BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF ALLOCATING FUNDS PURSUANT TO INTERIM STIPULATED AGREEMENT FOR PROCESSORS AND MUNICIPALITIES WITHIN AND NEAR IDWR ADMINISTRATIVE BASINS 35 AND 36	)	**ORDER ALLOCATING MITIGATION FUNDS RECEIVED**

This matter is before the Director of the Department of Water Resources ("Director" or "Department" or "IDWR") as a result of payments made in 2002, 2003, 2004, and 2005 pursuant to the *Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36* ("Processors and Municipalities Agreement") approved by the Director in an *Order Approving Stipulated Agreements,* dated January 18, 2002. Under that agreement, signatory processors and municipalities were obligated to provide 3,500 acre-feet of replacement water, or provide payment of up to $20,000 for mitigation to the extent replacement water was not provided, annually during 2002, 2003, and 2004.

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

FINDINGS OF FACT

1. On January 18, 2002, the Director issued *Order Approving Stipulated Agreements In the Matters of the American Falls Ground Water Management Area and the Thousand Springs Ground Water Management Area.* The order approved three stipulated agreements as follows: (1) *Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 35* ("Basin 35 Agreement"); (2) *Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36* ("Basin 36 Agreement"); and (3) *Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36* ("Processors and Municipalities Agreement"). During the term of these interim stipulated agreements, as revised and extended by mutual consent of the signatories through December 31, 2004, holders of certain junior priority ground water rights were provided "safe harbor" from curtailment of their rights for the benefit of senior priority surface water rights from the Snake River or tributary springs in the Thousand Springs Area held by signatory surface water entities, provided the holders of the junior priority ground water rights, or their representative ground water districts, performed the obligations required under the agreements.

2. Paragraph 2.1 of the Basin 35 Agreement required the Aberdeen-American Falls, Bingham, and Bonneville-Jefferson ground water districts to "... use their best efforts to provide

annually 28,500 acre feet of replacement water .... The agreed obligation to provide 28,500 acre feet of water will be reduced by any other replacement water provided, on either a temporary or permanent basis, by other entities within the Basins."

3. Signatories to the Basin 35 Agreement holding surface water rights from the Snake River consisted of the American Falls Reservoir District #2, Milner Irrigation District, North Side Pumping Company, North Side Canal Company, and Twin Falls Canal Company. The points of diversion for the water rights from the Snake River held by these signatory surface water entities are all downstream of American Falls Reservoir.

4. Paragraph 2.1 of the Basin 36 Agreement required the North Snake Ground Water District ("NSGWD") and Magic Valley Ground Water District ("MVGWD") to provide 40,000 acre-feet of replacement water. Similar to the Basin 35 Agreement, the Basin 36 Agreement included the following provision: "The obligation of NSGWD and MVGWD to provide 40,000 acre feet of water will be reduced by any other water provided pursuant to this or any other interim stipulated agreement for replacement water in Basin 36 through the NSCC [North Side Canal Company] system by entities other than the NSGWD and MVGWD."

5. Under the Processors and Municipalities Agreement, effective October 11, 2001, the processors and municipalities committed to provide 3,500 acre-feet of replacement water, or provide payment of up to $20,000 for mitigation to the extent replacement water was not provided, during the initial two-year term of the stipulated agreement, which expired on December 31, 2003.

6. Signatories to the Processors and Municipalities Agreement consisted of Basic American Foods, City of American Falls, City of Blackfoot, City of Chubbuck, City of Idaho Falls, City of Pocatello, J. R. Simplot Company, Lamb Weston, North Side Canal Company, and Twin Falls Canal Company.

7. Of the 3,500 acre-feet of replacement water to be provided under the Processors and Municipalities Agreement, 3,000 acre-feet was to be provided from the Water District 01 "... rental pools [sic] above Milner Dam for use by senior surface water users in Water District 01." Of this 3,000 acre-feet, 1,500 acre-feet was to be "... credited to the American Falls Reservoir storage proportionately and 1,500 acre-feet credited to downstream natural flow users proportionately as soon as Water District No. 01 goes on regulation. If American Falls Reservoir fills and spills, all 3,000 acre-feet shall be used to mitigate natural flow impacts after Water District No. 01 is on regulation." *See* Paragraph 2.1.1 of Processors and Municipalities Agreement.

8. Of the 3,500 acre-feet of replacement water to be provided under the Processors and Municipalities Agreement, 500 acre-feet was to be provided from the Water District 01 "... rental pools [sic] above Milner Dam for use pursuant to the terms of the INTERIM STIPULATED AGREEMENT FOR AREAS WITHIN AND NEAR IDWR ADMINISTRATIVE BASIN 36." *See* Paragraph 2.1.2 of Processors and Municipalities Agreement.

9. Paragraph 2.2 of the Processors and Municipalities Agreement provided that: "In the event the undersigned holders of junior priority ground water rights or their representatives provide none of the 3,500 acre-feet in paragraph 2.1 in any year, the undersigned holders of junior priority ground water rights agree to pay $20,000 into an escrow account at IDWR for IDWR to acquire water when available or use to mitigate the impacts of ground water pumping in the Basins as determined by IDWR. If some but not all of the 3,500 acre-feet is provided, an adjustment to the $20,000 may be made in proportion to the percentage of the 3,500 acre-feet provided."

10. On December 30, 2003, the parties to the Basin 35 Agreement submitted to the Director for approval *Amendment No. 1 to Interim Stipulated Agreement for Areas within and Near IDWR Administrative Basin 35* ("Amended Basin 35 Agreement"), which extended the Basin 35 Agreement for one year, until December 31, 2004, and added or changed Paragraphs 2.2, 2.3, 2.4, 2.7, 3.1, and 7.7 of the Basin 35 Agreement. The Amended Basin 35 Agreement did not alter or change the relationships described in Findings 2 and 4 between the Processors and Municipalities Agreement and the Amended Basin 35 Agreement and Basin 36 Agreement.

11. On December 12, 2003, the processor and municipal signatories to the Processors and Municipalities Agreement submitted to the Director for approval *Interim Stipulated Agreement for Processors and Municipalities Within and Near IDWR Administrative Basins 35 and 36 (Revised)* ("Revised Processors and Municipalities Agreement"), which extended the Processors and Municipalities Agreement for one year, until December 31, 2004. The Revised Processors and Municipalities Agreement continued to require that during 2004 the processors and municipalities provide 3,500 acre-feet of replacement water, or provide payment of up to $20,000 for mitigation to the extent replacement water was not provided, although the revised agreement did not require the specific distribution of replacement water described in Findings 7 and 8. Paragraph 2.2 in the Revised Processors and Municipalities Agreement was unchanged from the original agreement.

12. During the two-year time period in which the original Processors and Municipalities Agreement was in effect, 2002 and 2003, as well as 2004 when the Revised Processors and Municipalities Agreement was in effect, the processor and municipal signatories to the agreement were unable to lease storage water from the Water District 01 rental pool. Consequently, the signatory processors and municipalities made payments to the Department for 2002 mitigation totaling $20,000 over the time period October 16 through November 18, 2002. The signatory processors and municipalities again made payments to the Department totaling $20,000 for 2003 mitigation over the time period December 23, 2003, through January 28, 2004. Finally, the signatory processors and municipalities again made payments to the Department totaling $20,001 for 2004 mitigation over the time period January 11 through January 19, 2005.

13. After the Director consulted with the signatories to the Basin 35 Agreement, the Basin 36 Agreement, and the Processors and Municipalities Agreement, the Department awarded the $20,000 paid for mitigation in 2002 to the NSGWD in the form of a grant on April 28, 2003, to help fund the construction of the Sandy Pipeline Project. The Sandy Pipeline Project became operational in 2003 and provides for delivery of surface water leased by the NSGWD and MVGWD as mitigation to some of the holders of senior priority surface water rights below

Milner Dam and above and along Billingsley Creek in the Thousand Springs Area that depend on discharges from springs.

14. Based on further consultations with the signatories to the various interim agreements in effect during 2003 and 2004, the Director concluded that any other payments by processors and municipalities would be used to mitigate depletions to American Falls Reservoir and the Snake River between American Falls Reservoir and Milner Dam from junior priority ground water rights in Water District No. 120, pursuant to Paragraph 2.2 of the original Processors and Municipalities Agreement and Revised Processors and Municipalities Agreement.

15. The monies paid by the processors and municipalities for mitigation pursuant to the Processors and Municipalities Agreement and Revised Processors and Municipalities Agreement, after the $20,000 paid in 2002, total $40,001. In addition, an interest credit of approximately $2,131 has accrued at an annual interest rate of 3 percent. The annual interest rate of 3 percent is the rate earned on funds held by the Idaho State Treasurer, more or less.

16. Other than leasing storage water from the Water District 01 rental pool, when available, or distributing the payments made by processors and municipalities directly to holders of senior priority surface water rights from the Snake River below American Falls Reservoir and above Milner Dam, no other means of providing mitigation to those holders of senior priority surface water rights has been identified.

17. The payments made by processors and municipalities for mitigation in 2003 and 2004 described in Findings 12 and 15 can be distributed directly to holders of surface water rights from the Snake River between American Falls Reservoir and Milner Dam in the same proportion as replacement water rented from the Water District 01 rental pool would have been distributed had such water been available for lease.

18. Although the revised Processors and Municipalities Agreement did not specify an allocation of replacement water between natural flow and storage for 2004, the same allocation specified in the original Processors and Municipalities Agreement for 2003 can be used for 2004, that is 1,500 acre-feet to natural flow and 1,500 acre-feet to storage in American Falls Reservoir when the reservoir does not fill, or 3,000 acre-feet to natural flow and nothing to storage in American Falls Reservoir when the reservoir does fill.

19. American Falls Reservoir failed to fill in both 2003 and 2004. As a result, had the 3,000 acre-feet of replacement water been provided half would have been allocated to water rights for natural flow from the Snake River downstream of American Falls Reservoir and upstream of Milner Dam when such rights were not filled and the other half would have been allocated to storage in American Falls Reservoir for the benefit of holders of water rights between American Falls Reservoir and Milner Dam. Therefore, half of each of the annual payments made by processors and municipalities for 2003 and 2004 mitigation, or $10,000 each year, can be distributed based on water rights

for natural flow and the other half can be distributed based on storage space held in American Falls Reservoir.

20. The Department's water rights accounting program for Water District 01 was used to determine the distribution of 1,500 acre-feet of replacement water, had it been provided in 2003 and 2004, as a surrogate for the distribution of $10,000 of the payments made by processors and municipalities each year to the holders of surface water rights from the natural flow of Snake River between American Falls Reservoir and Milner Dam. This was accomplished by artificially increasing the discharge of the Portneuf River to the Snake River in the water rights accounting program and computing the differences in natural flow diverted from the Snake River between American Falls Reservoir and Milner Dam in a particular year with and without the artificial increase in discharge from the Portneuf River.

21. For 2003, the discharge from the Portneuf River was artificially increased by 3.9 cfs in the water rights accounting program over the time period of April 1 through October 12, 2003. For 2004, the discharge from the Portneuf River was artificially increased by 4.0 cfs in the water rights accounting program over the time period of April 1 through October 8, 2004. October 12, 2003, and October 8, 2004, are the dates in 2003 and 2004, respectively, on which demands for natural flow under applicable water rights were being fully met and late-season fill of the reservoirs on the Snake River began.

22. Using the water rights accounting program for Water District 01, as described in Finding 20, and proportionately distributing payments allocated for storage in American Falls Reservoir based on the amount of storage space held, results in the following percentages of distribution for each $10,000 portion of the payments made by processors and municipalities for 2003 and 2004 mitigation:

	2003 Natural Flow (percentage)	2003 Am. Falls Storage (percentage)	2004 Natural Flow (percentage)	2004 Am. Falls Storage (percentage)
A&B Irrigation District:	2.15	3.59	0.00	3.59
American Falls Res. Dist. #2:	2.66	30.21	0.71	30.21
Burley Irrigation District:	9.07	11.92	8.16	11.92
Milner Irrigation District:	0.69	3.45	0.00	3.45
Minidoka Irrigation District:	12.85	6.31	10.96	6.31
North Side Canal Company:	20.04	33.11	26.46	33.11
Twin Falls Canal Company:	52.54	11.41	53.71	11.41
Totals:	100.00	100.00	100.00	100.00

23. Since the amounts of the payments made by processors and municipalities for 2003 and 2004 mitigation to be distributed directly to the holders of surface water rights between American Falls Reservoir and Milner Dam essentially equal $10,000 each for natural flow in 2003 and 2004 and for storage in 2003 and 2004, the total amount paid

for 2003 and 2004 mitigation ($40,001) can be distributed using the following percentages, which are determined by summing the four distribution percentages by entity, as set forth in Finding 22, and dividing the sum of the percentages for each entity by 4:

	Percentages for Distributing Payments Processors and Municipalities Mitigation Payments For 2003 and 2004
A&B Irrigation District:	2.33
American Falls Res. Dist. #2:	15.95
Burley Irrigation District:	10.27
Milner Irrigation District:	1.90
Minidoka Irrigation District:	9.11
North Side Canal Company:	28.17
Twin Falls Canal Company:	32.27
Total:	100.00

24. The distribution percentages for allocating the payments made by processors and municipalities for 2003 and 2004 are also appropriate for allocating the interest credit described in Finding 15.

CONCLUSIONS OF LAW

1. The original Processors and Municipalities Agreement and Revised Processors and Municipalities Agreement are related to the Basin 35 Agreement, the Amended Basin 35 Agreement, and the Basin 36 Agreement through Paragraph 2.1 in each of the Basin 35 and Basin 36 agreements.

2. The processors and municipalities signatory to the original Processors and Municipalities Agreement and Revised Processors and Municipalities Agreement made payments to the Department for 2002, 2003, and 2004 mitigation totaling $20,000 over the time period October 16 through November 18, 2002; $20,000 over the time period December 23, 2003, through January 28, 2004; and $20,001 over the time period January 11 through January 19, 2005. The payments were made in lieu of providing 3,500 acre-feet of replacement water in each of the three years, which could not be leased from the Water District 01 rental pool, under the terms of the original Processors and Municipalities Agreement and Revised Processors and Municipalities Agreement, and the signatory processors and municipalities have completely fulfilled their obligations under those agreements.

3. Paragraph 2.2 of the original Processors and Municipalities Agreement and the Revised Processors and Municipalities Agreement provides "for IDWR [to use funds paid] to acquire water when available or use [funds paid] to mitigate the impacts of ground water pumping in the Basins [35 and 36] as determined by IDWR." The award of the $20,000 paid to

the Department for mitigation in 2002 in the form of a grant to the NSGWD in 2003 to help fund the construction of the Sandy Pipeline Project, which provides for delivery of surface water leased by the NSGWD and MVGWD as mitigation to some of the holders of senior priority surface water rights above and along Billingsley Creek in the Thousand Springs Area that depend on discharges from springs, is consistent with Paragraph 2.2.

4. Distribution of the $40,001 paid to the Department for 2003 and 2004 mitigation directly to holders of surface water rights from the Snake River between American Falls Reservoir and Milner Dam is also consistent with Paragraph 2.2 of the original Processors and Municipalities Agreement and the Revised Processors and Municipalities Agreement, with Paragraph 2.1.1 of the agreements limiting credits to natural flow water rights between American Falls Reservoir and Milner Dam, and with the location of the points of diversion for the surface water entities signatory to the original and amended Basin 35 agreements and to the original and revised processors and municipalities agreements.

5. Using the Department's water rights accounting program for Water District 01 to determine the distribution of 1,500 acre-feet of replacement water, had it been provided in 2003 and 2004, as a surrogate for the distribution of $10,000 of the payments made by processors and municipalities each year to the holders of surface water rights from the natural flow of the Snake River between American Falls Reservoir and Milner Dam provides an acceptable means of determining the equitable distribution of the $10,000 payments for 2003 and 2004 natural flow mitigation.

6. Using the proportion of storage space held in American Falls Reservoir by holders of surface water rights from the Snake River between American Falls Reservoir and Milner Dam to determine the distribution of 1,500 acre-feet of replacement water, had it been provided in 2003 and 2004, as a surrogate for the distribution of $10,000 of the payments made by processors and municipalities each year to spaceholders in American Falls Reservoir provides an acceptable means of determining the equitable distribution of the $10,000 payments for 2003 and 2004 reservoir storage mitigation.

7. Given the length of time that payments made by processors and municipalities for 2003 and 2004 mitigation have been held by the Department, pursuant to Paragraph 2.2 of the original Processors and Municipalities Agreement and Revised Processors and Municipalities Agreement, distribution of an interest credit of 3 percent, which is about the rate earned on funds held by the Idaho State Treasurer, is warranted.

ORDER

IT IS HEREBY ORDERED as follows:

1. The monies paid to the Department by processors and municipalities for 2003 and 2004 mitigation, totaling $40,001 pursuant to the original Processors and Municipalities Agreement and the revised Processors and Municipalities Agreement, are to be distributed to the following entities using the following distribution percentages:

Percentages for Distributing Payments
Processors and Municipalities Mitigation Payments
For 2003 and 2004

A&B Irrigation District:	2.33
American Falls Res. Dist. #2:	15.95
Burley Irrigation District:	10.27
Milner Irrigation District:	1.90
Minidoka Irrigation District:	9.11
North Side Canal Company:	28.17
Twin Falls Canal Company:	32.27
Total:	100.00

2. When the $40,001 paid for 2003 and 2004 mitigation is distributed, an interest credit is to be calculated based on the number of months that payments were held at an annual interest rate of 3 percent. The interest credit is to be paid to the entities listed above using the same distribution percentages set forth above.

3. The distribution of monies paid to the Department by processors and municipalities for 2003 and 2004 mitigation and the interest credit shall occur within five (5) business days after the later of the following occurs: (1) expiration of the time period for appeal of this order; or (2) receipt by the Department of completed "Request for Taxpayer Identification Number and Certification," U. S. Internal Revenue Service Form W-9, from each entity receiving a distribution (not applicable for Minidoka Irrigation District, North Side Canal Company, or Twin Falls Canal Company).

DATED this 20th day of September 2006.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of September, 2006, the above and foregoing, was served by the method indicated below, and addressed to the following:

TOM ARKOOSH ARKOOSH LAW OFFICES PO BOX 32 GOODING ID 83330 (208) 934-8873 alo@cableone.net	(x) U.S Mail, Postage Prepaid ( ) Facsimile (x) E-mail
W. KENT FLETCHER FLETCHER LAW OFFICE PO BOX 248 BURLEY ID 83318-0248 (208) 878-2548 wkf@pmt.org	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
ROGER D. LING LING ROBINSON PO BOX 396 RUPERT ID 83350-0396 (208) 436-6804 lnrlaw@pmt.org	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOHN ROSHOLT TRAVIS THOMPSON BARKER ROSHOLT 113 MAIN AVE WEST STE 303 TWIN FALLS ID 83301-6167 (208) 735-2444 jar@idahowaters.com tlt@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOHN SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 (208) 344-6034 jks@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOSEPHINE BEEMAN BEEMAN & ASSOC. 409 W JEFFERSON BOISE ID 83702 (208) 331-0954 jo.beeman@beemanlaw.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail

TERRY UHLING
JR SIMPLOT CO
999 MAIN STREET
BOISE ID 83702
tuhling@simplot.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

LYLE SWANK
ERNIE CARLSON
IDWR
900 N SKYLINE DR
IDAHO FALLS ID 83402-6105
(208) 525-7177
lyle.swank@idwr.idaho.gov
ernie.carlson@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

ALLEN MERRITT
CINDY YENTER
IDWR
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3033
(208) 736-3037
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.