Moratorium is necessary to continue “to protect existing water rights.” There is no scientific or other factual information that would support a different standard for new appropriations and diversions within the Non-trust Moratorium area. Since a moratorium is necessary to protect existing water rights, the Director should renew the moratorium in the Non-trust Moratorium area.

## **II. Renewal of the Non-trust Moratorium is Necessary to “Insure Compliance with the Provisions of Chapter 2, Title 42, Idaho Code.”**

In 1993, the Director determined that a moratorium in the Non-trust Moratorium area was necessary to insure compliance with Chapter 2 of the Idaho Code. *See* Rule 55.01.a.ii. In that same year, the Director made a similar finding in regards to the ESPA Moratorium area. Importantly, the ESPA Moratorium remains in effect.

Chapter 2, Title 42, Idaho Code provides the Director with direction and authority as it relates to the appropriation of the State’s waters. It mandates that the Director determine whether new water rights will “reduce the quantity of water under existing water rights” or whether there is even sufficient “water supply ... for the purpose for which it is sought to be appropriated.” I.C. § 42-203A(5). The Director has authority to “refuse issuance of a permit” that does not meet these criteria. *See also* I.C. § 42-231 (“It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the

state from depletion of ground water resources contrary to the public policy expressed in this act”); *C.f.* I.C. § 42-222(1) (the Director must consider water supply, including historical consumptive uses, when processing transfer applications); I.C. § 42-237A(g) (Director has power to “To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available”).

By allowing the ESPA Moratorium to remain in effect, the Director has determined that the moratorium is necessary to insure continued compliance with the provisions of Chapter 2, Title 42, Idaho Code. As discussed above, *supra* Part I, there is no legal, scientific or other factual distinction that warrants a different standard for the Non-trust Moratorium area. As such, the Non-trust Moratorium should be renewed.

### **III. Renewal of the Non-trust Moratorium is Necessary to “Prevent Reduction of Flows Below a Minimum Stream Flow.”**

The Idaho Water Resource Board (“IWRB”) has acquired several minimum flow water rights along the Snake River and its tributaries some of which are impacted by increased diversions within the ESPA Moratorium and Non-trust Moratorium.<sup>1</sup> In fact, in 1993, the Director recognized that a moratorium in the Non-trust Moratorium area was necessary to protect minimum stream flows. At the time, the Director determined there was a “need to conduct studies regarding the interrelationship between the Snake Plain Aquifer and the Snake River.” All information relating to the connectivity of surface and ground water resources in the Snake River Plain confirms that diversions within the Non-trust Moratorium area impact flows in the Snake River and its tributaries – thereby impacting applicable minimum flows. This has been

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<sup>1</sup> *See*

[http://www.idwr.idaho.gov/waterboard/WaterPlanning/Minimum%20Stream%20Flow/PDFs/MSF\\_for\\_Web.pdf](http://www.idwr.idaho.gov/waterboard/WaterPlanning/Minimum%20Stream%20Flow/PDFs/MSF_for_Web.pdf) (list of IWRB minimum stream flow and lake level rights) (accessed on Aug. 6, 2013).

conclusively determined both legally and scientifically. *Supra.*

These minimum stream flows include those established by the Swan Falls Agreement. That agreement established minimum flows at the Murphy Gauge on the Snake River and provided certain protections to water users so long as those minimums are met. Increased depletions to the flows of the Snake River would threaten those protections.

Given the connectivity of the water resources in the ESPA Moratorium and Non-trust Moratorium areas, and the fact that diversions from either area would impact flows on the Snake River and its tributaries, a moratorium is necessary to prevent reductions to minimum stream flows.

### **CONCLUSION**

There is no legal or scientific justification to distinguish treat diversion within the ESPA Moratorium area differently than the Non-trust Moratorium area. All legal and scientific understanding confirms that diversions within the Non-trust Moratorium area have the same or similar hydrologic impacts on the Snake River and its tributaries as diversions within the ESPA Moratorium area. Yet, the Department allowed the Non-trust Moratorium to expire while the ESPA Moratorium remains in effect. Renewal of the Non-trust Moratorium is necessary to protect existing water rights, ensure compliance with Chapter 2, Title 42, Idaho Code and to maintain minimum stream flows.

According, the Coalition requests the Director to enter an order renewing the Non-trust Moratorium for an indefinite term.

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DATED this 15<sup>th</sup> day of August, 2013.

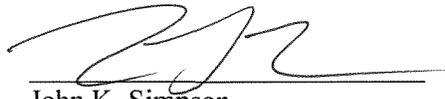
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of August, 2013, I served a copy of the foregoing **PETITION TO RENEW MORATORIUM ORDER FOR NON-TRUST WATER AREA**, by electronic and U.S. Mail to the following:

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