

C. Tom Arkoosh, ISB No. 2253  
ARKOOSH LAW OFFICES, CHTD.  
P.O. Box 32  
Gooding, ID 83330  
Telephone: (208) 934-8872  
Facsimile: (208) 934-8873

Attorneys for American Falls Reservoir  
District #2

John A. Rosholt, ISB #1037  
John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
BARKER ROSHOLT & SIMPSON LLP  
P.O. Box 485  
113 Main Ave. West, Suite 303  
Twin Falls, Idaho 83303-485  
Telephone: (208) 733-0700  
Facsimile: (208) 735-2444

Attorneys for  
Twin Falls Canal Company

Roger D. Ling, ISB No. 1018  
LING ROBINSON & WALKER  
P.O. Box 396  
Rupert, ID 83350  
Telephone: (208) 436-4717  
Facsimile: (208) 436-6804

Attorneys for A & B  
Irrigation District  
And Burley Irrigation District

W. Kent Fletcher, ISB No. 2248  
FLETCHER LAW OFFICE  
P.O. Box 248  
Burley, ID 83318  
Telephone: (208) 670-3250  
Facsimile: (208) 878-2548

Attorney for Minidoka Irrigation  
District

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COPY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

AMERICAN FALLS RESERVOIR DISTRICT )  
#2, A & B IRRIGATION DISTRICT, BURLEY )  
IRRIGATION DISTRICT, )  
MINIDOKA )  
IRRIGATION DISTRICT, and TWIN FALLS )  
CANAL COMPANY, )

Case No. CV-2005-600

Plaintiffs, )

vs. )

SUMMONS

THE IDAHO DEPARTMENT OF WATER )  
RESOURCES and KARL DREHER, )  
its Director, )

Defendants. )

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF.  
THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT  
FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS.  
READ THE INFORMATION BELOW.**

**TO: THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL DREHER,  
its Director, 322 E. Front St., Boise, Idaho, 83720-0098.**

YOU ARE HEREBY NOTIFIED that in order to defend this lawsuit, an appropriate written response must be filed with the above-designated court within twenty (20) days after service of this Summons on you. If you fail to so respond the court may enter judgment against you as demanded by the Plaintiff in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED this \_\_\_\_\_ day of August, 2005.

CLERK OF THE DISTRICT COURT

Helen P. Edwards  
Deputy clerk

C. Tom Arkoosh, ISB No. 2253  
ARKOOSH LAW OFFICES, CHTD.  
P.O. Box 32  
Gooding, Idaho 83330  
Telephone: (208) 934-8872  
Facsimile: (208) 934-8873

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LING ROBINSON & WALKER  
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Facsimile: (208) 735-2444

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING**

AMERICAN FALLS RESERVOIR DISTRICT )  
#2, A & B IRRIGATION DISTRICT, BURLEY )  
IRRIGATION DISTRICT, )  
MINIDOKA )  
IRRIGATION DISTRICT, and TWIN FALLS )  
CANAL COMPANY, )

Plaintiffs, )

vs. )

THE IDAHO DEPARTMENT OF WATER )  
RESOURCES and KARL DREHER, )  
its Director, )

Defendants. )

Case No. \_\_\_\_\_

**COMPLAINT**

Fee Category: A.1.  
Filing Fee: \$82.00

COME NOW the plaintiffs American Falls Reservoir District #2, A & B  
Irrigation District, Burley Irrigation District, Minidoka Irrigation District, and Twin Falls  
Canal Company, and petition the Court for declaratory judgment pursuant to § 67-5278  
and § 10-1201, *et seq*, Idaho Code, regarding the validity and constitutionality of the  
COMPLAINT

COPY

Rules of Conjunctive Management of Surface and Ground Water Resources", IDAPA 37.03.11 et seq., as promulgated by the Idaho Department of Water Resources (hereinafter "IDWR"), and in support thereof, allege:

### COUNT I

1. American Falls Reservoir District #2 is a duly organized irrigation district under the laws of the State of Idaho.

2. American Falls Reservoir District #2 does business in Gooding County, Idaho, and Gooding County is the proper venue for filing this action pursuant to Idaho Code § 67-5272(c).

3. A & B Irrigation District is an irrigation district organized and existing under the laws of the State of Idaho.

4. Burley Irrigation District is an irrigation district organized and existing under the laws of the State of Idaho.

5. Minidoka Irrigation District is a duly organized irrigation district under the laws of the State of Idaho.

6. Twin Falls Canal Company is a non-profit Idaho corporation organized under the laws of the State of Idaho.

7. IDWR is an administrative agency of the State of Idaho. The Director of IDWR is authorized, pursuant to Idaho Code § 42-603, to adopt rules and regulations for the distribution of water from all sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.

8. On or about October 7, 1994, the Director of IDWR promulgated administrative rules cited as IDAPA 37, Title 03, Chapter 11, also known as the "Rules for Conjunctive Management of Surface and Ground Water Resources" (hereinafter the "Rules"), a true copy of which is attached hereto as Exhibit "A." All exhibits are by reference incorporated herein.

9. Pursuant to Idaho Code § 67-5201(15), plaintiffs are "persons" entitled to seek declaratory relief in accordance with Idaho Code § 67-5278.

10. Plaintiffs are the holders of various natural flow and storage water rights (hereinafter "Rights") dating from the early 1900's which grant plaintiffs the right to divert water from the Snake River in Idaho, with certain priorities, including the rights set forth below:

A. American Falls Reservoir District #2 Water Right No. 01-00006 in the amount of 1,700 cfs, with a priority date of March 20, 1921.

B. American Falls Reservoir District #2 holds a contractual right in the amount of 393,550 acre-feet of storage space in American Falls Reservoir.<sup>1</sup>

C. The A&B Irrigation District Water Right No. 01-00014 in the amount of 267 cfs, with a priority date of April 1, 1939.

D. A&B Irrigation District holds contractual rights in the amounts of 46,826 acre-feet of storage space in American Falls reservoir and 90,800 acre-feet of storage space in Palisades Reservoir, for a total of 137,626 acre-feet of storage space.<sup>2</sup>

E. The Burley Irrigation District holds the following surface water rights:

(1) Water Right No. 01-00007 in the amount of 163.4 cfs, with a priority date of April 1, 1939;

(2) Water Right No. 01-00211B in the amount of 655.88 cfs, with a priority date of March 26, 1903;

---

<sup>1</sup> The United States Bureau of Reclamation holds various water rights for the diversion of water from the Snake River for irrigation, reservoir storage for irrigation, and reservoir releases for irrigation and incidental power generation under some rights. The nature and extent of the spaceholders' ownership interests in the storage water rights is currently at issue before the Idaho Supreme Court on appeal from the SRBA District Court (Case No. 39576, Consolidated Subcase No. 91-63). The plaintiffs own storage space in these reservoirs pursuant to contracts they entered into with Reclamation, and in some cases have filed their own storage water right claims. For purposes of the priority dates attached to storage space held by plaintiffs in various reservoirs, a portion of Reclamation's water rights are described as follows: 1) Water Right No. 01-00284, 1.7 million acre-feet, decree, American Falls, March 30, 1921; 2) 01-02064, 1.8 million acre-feet, license, American Falls, March 30, 1921; and 3) 01-02068, 1.4 million acre-feet, Palisades, June 28, 1939.

<sup>2</sup> See n. 1.

(3) Water Right No. 01-00214B in the amount of 380 cfs, with a priority date of August 6, 1908.

F. The Burley Irrigation District holds contractual rights in the amounts of 31,892 acre-feet of storage space in Lake Walcott, 155,395 acre-feet of storage space in American Falls Reservoir, and 39,200 acre-feet of storage space in Palisades Reservoir, for a total of 226,487 acre-feet of storage space.<sup>3</sup>

G. The Minidoka Irrigation District, or Reclamation on Minidoka's behalf, holds the following natural flow water rights:

(1) Water Right No. 01-00008 in the amount of 266.6 cfs, with a priority date of April 1, 1939.

(2) Water Right No. 01-10187 in the amount of 1,070.12 cfs with a priority date of March 26, 1926.

(3) Water Right No. 01-10188 in the amount of 620 cfs with a priority date of August 6, 1908.

(4) Water Right No. 01-10192 in the amount of 1,550 cfs with a priority date of August 23, 1906.

(5) Water Right No. 01-10193 in the amount of 1,550 cfs with a priority date of December 28, 1909.

(6) Water Right No. 01-10194 in the amount of 550.56 cfs with a priority date of June 16, 1911.

H. The Minidoka Irrigation District holds contractual rights in the amounts of 186,030 acre-feet of storage space in Jackson Lake, 63,308 acre-feet of storage space in Lake Walcott, 82,216 acre-feet of storage space in American Falls Reservoir, and 35,000 acre-feet of storage space in Palisades Reservoir, for a total of 366,554 acre-feet of storage space.<sup>5</sup>

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<sup>3</sup> See n. 1.

<sup>5</sup> See n. 1.

I. The Twin Falls Canal Company holds the following surface water rights:

(1) Water Right No. 01-00004 in the amount of 600 cfs, with a priority date of December 22, 1915;

(2) Water Right No. 01-00010 in the amount of 180 cfs, with a priority date of April 1, 1939;

(3) Water Right No. 01-00209 in the amount of 3,000 cfs, with a priority date of October 11, 1900.

J. The Twin Falls Canal Company holds contractual rights in the amounts of 97,183 acre-feet of storage space in Jackson Lake and 148,747 acre-feet of storage space in American Falls Reservoir, for a total of 245,930 acre-feet of storage space.<sup>6</sup>

11. In the non-irrigation season and during the irrigation season when spring flood runoff exceeds diversions, the surface water flows of the Snake River are stored in Snake River reservoirs. Part of these flows are diverted to reservoir storage space in United States Bureau of Reclamation reservoirs to which plaintiffs have a right (also, the "Rights") by reason of spaceholder contracts with the United States. The stored water accruing to plaintiffs' space in Reclamation's reservoirs is owned and controlled by each plaintiff for its use and for the use of its landowners or shareholders.

12. The ground water in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and the Snake River and its tributaries is in the American Falls area.

13. On January 14, 2005, the plaintiffs requested administration of junior ground water rights in Water District No. 120 so that water would be delivered to plaintiffs pursuant to their senior natural flow and storage water rights. In responding to

plaintiffs' request, the Director has applied the conjunctive management rules, IDAPA 37.03.11 et seq.

14. The conjunctive management rules which have been applied to plaintiffs' requests for delivery of water are contrary to law and unconstitutional on their face. In addition, the application of the Rules as adopted does impair, and threatens to interfere with or impair, the rights of plaintiffs as follows:

A. The Rules require plaintiffs to submit a "call" and initiate administrative procedures prior to the distribution and delivery of water according to plaintiffs' prior rights and as required by the watermaster of Water District No. 120. This process results in unreasonable delay in the distribution of water to senior water rights, including plaintiffs' water rights, and is contrary to plaintiffs' rights, Idaho law, the prior appropriation doctrine, and Idaho Code § 42-602 et seq.

B. The Rules contain "factors" which impose burdens on senior water right holders contrary to Idaho law. These "factors" include, but are not limited to, a showing of material injury, reasonableness of the senior water right diversion, and that the senior right could not be satisfied using alternate points and/or means of diversion. The applications of these "factors" results in unreasonable delay in the distribution of water to senior water rights, including plaintiffs' water rights, and imposes burdens which are contrary to plaintiffs' water rights and constitutional rights, Idaho law, the prior appropriation doctrine and Idaho Code § 42-602 et seq.

C. As adopted, the Rules, and more specifically, Rules 10.07 and 20.03, purport to apply the full economic development" provisions of Idaho Code § 42-226 in the ground water code to surface water rights, contrary to the prior appropriation doctrine as set forth in Idaho's Constitution and statutes.

D. As adopted, the Rules, and more specifically, Rules 10.08 and 20.04, misinterpret and misapply the "futile call" doctrine, thereby ignoring the cumulative

impacts of ground water development and the hydrologic reality of the impact of ground water extraction on surface water rights over time.

E. As adopted, the Rules, and more specifically, Rules 20.05, 40.03 and 42, violate the doctrine of separation of powers in that IDWR's determination of the reasonable exercise of rights and intrudes upon a court's jurisdiction over the determination of elements of a water right.

F. As adopted, the Rules, and more specifically, Rules 20.05, 40.03 and 42, further violate the doctrine of prior appropriation set forth in Idaho's Constitution and statutes by:

(1) Requiring a surface water user to exhaust storage before placing a call on a junior water right holder, thereby artificially and unlawfully subordinating senior water rights to junior water rights;

(2) Affording IDWR the discretion to compel a surface water user to convert his point of diversion to a ground water source;

(3) Allowing IDWR to determine the legitimacy of a call on a junior diverter based on the effort or expense of the holder of the senior water right to divert water from its source; and

(4) Requiring, as a condition precedent to the determination of reasonableness, an inquiry into system diversion and conveyance efficiency, as well as the method of irrigation water application.

G. Inclusion of the term "material injury" as defined by Rules 10.14 and 42, which is inconsistent with the "injury" criteria defined in Title 42, Idaho Code.

H. The term "reasonably anticipated average rate of future natural recharge" is improperly defined in Rule 10.09 to include "artificial recharge," rendering it inconsistent with Idaho Code § 42-237a(g).

I. As adopted, the Rules contravene Idaho Code § 42-603, which requires that rules so promulgated must be in accordance with the priorities of the rights

of the water users. Specifically, the adoption and application of the "reasonable use" policy set forth in Rule 20.03 is contrary to the prior appropriation doctrine contained in the Idaho Constitution and Idaho statutes, and is therefore contrary to Idaho Code § 42-603 generally, and in the following particulars:

(1) The same suggests or allows administration of water rights on a correlative basis, i.e., administration of water rights in an aquifer on a mutual pro-rata or proportionate basis instead of a priority-in-time basis.

(2) The same suggests or allows administration of water rights such that water in a well or the aquifer shall be deemed available to fill a junior water right notwithstanding that withdrawal of the amount used by the junior water right would effect, contrary to the direct dictates of the statutory and constitutional law of the State of Idaho, the present or future use of any senior surface water right.

(3) The same would suggest or allow or could be used to allow the administration of water rights such that the administrator would impermissibly investigate and take into consideration in the enforcement of the water rights components of beneficial use such as what crops are grown, or the means or method of irrigation. Such considerations are impermissible except for the determination of waste, forfeiture, or abandonment.

(4) The same would suggest or allow an administrator to micromanage senior water rights, or make *ad-hoc* determinations of the quantity deliverable to senior water rights such that the administrator would claim the right or capacity to delivery less than the full face amount of the senior water right when water under the right would be diverted and applied to a beneficial use.

(5) Requiring a surface water users to be subject to a mitigation plan to relieve a junior water user from the obligation to curtail use during drought periods, without the prior volitional agreement of the senior water user, is

contrary to the state constitutional and statutory provisions governing the administration of water rights, and is beyond the authority of the statutes enabling the adoption of the Rules.

(6) In the event that a junior water user affects the fulfillment of a hydrologically connected senior water right, whether the effect is instantaneous or an effect over time, then the priority doctrine requires immediate curtailment of junior users who affect the fulfillment of hydrologically connected senior water rights unless and until the hydrologically connected junior user proves that curtailment will not alleviate the affect of the junior user upon the senior water right.

J. As adopted, Rule 40.01(a) would allow the Director of IDWR, in the face of material injury to a senior appropriator, the ability to phase in the regulation of the diversion and use of water under a junior right to lessen the economic impact of immediate and complete curtailment on the junior right holder. Such phasing over time is contrary in all respects to the prior appropriation doctrine.

15. The Director, in the application of the "Rules," has imposed a requirement upon the plaintiffs holding senior water rights that they use their storage water, acquired in Reclamation reservoirs as a reserve, before they may enforce their senior surface water rights against junior ground water appropriators, and such application of the Rules interferes with and impairs the legal rights and privileges of the plaintiffs that are represented by their legal and equitable water rights.

16. The application of the Rules by the Director is a denial to the plaintiffs of their priority of appropriations which give them the better right as between those using the water, as provided by article XV, section 3 of the Constitution of the State of Idaho.

17. The impairment of the full exercise by plaintiffs of their water rights by the application of the Rules by the Director constitutes a taking of property rights without due process, in violation of article I, section 13 of the Constitution of the State of Idaho, and the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

18. The Director, in his application of the Rules, has imposed upon plaintiffs an involuntary exchange of water authorized to be diverted under their water rights with water diverted under other water rights, contrary to the provisions of Idaho Code § 42-240 which requires the consent to any exchange by plaintiffs.

19. The majority of sections of the Rules is unconstitutional or contrary to existing Idaho statutes, or is so dependent on the invalid provisions, that the entire Rules are void.

20. To the extent that the Rules have any validity whatsoever, the same have no force or effect upon the water rights which were established prior to the enactment of Idaho's Groundwater Act.

## COUNT II

1. Plaintiffs incorporate, as though fully set forth herein, paragraphs 1 through 20 of Count I of this Complaint.

2. The Director, pursuant to his purported authority, which is unknown and undisclosed to the plaintiffs, and in his application of the Rules has allowed avoidance of curtailment by junior appropriators through the issuance of what the Director has conceived, adopted, ordered and styled as a "replacement water plan" which allows diversions under junior ground water rights which affect hydrologically connected senior surface water rights by providing "replacement water" in amounts and at times which conflict with plaintiffs' water rights, which "replacement water plans" are issued without notice or hearing, upon the instigation of the Director, upon terms and conditions subjectively set by the Director, and such application of the Rules interferes with and impairs the legal rights and privileges of the plaintiffs represented by their water rights. See Exhibits B, C, D (May 6, 2005 Order Regarding IGWA Replacement Water Plan, June 24, 2005 Order Approving IGWA's Replacement Water Plan for 2005; and July 22, 2005 Supplemental Order Amending Replacement Water Requirements).

WHEREFORE, plaintiffs pray for relief as follows:

1. For an Order of this Court finding that application of the Rules, as adopted, does impair, or threatens to interfere with or impair, the rights of plaintiffs.
2. For an Order of this Court declaring that the procedures and requirements of the conjunctive management rules are void on their face because they are unconstitutional, contrary to law, and violate plaintiffs' water rights and constitutional rights and defendants' duties.
3. For an Order of this Court declaring that defendants' application of the conjunctive management rules to plaintiffs' requests for delivery of water is unconstitutional, contrary to law, and violates plaintiffs' water rights and constitutional rights and defendants' duties.
4. For an Order awarding costs and attorney fees to the plaintiffs.
5. For such other and further relief as this Court deems just and equitable.

DATED this 15 day of August, 2005.

ARKOOSH LAW OFFICES, CHTD.

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\_\_\_\_\_  
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DATED this 15<sup>th</sup> day of August, 2005.

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COMPLAINT

WHEREFORE, plaintiffs pray for relief as follows:

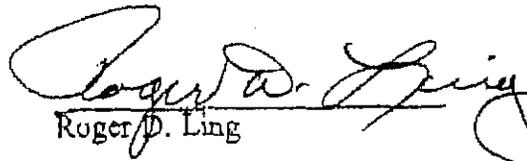
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COMPLAINT

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IDAPA 37  
TITLE 03  
CHAPTER 11

37.03.11 - RULES FOR CONJUNCTIVE MANAGEMENT OF SURFACE  
AND GROUND WATER RESOURCES

000. LEGAL AUTHORITY (RULE 0).

These rules are promulgated pursuant to Chapter 52, Title 67, Idaho Code, the Idaho Administrative Procedure Act, and Section 42-603, Idaho Code, which provides that the Director of the Department of Water Resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. These rules are also issued pursuant to Section 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department. (10-7-94)

001. TITLE AND SCOPE (RULE 1).

These rules may be cited as "Rules for Conjunctive Management of Surface and Ground Water Resources". The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply. It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently. (10-7-94)

002. WRITTEN INTERPRETATIONS (RULE 2).

In accordance with Section 67-5201(19)(b)(iv), Idaho Code, the Department of Water Resources does not have written statements that pertain to the interpretation of the rules of this chapter, or to the documentation of compliance with the rules of this chapter. (10-7-94)

003. ADMINISTRATIVE APPEALS (RULE 3).

Appeals may be taken pursuant to Section 42-1701A, Idaho Code, and the department's Rules of Procedure, IDAPA 37.01.01. (10-7-94)

004. SEVERABILITY (RULE 4).

The rules governing this chapter are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance is declared invalid, that invalidity does not affect the validity of any remaining portion of this chapter. (10-7-94)

005. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 5).

Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law. (10-7-94)

006. -- 009. (RESERVED).

010. DEFINITIONS (RULE 10).

For the purposes of these rules, the following terms will be used as defined below. (10-7-94)

01. **Area Having a Common Ground Water Supply.** A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. (Section 42-237a.g., Idaho Code) (10-7-94)

02. **Artificial Ground Water Recharge.** A deliberate and purposeful activity or project that is performed in accordance with Section 42-234(2), Idaho Code, and that diverts, distributes, injects, stores or spreads water to areas from which such water will enter into and recharge a ground water source in an area having a common ground water supply. (10-7-94)

03. **Conjunctive Management.** Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground

- water supply. (10-7-94)
04. **Delivery Call.** A request from the holder of a water right for administration of water rights under the prior appropriation doctrine. (10-7-94)
05. **Department.** The Department of Water Resources created by Section 42-1701, Idaho Code. (10-7-94)
06. **Director.** The Director of the Department of Water Resources appointed as provided by Section 42-1801, Idaho Code, or an employee, hearing officer or other appointee of the Department who has been delegated to act for the Director as provided by Section 42-1701, Idaho Code. (10-7-94)
07. **Full Economic Development of Underground Water Resources.** The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42. (10-7-94)
08. **Futile Call.** A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource. (10-7-94)
09. **Ground Water Management Area.** Any ground water basin or designated part thereof as designated by the Director pursuant to Section 42-233(b), Idaho Code. (10-7-94)
10. **Ground Water.** Water under the surface of the ground whatever may be the geological structure in which it is standing or moving as provided in Section 42-230(a), Idaho Code. (10-7-94)
11. **Holder of a Water Right.** The legal or beneficial owner or user pursuant to lease or contract of a right to divert or to protect in place surface or ground water of the state for a beneficial use or purpose. (10-7-94)
12. **Idaho Law.** The constitution, statutes, administrative rules and case law of Idaho. (10-7-94)
13. **Junior-Priority.** A water right priority date later in time than the priority date of other water rights being considered. (10-7-94)
14. **Material Injury.** Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42. (10-7-94)
15. **Mitigation Plan.** A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply. (10-7-94)
16. **Person.** Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character. (10-7-94)
17. **Petitioner.** Person who asks the Department to initiate a contested case or to otherwise take action that will result in the issuance of an order or rule. (10-7-94)
18. **Reasonable Ground Water Pumping Level.** A level established by the Director pursuant to Sections 42-226, and 42-237a.g., Idaho Code, either generally for an area or aquifer or for individual water rights on a case-by-case basis, for the purpose of protecting the holders of senior-priority ground water rights against unreasonable lowering of ground water levels caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law. (10-7-94)

19. **Reasonably Anticipated Average Rate of Future Natural Recharge.** The estimated average annual volume of water recharged to an area having a common ground water supply from precipitation, underflow from tributary sources, and stream losses and also water incidentally recharged to an area having a common ground water supply as a result of the diversion and use of water for irrigation and other purposes. The estimate will be based on available data regarding conditions of diversion and use of water existing at the time the estimate is made and may vary as these conditions and available information change. (10-7-94)
20. **Respondent.** Persons against whom complaints or petitions are filed or about whom investigations are initiated. (10-7-94)
21. **Senior-Priority.** A water right priority date earlier in time than the priority dates of other water rights being considered. (10-7-94)
22. **Surface Water.** Rivers, streams, lakes and springs when flowing in their natural channels as provided in Sections 42-101 and 42-103, Idaho Code. (10-7-94)
23. **Water District.** An instrumentality of the state of Idaho created by the Director as provided in Section 42-604, Idaho Code, for the purpose of performing the essential governmental function of distribution of water among appropriators under Idaho law. (10-7-94)
24. **Watermaster.** A person elected and appointed as provided in Section 42-605, and Section 42-801, Idaho Code, to distribute water within a water district. (10-7-94)
25. **Water Right.** The legal right to divert and use or to protect in place the public waters of the state of Idaho where such right is evidenced by a decree, a permit or license issued by the Department, a beneficial or constitutional use right or a right based on federal law. (10-7-94)

011. -- 019. (RESERVED).

020. GENERAL STATEMENTS OF PURPOSE AND POLICIES FOR CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER RESOURCES (RULE 20).

01. **Distribution of Water Among the Holders of Senior and Junior-Priority Rights.** These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply. (10-7-94)
02. **Prior Appropriation Doctrine.** These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law. (10-7-94)
03. **Reasonable Use of Surface and Ground Water.** These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule. (10-7-94)
04. **Delivery Calls.** These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued. (10-7-94)

05. **Exercise of Water Rights.** These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made. (10-7-94)

06. **Areas Having a Common Ground Water Supply.** These rules provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in incorporating the water rights within such areas into existing water districts or creating new districts as provided in Section 42-237a.g., and Section 42-604, Idaho Code, or designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code. (10-7-94)

07. **Sequence of Actions for Responding to Delivery Calls.** Rule 30 provides procedures for responding to delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district or designated a ground water management area. Rule 40 provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created. Rule 41 provides procedures for responding to delivery calls within areas that have been designated as ground water management areas. Rule 50 designates specific known areas having a common ground water supply within the state. (10-7-94)

08. **Reasonably Anticipated Average Rate of Future Natural Recharge.** These rules provide for administration of the use of ground water resources to achieve the goal that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge. (Section 42-237a.g., Idaho Code) (10-7-94)

09. **Saving of Defenses.** Nothing in these rules shall affect or in any way limit any person's entitlement to assert any defense or claim based upon fact or law in any contested case or other proceeding. (10-7-94)

10. **Wells as Alternate or Changed Points of Diversion for Water Rights From a Surface Water Source.** Nothing in these rules shall prohibit any holder of a water right from a surface water source from seeking, pursuant to Idaho law, to change the point of diversion of the water to an inter-connected area having a common ground water supply. (10-7-94)

11. **Domestic and Stock Watering Ground Water Rights Exempt.** A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury. (10-7-94)

021. - 029. (RESERVED).

030. **RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS WITHIN AREAS OF THE STATE NOT IN ORGANIZED WATER DISTRICTS OR WITHIN WATER DISTRICTS WHERE GROUND WATER REGULATION HAS NOT BEEN INCLUDED IN THE FUNCTIONS OF SUCH DISTRICTS OR WITHIN AREAS THAT HAVE NOT BEEN DESIGNATED GROUND WATER MANAGEMENT AREAS (RULE 30).**

01. **Delivery Call (Petition).** When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at least, the following in addition to the information required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 230: (10-7-94)

a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water. (10-7-94)

b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records. (10-7-94)

c. All information, measurements, data or study results available to the petitioner to support the claim of material injury. (10-7-94)

d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated. (10-7-94)

02. **Contested Case.** The Department will consider the matter as a petition for contested case under the Department's Rules of Procedure, IDAPA 37.01.01. The petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 203. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter. (10-7-94)

03. **Informal Resolution.** The Department may initially consider the contested case for informal resolution under the provisions of Section 67-5241, Idaho Code, if doing so will expedite the case without prejudicing the interests of any party. (10-7-94)

04. **Petition for Modification of an Existing Water District.** In the event the petition proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, and the water rights have been adjudicated, the Department may consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure. (10-7-94)

05. **Petition for Creation of a New Water District.** In the event the petition proposes regulation of ground water rights from a ground water source or conjunctively with surface water rights within an area having a common ground water supply which is not in an existing water district, and the water rights have been adjudicated, the Department may consider such to be a petition for creation of a new water district and notice of proposed creation of a water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

06. **Petition for Designation of a Ground Water Management Area.** In the event the petition proposes regulation of ground water rights from an area having a common ground water supply within which the water rights have not been adjudicated, the Department may consider such to be a petition for designation of a ground water management area pursuant to Section 42-233(b), Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

07. **Order.** Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district; (10-7-94)

d. Incorporate an area having a common ground water supply into an organized water district following the procedures of Section 42-604, Idaho Code, provided that the ground water rights that would be incorporated into the water district have been adjudicated relative to the rights already encompassed within the district; (10-7-94)

e. Create a new water district following the procedures of Section 42-604, Idaho Code, provided that

the water rights to be included in the new water district have been adjudicated; (10-7-94)

f. Determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and respondents and initiate such adjudication pursuant to Section 42-1406, Idaho Code; (10-7-94)

g. By summary order as provided in Section 42-237 a.g., Idaho Code, prohibit or limit the withdrawal of water from any well during any period it is determined that water to fill any water right is not there available without causing ground water levels to be drawn below the reasonable ground water pumping level, or would affect the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. The Director will take into consideration the existence of any approved mitigation plan before issuing any order prohibiting or limiting withdrawal of water from any well; or (10-7-94)

h. Designate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights. (10-7-94)

08. **Orders for Interim Administration.** For the purposes of Rule Subsections 030.07.d. and 030.07.e., an outstanding order for interim administration of water rights issued by the court pursuant to Section 42-1417, Idaho Code, in a general adjudication proceeding shall be considered as an adjudication of the water rights involved. (10-7-94)

09. **Administration Pursuant to Rule 40.** Upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40. (10-7-94)

10. **Administration Pursuant to Rule 41.** Upon the designation of a ground water management area, the diversion and use of water within such area shall be administered in accordance with the priorities of the various water rights as provided in Rule 41. (10-7-94)

**031. DETERMINING AREAS HAVING A COMMON GROUND WATER SUPPLY (RULE 31).**

01. **Director to Consider Information.** The Director will consider all available data and information that describes the relationship between ground water and surface water in making a finding of an area of common ground water supply. (10-7-94)

02. **Kinds of Information.** The information considered may include, but is not limited to, any or all of the following: (10-7-94)

a. Water level measurements, studies, reports, computer simulations, pumping tests, hydrographs of stream flow and ground water levels and other such data; and (10-7-94)

b. The testimony and opinion of expert witnesses at a hearing on a petition for expansion of a water district or organization of a new water district or designation of a ground water management area. (10-7-94)

03. **Criteria for Findings.** A ground water source will be determined to be an area having a common ground water supply if: (10-7-94)

a. The ground water source supplies water to or receives water from a surface water source; or (10-7-94)

b. Diversion and use of water from the ground water source will cause water to move from the surface

water source to the ground water source.

(10-7-94)

c. Diversion and use of water from the ground water source has an impact upon the ground water supply available to other persons who divert and use water from the same ground water source.

(10-7-94)

04. **Reasonably Anticipated Average Rate of Future Natural Recharge.** The Director will estimate the reasonably anticipated average rate of future natural recharge for an area having a common ground water supply. Such estimates will be made and updated periodically as new data and information are available and conditions of diversion and use change.

(10-7-94)

05. **Findings.** The findings of the Director shall be included in the Order issued pursuant to Rule Subsection 030.07.

(10-7-94)

032. -- 039. (RESERVED).

040. **RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (RULE 40).**

01. **Responding to a Delivery Call.** When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

(10-7-94)

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or

(10-7-94)

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

(10-7-94)

02. **Regulation of Uses of Water by Watermaster.** The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in Section 42-604, Idaho Code, and under the following procedures:

(10-7-94)

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source.

(10-7-94)

b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director.

(10-7-94)

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority.

(10-7-94)

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by Section 42-606, Idaho Code.

(10-7-94)

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated. (10-7-94)

03. **Reasonable Exercise of Rights.** In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste. (10-7-94)

04. **Actions of the Watermaster Under a Mitigation Plan.** Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan. (10-7-94)

05. **Curtailment of Use Where Diversions Not In Accord With Mitigation Plan or Mitigation Plan Is Not Effective.** Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights. (10-7-94)

06. **Collection of Assessments Within Water District.** Where a mitigation plan has been approved, the watermaster of the water district shall include the costs of administration of the plan within the proposed annual operation budget of the district; and, upon approval by the water users at the annual water district meeting, the water district shall provide for the collection of assessment of ground water users as provided by the plan, collect the assessments and expend funds for the operation of the plan; and the watermaster shall maintain records of the volumes of water or other compensation made available by the plan and the disposition of such water or other compensation. (10-7-94)

**041. ADMINISTRATION OF DIVERSION AND USE OF WATER WITHIN A GROUND WATER MANAGEMENT AREA (RULE 41).**

01. **Responding to a Delivery Call.** When a delivery call is made by the holder of a senior-priority ground water right against holders of junior-priority ground water rights in a designated ground water management area alleging that the ground water supply is insufficient to meet the demands of water rights within all or portions of the ground water management area and requesting the Director to order water right holders, on a time priority basis, to cease or reduce withdrawal of water, the Director shall proceed as follows: (10-7-94)

a. The petitioner shall be required to submit all information available to petitioner on which the claim is based that the water supply is insufficient. (10-7-94)

b. The Director shall conduct a fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area. (10-7-94)

02. **Order.** Following the hearing, the Director may take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Find that the water supply of the ground water management area is insufficient to meet the

demands of water rights within all or portions of the ground water management area and order water right holders on a time priority basis to cease or reduce withdrawal of water, provided that the Director shall consider the expected benefits of an approved mitigation plan in making such finding. (10-7-94)

d. Require the installation of measuring devices and the reporting of water diversions pursuant to Section 42-701, Idaho Code. (10-7-94)

03. **Date and Effect of Order.** Any order to cease or reduce withdrawal of water will be issued prior to September 1 and shall be effective for the growing season during the year following the date the order is given and until such order is revoked or modified by further order of the Director. (10-7-94)

04. **Preparation of Water Right Priority Schedule.** For the purposes of the Order provided in Rule Subsections 041.02 and 041.03, the Director will utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule. (10-7-94)

042. **DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).**

01. **Factors.** Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following: (10-7-94)

a. The amount of water available in the source from which the water right is diverted. (10-7-94)

b. The effort or expense of the holder of the water right to divert water from the source. (10-7-94)

c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply. (10-7-94)

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. (10-7-94)

e. The amount of water being diverted and used compared to the water rights. (10-7-94)

f. The existence of water measuring and recording devices. (10-7-94)

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system. (10-7-94)

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority. (10-7-94)

02. **Delivery Call for Curtailment of Pumping.** The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan. (10-7-94)

043. MITIGATION PLANS (RULE 43).

01. **Submission of Mitigation Plans.** A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

- a. The name and mailing address of the person or persons submitting the plan. (10-7-94)
- b. Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)
- c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)
- d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

02. **Notice and Hearing.** Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

03. **Factors to be Considered.** Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

- i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)
- j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)
- k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)
- l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)
- m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)
- n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)
- o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

044. -- 049. (RESERVED).

050. AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY (RULE 50).

01. **Eastern Snake Plain Aquifer.** The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. (10-7-94)

- a. The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River. (10-7-94)
- b. The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply. (10-7-94)
- c. The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer will be estimated in any order issued pursuant to Rule 30. (10-7-94)
- d. The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area. (10-7-94)

051. -- 999. (RESERVED).

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MAY 19 2005

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 IGWA  
REPLACEMENT WATER  
PLAN

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of the *Idaho Ground Water Appropriators' Initial Plan for Providing Replacement Water* ("Replacement Water Plan"), submitted to the Department on April 29, 2005, by the Idaho Ground Water Appropriators, Inc. ("IGWA") on behalf of its members, which include, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, Southwest Irrigation District, and North Snake Ground Water District (collectively referred to as "the Districts").

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")<sup>1</sup> delivered to the Director a letter ("Letter") regarding *Request for Water Right Administration in Water District*

<sup>1</sup> 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.



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.

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 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").

8. 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 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.

9. The Amended Order provides that no later than 5:00 p.m. on April 29, 2005, "the <sup>18C</sup> 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.

10. "The plan will be disallowed, approved, or approved with conditions by May 6, <sup>18C</sup> 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.

11. 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.

12. 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." *Id.* at p. 45, ¶ 2.

13. "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.

14. 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.

15. 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.

16. 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.*

17. 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.

18. "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.

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

### The Districts' Replacement Water Plan

20. Before 5:00 p.m. on April 29, 2005, IGWA, on behalf of the Districts, filed its Replacement Water Plan with the Department, purporting to comply with paragraph 9, page 46, of the Director's May 2, 2005, Amended Order, which required a plan for providing replacement water to the Coalition.

21. The Districts state in their Replacement Water Plan that the mitigation plan that was filed on February 8, 2005, *Application for Approval of Mitigation Plan (AFR) and Ground Water Districts' Mitigation Plan for American Falls Reach of the Snake River*, "is broad enough in scope and substance to satisfy the minimum requirements the Director's Order imposes on the 120/130 Districts for 2005." *Replacement Water Plan* at p. 2. "However, because the Director's Order contains requirements not contemplated in the February 2005 Mitigation Plan, and because it provides a specific obligation for replacement water in 2005, this Replacement Water Plan is submitted to comply with the Director's Order." *Id.*

22. While the Districts state they are not withdrawing or amending their February 2005 Mitigation Plan, the Districts declare that "[t]o the extent that this Replacement Water Plan is deemed a mitigation plan under the Department's Conjunctive Management Rules . . . the . . .

Districts incorporate herein by reference each provision of the February Mitigation Plan as may be required by such rules to be included in a mitigation plan under consideration by the Department." *Id.* at p. 3.

23. The Districts' Replacement Water Plan describes sources and amounts of water to be used for replacement purposes, as well as mitigation credits that should accrue in 2005 and subsequent years.

24. According to the Replacement Water Plan, IGWA, on behalf of the Districts, "commits to make available 27,700 acre-feet of replacement water during the 2005 irrigation season . . . from one or more of the sources shown in Attachment A." *Id.* at p. 3. "Unless the Director otherwise requires, IGWA will determine which of the[] water sources [described in Attachment A] will be provided to meet the 2005 Replacement Obligation, and will, at the appropriate time, notify the Director in writing and authorize him to take immediate control of such water and instruct the District 1 Watermaster or other agents or employees to deliver it to fulfill the 2005 Replacement Obligation." *Id.*

25. The first page of Attachment A describes the replacement water sources as follows:

2005 Replacement Water Sources

<u>Source</u>	<u>Acre-Feet</u>
FMC Lease	6,820
New Sweden Irr. Dist.	15,000
Peoples Canal Co.	3,000
Snake River Valley Irr. Dist.	2,000
Grindstone-Butte, et al. (High-lift exchange)	47,970*
United Water Idaho (High-lift exchange)	9,833**
<b>Subtotal -- Surface water supplies</b>	<b>84,623</b>
WD 120 Dry-Year Leasing	2,522***
<b>Subtotal -- Above Milner water</b>	<b>87,145</b>

\* Based on total 2005 lease of 58,500 AF at 82% exchange credit from USBOR. Letter of Intent executed between Ground Water Districts and Lessors. Exchange Agreement with USBOR is pending.

\*\* Based on total 2005 lease of 11,992 AF at 82% exchange credit from USBOR. Execution of lease agreement with Lessor and exchange agreement with USBOR are pending.

\*\*\* Eight separate dry-year lease agreements affecting 1,261 total acres in Bingham and Power Counties have been executed. Total associated consumptive use foregone in 2005 is 6,828 AF. First year reach gain increase in Blackfoot to Milner reach is 520 AF. Second year reach gain increase is 344 AF.

*Replacement Water Plan, Attachment "A".*

26. The second page of Attachment A is titled "Lease Program Offers," and summarizes Water District No. 120 dry-year leases.

### **Replacement Water Provided by Storage**

27. Documentation is provided in Attachment B to the Replacement Water Plan that verifies that IGWA, on behalf of the Districts, has entered into agreements to secure, for replacement purposes, the water described in Attachment A. *Replacement Water Plan* at p. 3.

28. The first document in Attachment B, dated April 28, 2005, is an agreement by the Peoples Canal & Irrigation Co. "to lease 3,000 A/F of water to the ground water users, represented by Lynn Tominaga [IGWA Executive Director]. The water will be available upon receipt of payment for the water as agreed."

29. The second document in Attachment B, dated April 28, 2005, is an agreement by Snake River Valley Irrigation District with Mr. Tominaga to "lease 2000 af of water for the 2005 irrigation season."

30. The third document in Attachment B, dated March 15, 2005, is a Private Lease Agreement whereby the New Sweden Irrigation District agrees to lease 15,000 acre-feet of water to the Water District 01 Rental Pool as mitigation water for "Bonneville/Jefferson and Bingham and American Falls/Aberdeen Ground Water Districts. . . . [U]pon the payment of the appropriate Rental Pool fees, and the approval of the Watermaster, the parties of this agreement agree and request that the Watermaster change the point of delivery for 15,000 acre-feet of storage from New Sweden Irrigation to the Ground Water Districts, for the year ending October 1, 2005."

31. IGWA, on behalf of the Districts, proposes to dedicate Snake River storage water totaling 20,000 acre-feet as replacement water.

### **Deficiencies in Stored Water Proposal**

32. IGWA submitted evidence of an agreement between IGWA and holders of storage water entitlements for rental of storage water by IGWA for the benefit of the Districts. IGWA did not submit documentation that the storage had been placed in the Water District 01 Rental Pool and was committed to IGWA for release as mitigation.

### **Lease of FMC Ground Water Right**

33. The first line of Page 1 of Attachment A refers to an "FMC Lease" of 6,820 acre-feet of water.

34. In 2002, American Falls-Aberdeen Ground Water District and Bonneville-Jefferson Ground Water District leased all or portions of water right nos. 29-2284, 29-2301, and 29-11342 from FMC. In a letter dated August 6, 2002, the Department recognized a mitigation

credit to those ground water districts of 6,819.87 acre-feet of water resulting from the lease and nonuse of the FMC water rights.

### Deficiencies in Proposed Lease of FMC Ground Water Right

35. IGWA did not submit documentation showing that it has executed an agreement with FMC to lease FMC water rights during 2005. Furthermore, IGWA did not submit documentation showing that water not diverted under FMC's water rights will be delivered as surface water flow to the Coalition as replacement water by placing the leased rights in Idaho State Water Bank for mitigation by IGWA and then renting the rights from the Water Bank for delivery to one or more members of the Coalition, or other acceptable means of delivery.

### Dry-Year Leases

36. The second page of Attachment A is titled "Lease Program Offers," and cross-references to the line item "WD 120 Dry-Year Leasing" on page 1 of Attachment A. The dry-year leases are summarized on the second page of Attachment A as follows:

Name	Water Right	Total Acres	Flow Rate (cfs)
KBC Farms LLC	35-2426	291	3.4
J. Henry Olsen	35-2384	296	4.5
	35-7092		1.07
Foster Land and Cattle	35-02653	250	9.0
	35-12933		
Foster Land and Cattle	35-2503A	200	3.63
Howard & Joy Klempel	35-2550	95	2.7
William Toevs	35-8626	129	1.88

37. IGWA summarizes the augmentation to the Snake River flows resulting from the proposed dry-year leases in a footnote associated with page 1 of Attachment A. The footnote asserts that these dry-year leases will increase reach gains 520 acre-feet during the first year, and 344 acre-feet the second year. IGWA bases the reach gain increase on a foregone consumptive use of 6,828 acre-feet resulting from non-irrigation of 1,261 acres.

### Deficiencies in Dry-Year Lease Proposal

38. The title "Lease Program Offers" infers that offers to lease ground water rights have been extended by IGWA, but IGWA did not submit copies of executed contracts for lease of the water.

39. Department staff reviewed the water right records of the water rights proposed for dry-year leases. Summaries of the water right records are attached to this order as Attachment 1.

40. Department staff found several inconsistencies in the page titled "Lease Program Offers." The inconsistencies are contrasted in parenthesis and bold text next to the original information presented by IGWA:

Name	Water Right	Total Acres	Flow Rate (cfs)
KBC Farms LLC (Grandview Properties LTD)	35-2426	291	3.4
J. Henry Olsen	35-2384 35-7092	296 <b>(320)</b>	4.5 1.07
Foster Land and Cattle (Thayne R. Gneiting)	35-02653 35-12933	250 <b>(461)</b> <b>(439)</b>	9.0
Foster Land and Cattle (Thayne R. Gneiting)	35-2503A	200 <b>(276)</b>	3.63
Howard & Joy Klempel	35-2550	95	2.7
William Toevs	35-8626	129	1.88

41. IGWA did not submit documentation showing that the places of use described by the above water rights were irrigated in 2004 or were not irrigated during continuous, consecutive past years preceding 2005 as part of a mitigation plan to provide replacement water to the Snake River between Near Blackfoot and Minidoka.

42. Crops grown on 1,261 acres cannot consume 6,828 acre-feet of water.

## Snake River Natural Flow Water Right Lease and Exchange

43. The fourth document in Attachment B, dated April 1, 2005, is a Letter of Intent between IGWA, on behalf of the Districts, and Glens Ferry, Murphy, and Mountain Home Groups ("high lift pumpers"). The purpose of the relationship between the parties to the Letter "is to acquire water rights by lease and/or purchase to facilitate a Water Exchange Agreement with the Bureau of Reclamation . . . . Pursuant to the Exchange Agreement the acquired water rights will be exchanged for water in the Upper Snake River Basin in order to augment Snake River flows above Milner Dam during the irrigation season to mitigate for ground water pumping in the Eastern Snake Plain Aquifer . . . ." The second page of the Letter, marked "Redacted," states "[a] Lease Agreement will be entered into pursuant to which the Owners will lease to the Districts 58,500 AF . . . for the 2005 irrigation season based upon a minimum of 3AFA. The rent will be (redacted) for 46,500 AF subject to the Purchase Option ('Option') described below, and (redacted) for 12,000 AF not subject to the Option, a total rent of (redacted)." Furthermore, "an irrevocable and exclusive Option to purchase approximately 53,100 AF" was contemplated.

44. The fifth document in Attachment B, is a package of agreements for water, signed during the month of April 2005, between IGWA and various water providers, entities, and private person for lease during the 2005 irrigation season, lease/option to purchase during the 2005 irrigation season, and option to sell.

## Deficiencies in the Snake River Natural Flow Water Right Lease and Exchange

45. IGWA, on behalf of the Districts, did not submit executed contracts between it and the high lift pumpers for lease of the high lift pumpers' water rights during the 2005 irrigation season. Moreover, IGWA did not submit documentation establishing that the USBR has consented to the exchange of the water left undiverted by the high lift pumpers for storage in the Upper Snake River reservoirs that IGWA can dedicate to the Coalition as replacement water.

## Overlap with Other Ongoing Mitigation

46. In addition to its obligation to provide at least 27,700 acre-feet of replacement water in 2005, the Districts state that they will provide 45,500 acre-feet of water from one or more of the sources described in Attachment A for the following three purposes:

- 1) provide water to the Sandy Pipeline Ponds to augment the water supply to water right holders in the Billingsley Creek subreach of the Thousand Springs Reach ('TSR');
- 2) provide a surface water source for irrigation of lands previously converted from ground water irrigation as part of ongoing, stipulated and Department-approved mitigation actions of these Districts; and
- 3) potentially undertake small-scale, targeted recharge intended to augment the water supply to water right holders in the TSR.

*Replacement Water Plan* at p. 4.

### Deficiency in Overlap with Other Ongoing Mitigation

47. IGWA, on behalf of the Districts, did not describe how the water delivered to the Sandy Pipeline Ponds, lands previously converted from ground water irrigation, and recharge augmenting the water supply to the Thousand Springs Reach, will replace any water in the Near Blackfoot to Minidoka Reach of the Snake River. Without an analysis of the reach gains to the Near Blackfoot to Minidoka Reach resulting from these efforts to supply replacement water to the Thousand Springs Reach, no credit will be recognized for activities providing water to a different source of surface water supply.

### Mitigation Credits

48. According to the Replacement Water Plan, the "Districts intend to document and take full credit for all reach gains demonstrated by the Department's ESPA model to accrue to the AFR in 2005 and subsequent years . . ." *Id.* at 5. Credits will be claimed by the District for reach gains attributable to Water District No. 130 mitigation actions, reach gains attributable to voluntary curtailments of ground water withdrawals in 2005, reach gains attributable to previous years' mitigation, recognition of mitigation credits for separate mitigation plans, and additional accounting for mitigation at season's end. *Id.* at p. 5-7.

### Deficiencies in Mitigation Credits

49. IGWA, on behalf of the Districts, did not submit documentation to establish reach gains that accrued in past years or that will accrue in 2005 because of past mitigation activities of IGWA or its member ground water districts.

50. All reach gains resulting from past activities have already accrued to the Snake River, increased the flow of the Snake River, and have reduced the predicted deficit in the minimum reasonable supply of water for the Coalition. IGWA should not receive any credit for these benefits already derived.

## 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 stream 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. The temporary plan submitted by IGWA for providing replacement water will contribute sufficient water to supply the minimum requirement of 27,700 acre-feet of water during the 2005 irrigation season if additional information and commitments by IGWA are submitted to IDWR.

6. The additional information and commitments must be submitted on or before May 23, 2005, in order for the ground water users in Water Districts No. 120 and No. 130 to avoid curtailment. *AKC*

7. Despite IGWA's request for flexibility in determining the source of water from which replacement water will be provided, the Director should determine an order of source preference for recognizing credit for replacement water. The order of preference is determined by the magnitude of the deficiencies identified in the findings of fact, the estimated time within which the deficiencies can be corrected, and the ease of monitoring the delivery of the replacement water. The sources of replacement water in order of preference are: storage water, FMC leased water, dry-year leases, natural flow leases and associated exchanges for storage, and credit for other mitigation activities.

## 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:

1. That IGWA's one-year proposal to provide replacement water will provide the necessary reach gains during the 2005 irrigation season and is **APPROVED** provided IGWA submits information in the following order of preference until a total of 27,700 acre-feet has been secured to provide replacement water to the Coalition. Rearrangement of all or a portion of the order of preference must be justified in writing by increases in the magnitude of present deficiencies, increases in the time within which assigned tasks can be accomplished, or increases in the difficulty of accomplishing the tasks.

2. IGWA must submit the following:

- a. Documentation that the 20,000 acre-feet of storage water proposed for lease from Peoples Irrigation Company, the Idaho Irrigation District, and the New Sweden Irrigation District, and any other storage water available or dedicated to IGWA for replacement water is leased to the Water District 01 Rental Pool for delivery to and use as replacement water by the Coalition. Delivery of this water for any other mitigation or replacement requirements will not be recognized by the Director as replacement water for the Coalition unless IGWA technically determines the Near Blackfoot to Minidoka reach gains resulting from the other mitigation activities as confirmed by the Department.
- b. Documentation that 6,820 acre-feet of water has been leased from FMC to the Idaho State Water Bank and rented by IGWA as replacement water for delivery to one or more members of the Coalition.
- c. Documentation about the dry-year leases as follows:
  - i. Copies of contracts with the current owners of the water rights leased;
  - ii. Original change of ownership documents for any new owners of the leased water rights accompanied by the appropriate change of ownership filing fees;
  - iii. Information reconciling the discrepancies and inconsistencies between flow rate, acreage irrigated, and total volume of consumptive use foregone, as discussed in Finding 40;
  - iv. Identification of the lands described as a place of use that will be dried up within each 40-acre parcel; and
  - v. Aerial imagery and sworn statement that the lands described by the dry-year lease water rights were irrigated in 2004 or have been continuously and uninterruptedly not been irrigated for multiple years because of a mitigation plan already approved by the Department.
- d. Documentation about high lift water rights and exchanges as follows:
  - i. Copies of executed contracts to lease water rights authorizing diversion from Snake River natural flow; and

- ii. An approved exchange of water rights authorizing the exchange of water rights authorizing diversion of Snake River natural flow, and leased by IGWA, with storage water held by the USBR physically deliverable between Near Blackfoot and Minidoka.

3. The exchange must be approved under Idaho Code § 42-240 or as a temporary exchange under Idaho Code § 42-222A. Any temporary exchange must be preceded by a drought declaration for all the counties in which water will be diverted or left in the Snake River pursuant to the exchange.

4. Technical information regarding the reach gains to the Snake River between Near Blackfoot and Minidoka resulting from mitigation efforts that overlap the proposals by IGWA, or resulting in reach gains in 2005 from past mitigation efforts.

IT IS FURTHER ORDERED that information required by this order must be submitted <sup>✓PZ</sup> by May 23, 2005, to fully remedy deficiencies identified in this order for at least 27,700 acre-feet of replacement water. Any request for extension of time of this deadline will be approved by the Director only upon a showing of good cause.

IT IS FURTHER ORDERED that failure to submit the information curing deficiencies for 27,700 acre-feet of replacement water on or before the due date will result in immediate curtailment consistent with the Director's Amended Order issued on May 2, 2005.

IT IS FURTHER ORDERED that any replacement water provided by the above instructions in excess of the 27,700 acre-feet will be credited toward the 101,000 acre-feet owed for 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 6<sup>th</sup> day of May 2005.

  
\_\_\_\_\_  
KARL J. DREHER  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1<sup>st</sup> day of May, 2005, 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](mailto:alo@cableone.net)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

W. KENT FLETCHER  
FLETCHER LAW OFFICE  
PO BOX 248  
BURLEY ID 83318-0248  
(208) 878-2548  
[wkf@pmt.org](mailto:wkf@pmt.org)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

ROGER D. LING  
LING ROBINSON  
PO BOX 396  
RUPERT ID 83350-0396  
(208) 436-6804  
[lnrlaw@pmt.org](mailto:lnrlaw@pmt.org)

U.S. Mail, Postage Prepaid  
 Facsimile  
 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](mailto:jar@idahowaters.com)  
[ilt@idahowaters.com](mailto:ilt@idahowaters.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JOHN SIMPSON  
BARKER ROSHOLT  
PO BOX 2139  
BOISE ID 83701-2139  
(208) 344-6034  
[jks@idahowaters.com](mailto:jks@idahowaters.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JEFFREY C. FEREDAY  
MICHAEL C. CREAMER  
GIVENS PURSLEY LLP  
PO BOX 2720  
BOISE ID 83701-2720  
(208) 1300  
[cfr@givenspursley.com](mailto:cfr@givenspursley.com)  
[mccr@givenspursley.com](mailto:mccr@givenspursley.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

SCOTT CAMPBELL  
MOFFATT THOMAS  
PO BOX 829  
BOISE ID 83701  
(208) 385-5384  
[slc@moffatt.com](mailto:slc@moffatt.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

KATHLEEN CARR  
OFFICE OF THE FIELD SOLICITOR  
550 W FORT STREET MSC 020  
BOISE ID 83724  
(208) 334-1378

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

GAIL MCGARRY PN-3100  
US BUREAU OF RECLAMATION  
1140 N CURTIS ROAD  
BOISE ID 83706-1234  
(208) 378-5066  
[emcgarry@pn.usbr.gov](mailto:emcgarry@pn.usbr.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

RON CARLSON  
LEWIS ROUNDS  
IDWR  
900 N SKYLINE DR  
IDAHO FALLS ID 83402-6105  
(208) 525-7177  
[ron.Carlson@idwr.idaho.gov](mailto:ron.Carlson@idwr.idaho.gov)  
[lewis.rounds@idwr.idaho.gov](mailto:lewis.rounds@idwr.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 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](mailto:allen.merritt@idwr.idaho.gov)  
[cindy.yenter@idwr.idaho.gov](mailto:cindy.yenter@idwr.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

COPY

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE  
STATE OF IDAHO

MAY 27 2005

Handwritten initials

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, MINIDOKA )  
IRRIGATION DISTRICT, NORTH SIDE )  
CANAL COMPANY, AND TWIN FALLS )  
CANAL COMPANY )

ORDER APPROVING  
IGWA'S REPLACEMENT  
WATER PLAN FOR 2005

On April 19, 2005, the Director of the Department of Water Resources ("Director" or "Department") 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 in 2005 by consumptive diversion of ground water under junior priority rights. As part of the Order, the Director ordered 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.

On April 29, 2005, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a *Plan for Providing Replacement Water* on behalf of its members, which include, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, Southwest Irrigation District, and North Snake Ground Water District (collectively referred to as "the Districts").

On May 6, 2005, the Department issued an *Order Regarding IGWA Replacement Water Plan*. The order conditionally approved IGWA's replacement water plan for 2005. The order also identified deficiencies in the replacement plan, and required that IGWA submit additional information to correct deficiencies on or before May 23, 2005.

On May 23, 2005, IGWA submitted a document titled *IGWA Information Submittal Responding to May 6, 2005 Order Regarding IGWA Replacement Water Plan*. On June 3, 2005, IGWA submitted another document titled *IGWA's Supplement to Information Submittal*.

CC: CLIENT Letter 6/27/05 etc



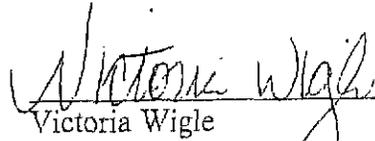
COURTESY COPY

JOSEPHINE P. BEEMAN  
BEEMAN & ASSOC.  
409 W JEFFERSON  
BOISE ID 83702  
(208) 331-0954  
[jo.beeman@beemanlaw.com](mailto:jo.beeman@beemanlaw.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

MICHAEL GILMORE  
ATTORNEY GENERAL'S OFFICE  
PO BOX 83720  
BOISE ID 83720-0010  
(208) 334-2830  
[mike.gilmore@ag.idaho.gov](mailto:mike.gilmore@ag.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

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

COPY

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE  
STATE OF IDAHO

MAY 27 2005

HC

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, MINIDOKA )  
IRRIGATION DISTRICT, NORTH SIDE )  
CANAL COMPANY, AND TWIN FALLS )  
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CC: CLIENT Letter 6/27/05 HC



## FINDINGS OF FACT

The following findings of fact summarize the deficiencies identified in the *Order Regarding IGWA Replacement Water Plan* of May 6, 2005, and discuss whether the deficiencies are adequately addressed by the responses of May 23 and June 3, 2005, by IGWA.

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 will hereafter be referred to as "the Surface Water Coalition" or "the Coalition."

### Private Leases of Storage Water

#### **Previous Deficiencies**

1. IGWA was required to provide "[d]ocumentation that the 20,000 acre-feet of storage water proposed for lease from Peoples Irrigation Company, the Idaho Irrigation District, and the New Sweden Irrigation District, and any other storage water available or dedicated to IGWA for replacement water is leased to the Water District 01 Rental Pool for delivery to and use as replacement water by the Coalition. Delivery of this water for any other mitigation or replacement requirements will not be recognized by the Director as replacement water for the Coalition unless IGWA technically determines the Near Blackfoot to Minidoka reach gains resulting from the other mitigation activities as confirmed by the Department."

#### **Additional Information Analysis**

2. IGWA submitted executed lease agreements with Peoples Irrigation Company, the Idaho Irrigation District, and the New Sweden Irrigation District that lease a total of 20,000 acre-feet of storage water. IGWA also submitted a letter from Ron Carlson, Watermaster for Water District No. 01, confirming that the 20,000 acre-feet of storage water is dedicated for use by the ground water districts.

#### **Allocation of Stored Water from Private Leases**

3. The portion of the stored water from private leases provided as replacement water to members of the Surface Water Coalition pursuant to the Amended Order of May 2, 2005, must be allocated to the members of the Surface Water Coalition in the 2005 irrigation year (November 1, 2004, through October 31, 2005).

4. Since the Department will make the allocation, the portion of the stored water from private leases provided as replacement water to members of the Surface Water Coalition must be assigned to the Department.

## FMC Lease

### **Previous Deficiencies**

5. IGWA was required to submit “[d]ocumentation that 6,820 acre-feet of water has been leased from FMC to the Idaho State Water Bank and rented by IGWA as replacement water for delivery to one or more members of the Coalition.”

### **Additional Information Analysis**

6. IGWA submitted information confirming a valid private lease agreement between FMC Idaho, L.L.C. and American Falls-Aberdeen Ground Water District, Bingham Ground Water District, and Bonneville-Jefferson Ground Water District to lease water right nos. 29-2284 and 29-2301 and claim no. 29-11342. IGWA also submitted copies of checks executed in 2005 for lease of the FMC water rights. Finally, IGWA submitted an application to lease water to the Idaho Water Resource Board Water Supply Bank (“Water Supply Bank”) and a parallel application to lease the same water rights from the Water Supply Bank. The Department has not yet approved the lease applications.

7. In reviewing the water right records, the Department found that the Snake River Basin Adjudication (“SRBA”) District Court disallowed claim no. 29-11342 in 2004. FMC is presently attempting to obtain leave of the Court to file a late claim for a similar amount of water that was transferred by the City of Pocatello under water right no. 29-2338. The validity, ownership, and historical place of use must be established prior to recognition of claim no. 29-11342 as a basis for providing replacement water to the members of the Surface Water Coalition.

8. In a letter written by Norman C. Young, dated August 2, 2002, the Department approved 6,820 acre-feet of mitigation resulting from non-use of the FMC water rights. The 6,820 acre-feet included a contribution from claim no. 29-11342. The letter of August 2, 2002, was sent prior to disallowal of claim no. 29-11342 in the SRBA. The letter stated that the Department might further adjust the volume recognized for mitigation based on further review. The Department has determined that the pro-rata portion of the 6,820 acre-feet attributable to claim no. 29-11342 is 796 acre-feet. Subtracting 796 acre-feet from 6,820 acre-feet leaves a remainder replacement credit for the FMC lease of 6,024 acre-feet.

## Dry Year Leases

### **Previous Deficiencies**

9. IGWA was required to submit copies of contracts with current owners; change of ownership documents; information reconciling discrepancies and

inconsistencies between flow rate, acreage irrigated, and total volume of consumptive use foregone; identification of lands that will be dried up within each 40-acre parcel; and aerial imagery and sworn statements that the lands described were irrigated in 2004 or have been continuously and uninterruptedly not irrigated for multiple years because of a mitigation plan already approved by the Department.

#### Additional Information Analysis

10. IGWA submitted information about all of the water rights originally proposed for dry year lease except for water right no. 35-2550, held by Howard and Joyce Klempel. As a result, water right no. 35-2550 was removed from the dry year lease proposal.

11. IGWA submitted acceptable change of ownership documentation and copies of lease contracts with the current owners. Inconsistencies about water use were resolved by submittal of 2005 satellite imagery. The acreage to be dried up was not identified by 40-acre parcel, but water use was reviewed and confirmed by Lewis Rounds, Watermaster for Water District No. 120.

12. The following is a revised table from the Order of May 6, 2005, that recognizes leases to dry-up acreage irrigated in 2004.

Name	Water Right	Total Acres Irrigated Per WD 120 Review	Flow Rate Reduced (cfs)
KBC Farms LLC	35-2426	291	3.4
J. Henry Olsen	35-2384 35-7092	296	4.5 1.07
Foster Land and Cattle	35-02653 35-12933	250	2.5
Foster Land and Cattle	35-2503A	200	2.63
William Toevs	35-8626	129	1.88

13. The information listed above and associated information from the water rights was input into the ground water model for the Eastern Snake Plain Aquifer ("ESPA"), and the model was run to determine the reach gains for Near Blackfoot to Minidoka resulting from cessation of pumping. Based on the model results, it was determined that in 2005, the dry year leases result in a reach gain of 435 acre-feet.

14. If the reach gain attributable to the dry year leases is not identified and delivered directly to the Surface Water Coalition members, the gain may be diverted by

other water right holders whose water rights bear earlier priority dates than the priority dates of the rights held by the members of the Surface Water Coalition. Although not identified as a deficiency in the Director's Order of May 6, 2005, applications for lease to and from the Water Supply Bank must be approved for the dry year lease water rights.

### Snake River Natural Flow Water Right Lease and Exchange

#### **Previous Deficiencies**

15. IGWA was required to submit copies of executed contracts to lease water rights authorizing diversion from Snake River natural flow, and an exchange approved by the Department allowing the exchange of water rights authorizing diversion of Snake River natural flow, and leased by IGWA, with storage of water held or leased by the United States Bureau of Reclamation ("USBR") that is physically deliverable between Near Blackfoot and Minidoka.

#### **Additional Information Analysis**

16. IGWA submitted executed lease agreements with Snake River natural flow water right holders. IGWA proposes to lease Snake River water rights to/from the Water Supply Bank authorizing the irrigation of 23,683.5 acres and associated water volume of 75,048 acre-feet. In addition, IGWA agreed to lease an additional 4,644 acre-feet from the Water Supply Bank. The total volume of water proposed to be leased from the Water Supply Bank is 79,692 acre-feet.

17. Department staff generally reviewed the lands and associated water rights. Staff concluded that the lease agreement water rights are likely to be accepted for lease into and from the Water Supply Bank. The exact quantity of water leased may change when more carefully reviewed by Department staff. Department staff will refine the acreage and volumes eligible for Water Supply Bank acceptance by corresponding with IGWA, the USBR, and the water right holders.

18. IGWA has not yet submitted agreements with the USBR to exchange the Snake River natural flow water rights leased with storage water held or leased by the USBR in the reservoirs above Milner Dam. The Department has not yet received an application for exchange.

19. Because of ongoing negotiations with the USBR, IGWA is unable to execute a contract with the USBR until additional verification confirms how much water is available for lease and exchange with storage water. The Department understands the USBR will reduce the storage exchanged with the natural flow leased from the Water Supply Bank by 80.65 percent. Multiplying 79,692 acre-feet by 0.8065 results in 64,272 acre-feet. This is the approximate amount of Snake River storage water that will be available to IGWA for replacement water.

### **Allocation of Stored Water from Exchange with Snake River Natural Flow**

20. The portion of the stored water from exchange with Snake River natural flow leased by IGWA and provided as replacement water to members of the Surface Water Coalition pursuant to the Amended Order of May 2, 2005, must be allocated to the members of the Surface Water Coalition in the 2005 irrigation year (November 1, 2004, through October 31, 2005).

21. Since the Department will make the allocation, the portion of the stored water from exchange with Snake River natural flow leased by IGWA and provided as replacement water to members of the Surface Water Coalition must be assigned to the Department.

### **Review of Water Supply Information**

22. In paragraph 10 of the Section titled "Order" in the orders of April 19 and May 2, 2005, the Director stated he "will monitor water supply requirements and the water supplies available throughout the irrigation season and may issue additional orders or instructions to the watermasters as conditions warrant."

23. Following issuance of the Amended Order on May 2, 2005, May rainfall over the Snake River watershed significantly exceeded normal precipitation.

24. On June 14, 2005, IGWA filed a motion titled *IGWA's Motion to Reduce Replacement Water Obligation* seeking a review by the Director of the Director's determination of its obligation to provide replacement water to members of the Surface Water Coalition following the significantly above-average spring precipitation over the Snake River watershed.

25. As of the date of this order, storage in the Snake River Reservoirs has not been allocated to the storage space holders.

### **CONCLUSIONS OF LAW**

1. The Department recognizes, as replacement water in 2005, 20,000 acre-feet of storage water leased from the Peoples Irrigation Company, the Idaho Irrigation District, and the New Sweden Irrigation District.

2. The Department recognizes as replacement water in 2005, 6,024 acre-feet leased by agreement from FMC Idaho, L.L.C. that will be leased into and from the Water Supply Bank by IGWA, and will be delivered as natural flow to the Surface Water Coalition members.

3. The Department recognizes, as replacement water in 2005, 435 acre-feet of reach gain resulting from dry year leases during the 2005 irrigation season. The water rights must be leased into and from the Idaho Water Supply Bank by IGWA and delivered as natural flow to the Surface Water Coalition members. Additional reach gain to the Snake River accruing after the irrigation season by nondiversion in 2005 will also be credited to future mitigation requirements.

4. The Department recognizes that approximately 64,272 acre-feet of water will be made available in 2005 from USBR storage as a result of an anticipated exchange between the USBR and the IGWA.

5. IGWA has submitted sufficient information for the Director to recognize replacement water in excess of the 27,700 acre feet required in 2005 by the Amended Order of May 2, 2005.

6. Stored water from private leases and exchange with Snake River natural flow leased by IGWA and provided as replacement water must be assigned to the Department for allocation to members of the Surface Water Coalition.

7. Because of significant changes in water supply conditions, the Director should review whether the changes in water supply would also change the extent of material injury likely to be incurred in 2005 by members of the Surface Water Coalition.

### ORDER

IT IS HEREBY ORDERED that IGWA's Replacement Water Plan is Approved for 2005 as follows:

- (1) Replacement water of 20,000 acre-feet of storage water leased from the Peoples Irrigation Company, the Idaho Irrigation District, and the New Sweden Irrigation District.
- (2) Replacement water of 6,024 acre-feet leased from FMC Idaho, L.L.C.
- (3) Replacement water of 435 acre-feet reach gains during the 2005 irrigation season resulting from nonirrigation of lands idled in 2005.
- (4) Replacement water of approximately 64,272 acre-feet of storage water stored in Snake River reservoirs exchanged with the USBR that can be allocated to members of the Surface Water Coalition. The volume of storage water recognized as replacement water in 2005 may be amended upon further review as the leases and exchanges are processed.

IT IS FURTHER ORDERED that natural flow resulting from the FMC lease and the leases of nonirrigated farmland shall be delivered first to the Surface Water Coalition members when the natural flow water rights held by members of the Surface Water Coalition are not otherwise filled in 2005.

IT IS FURTHER ORDERED that IGWA must assign storage water rented directly from one of the upper Snake River water delivery organizations to the Department for allocation to the Surface Water Coalition members until the lease and exchange arrangements with the USBR are complete. None of the 20,000 acre-feet can be used for any other purpose until at least 21,241 acre-feet (obligation for 2005, less FMC lease, and less idled lands) are available for delivery from a storage water held or leased by the USBR that has been placed at the disposal of IGWA, for assignment to the Department for allocation, through an exchange approved by the Department.

IT IS FURTHER ORDERED that replacement water activities related to lease and exchange of Snake River natural flow water rights will be conducted within the normal Water Supply Bank and application for exchange processes. The final quantity of replacement water available for exchange with the USBR will also be determined by these administrative processes.

IT IS FURTHER ORDERED that the Director will review the Snake River water supply available to the Surface Water Coalition members following the allocation of storage in the Snake River reservoirs, and determine whether changes in the water supply also justify changes to the extent of injury predicted to likely occur to members of the Surface Water Coalition.

Dated this 24<sup>th</sup> day of June 2005.

  
\_\_\_\_\_  
KARL J. DREHER  
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24<sup>th</sup> day of June, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

TOM C. ARKOOSH  
ARKOOSH LAW OFFICES  
PO BOX 32  
GOODING ID 83330  
(208) 934-8873  
[alo@cableone.net](mailto:alo@cableone.net)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

W. KENT FLETCHER  
FLETCHER LAW OFFICE  
PO BOX 248  
BURLEY ID 83318-0248  
(208) 878-2548  
[wkfi@pmt.org](mailto:wkfi@pmt.org)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

ROGER D. LING  
LING ROBINSON  
PO BOX 396  
RUPERT ID 83350-0396  
(208) 436-6804  
[lnrlaw@pmt.org](mailto:lnrlaw@pmt.org)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JOHN A. ROSHOLT  
TRAVIS L. THOMPSON  
BARKER ROSHOLT  
113 MAIN AVENUE WEST, SUITE 303  
TWIN FALLS ID 83301-6167  
(208) 735-2444  
[jar@idahowaters.com](mailto:jar@idahowaters.com)  
[tlt@idahowaters.com](mailto:tlt@idahowaters.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JOHN K. SIMPSON  
BARKER ROSHOLT  
PO BOX 2139  
BOISE ID 83701-2139  
(208) 344-6034  
[jks@idahowaters.com](mailto:jks@idahowaters.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JEFFREY C. FEREDAY  
MICHAEL C. CREAMER  
GIVENS PURSLEY  
PO BOX 2720  
BOISE ID 83701-2720  
(208) 388-1200  
[cfi@givenspursley.com](mailto:cfi@givenspursley.com)  
[mcc@givenspursley.com](mailto:mcc@givenspursley.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

SCOTT L. CAMPBELL  
MOFFATT THOMAS  
PO BOX 829  
BOISE ID 83701  
(208) 385-5384  
[slc@moffatt.com](mailto:slc@moffatt.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

KATHLEEN M. CARR  
OFFICE OF THE FIELD SOLICITOR  
550 WEST FORT STREET MSC 020  
BOISE ID 83724  
(208) 334-1378

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

GAIL MCGARRY PN-3100  
US BUREAU OF RECLAMATION  
1140 NORTH CURTIS ROAD  
BOISE ID 83706-1234  
(208) 378-5066  
[emcgarry@pn.usbr.gov](mailto:emcgarry@pn.usbr.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JOSEPHINE P. BEEMAN  
BEEMAN & ASSOCIATES  
409 WEST JEFFERSON STREET  
BOISE ID 83702  
(208) 331-0954  
[jo.beeman@beemanlaw.com](mailto:jo.beeman@beemanlaw.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

SARAH A. KLAHN  
WHITE & JANKOWSKI  
511 16TH STREET, SUITE 500  
DENVER CO 80202  
[sarahk@white-jankowski.com](mailto:sarahk@white-jankowski.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

MICHAEL S. GILMORE  
ATTORNEY GENERAL'S OFFICE  
PO BOX 83720  
BOISE ID 83720-0010  
(208) 334-2830  
[mike.gilmore@ag.idaho.gov](mailto:mike.gilmore@ag.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

TERRY T. UHLING  
J.R. SIMPLOT COMPANY  
999 MAIN STREET  
BOISE ID 83702  
(208) 336-2110  
[tuhling@simplot.com](mailto:tuhling@simplot.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JAMES C. TUCKER  
IDAHO POWER COMPANY  
1221 WEST IDAHO STREET  
BOISE ID 83702  
(208) 388-2112  
[jamestucker@idahopower.com](mailto:jamestucker@idahopower.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JAMES S. LOCHHEAD  
BROWNSTEIN HYATT & FARBER  
410 17TH STREET, 22ND FLOOR  
DENVER CO 80202  
(303) 223-1100  
[jlochhead@bhf-law.com](mailto:jlochhead@bhf-law.com)

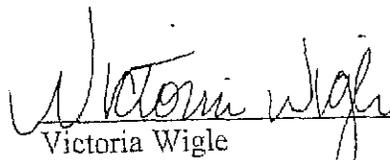
U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

RON CARLSON  
LEWIS ROUNDS  
IDWR  
900 NORTH SKYLINE DRIVE  
IDAHO FALLS ID 83402-6105  
(208) 525-7177  
[ron.carlson@idwr.idaho.gov](mailto:ron.carlson@idwr.idaho.gov)  
[lewis.rounds@idwr.idaho.gov](mailto:lewis.rounds@idwr.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

ALLEN MERRITT  
CINDY YENTER  
IDWR  
1341 FILLMORE STREET, SUITE 200  
TWIN FALLS ID 83301-3033  
(208) 736-3037  
[allen.merritt@idwr.idaho.gov](mailto:allen.merritt@idwr.idaho.gov)  
[cindy.yenter@idwr.idaho.gov](mailto:cindy.yenter@idwr.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail



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

COPY

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 )

SUPPLEMENTAL  
ORDER AMENDING  
REPLACEMENT WATER  
REQUIREMENTS

On April 19, 2005, the Director of the Department of Water Resources ("Director" or "Department") 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*. These entities, or members, are referred to herein as the "Surface Water Coalition" or "Coalition." The Order of April 19, 2005, was amended on May 2, 2005 (herein referred to as the "May 2 Order").

The May 2 Order included a determination that surface water rights held by or for the benefit of members of the Surface Water Coalition were reasonably likely to incur material injury in 2005 because of the diversion and consumptive uses of ground water under junior priority water rights. In response, the Director ordered ground water districts representing certain holders of junior priority ground water rights to provide replacement water pursuant to a plan submitted to the Department no later than April 29, 2005.

In determining that senior priority water rights were reasonably likely to incur material injury, the Director found that "[w]hether effects of ground water depletions result in material injury to the senior priority surface water rights held by the members of the Surface Water Coalition in a particular year depends in large part on the total water supply, under natural flow water rights and from reservoir storage, and in some instances supplemental ground water rights, otherwise available to each member of the Coalition in that year." *May 2 Order* at p. 19, Finding 88.

Findings in the May 2 Order set forth the following process in making the determination whether senior surface water rights held by or for the benefit of members of the Surface Water Coalition would be reasonably likely to incur material injury in 2005:

- (1) Determine the minimum full water supply for irrigation (natural flow and reservoir storage releases) for the most recent year when the members of the Surface Water Coalition (the Director determined that 1995 was the most recent year that the members of the Surface Water Coalition received a minimum full water supply);

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CLIENT letter



- (2) Compare the forecast as of April 1, 2005, for unregulated inflow from the Upper Snake River Basin for the time period of April 1, 2005, through July 31, 2005, with historic unregulated inflow from the Upper Snake River Basin for the period of April 1 through July 31;
- (3) Select a year or years of similar unregulated inflow and assume that:
  - (a) natural flow diversions in 2005 will be essentially the same as the natural flow diversions in the similar year(s); (b) water stored in the reservoirs after April 1 in the similar year(s) added to the volume actually stored as of April 1, 2005, adjusted for evaporation, will be the total reservoir storage available for release and use in 2005; and (c) the sum of the predicted natural flow diversions and the predicted reservoir storage, adjusted for evaporation, constitutes the "the predicted 2005 water supply"; and
- (4) For each member of the Surface Water Coalition, subtract the predicted total water supply for 2005 from the minimum full water supply needed, and to the remainder<sup>1</sup> add the amount of carryover storage reasonably needed assuming a drought year in 2006, unless the remainder is negative and the value equals or exceeds the reasonably needed carryover storage.

Finding 96 of the May 2 Order stated in pertinent part:

[I]t is reasonable to conclude that as for the American Falls Reservoir District #2, the North Side Canal Company, and the Twin Falls Canal Company, the A&B, Burley, Milner, and Minidoka irrigation districts each had a full supply of water in 1995 considering both natural flow and storage releases.

In Finding 100 of the May 2 Order, the Director determined that:

The joint operating forecast prepared by the USBR [United States Bureau of Reclamation] and the USACE [United States Army Corps of Engineers] for unregulated inflow from the Upper Snake River Basin predicted for the Heise Gage for the period April 1 through July 31 . . . predicts an unregulated inflow of 2,340,000 acre-feet. . . the predicted inflow is similar to the measured, unregulated inflows at the Heise Gage for two recent years in the present sequence of drought years, 2002 and 2004.

For each member of the Surface Water Coalition, the Director (1) averaged the 2002 and 2004 natural flow diversions; (2) estimated the 2005 storage allocation based on the average of the volume of water stored after April 1, 2002, and after April 1, 2004, added to the volume of water actually in storage on April 1, 2005, less estimated 2005 evaporation; and (3) summed the average natural flow diversions and estimated 2005 storage allocations. The sum of natural flow diversions averaged for 2002 and 2004 and the estimated 2005 storage allocations based on the

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<sup>1</sup> Negative remainder indicates water in excess of minimum needed without consideration of reasonable carryover storage needed. Positive remainder indicates shortage from minimum needed without consideration of reasonable carryover storage needed.

actual storage as of April 1, 2005, and the storage after April 1 averaged for 2002 and 2004 was deemed the predicted 2005 water supply for each Surface Water Coalition Member.

For each Surface Water Coalition Member, the predicted 2005 water supply was subtracted from the water supply in 1995, which was deemed the minimum full water supply needed. If the difference was greater than zero, the difference was the "Predicted Shortage in 2005." The total predicted shortage for 2005 for the members of the Surface Water Coalition that were predicted to incur shortages was 27,700 acre-feet.

Finding 119 of the May 2 Order established a reasonable amount of carryover storage at the end of 2005 for each member of the Surface Water Coalition "by averaging (1) the amounts of carryover storage required for Coalition members to have full supplies of water in 2006 if the divertible natural flow and storage accruals in 2006 are the same as in 2002 and (2) the amounts of carryover storage required for Coalition members to have full supplies of water in 2006 if the divertible natural flow and storage accruals in 2006 are the same as in 2004."

The "Predicted 2005 Material Injury" for each member of the Surface Water Coalition was determined by summing the "Predicted Shortage in 2005," if any, and the amount, if any, that the predicted carryover storage at the end of 2005 was less than the reasonable carryover storage determined in Finding 119 of the May 2 Order. The total "Predicted 2005 Material Injury" for all of the members of the Surface Water Coalition, computed by summing the predicted injury for each of the members, was 133,400 acre-feet, 101,000 acre-feet of which was determined to be caused by the diversion and consumptive use of ground water under junior priority rights in Water District No. 120 and No. 130 based on simulations using the Department's ground water model for the ESPA.

Following issuance of the May 2 Order, the Idaho Ground Water Appropriators, Inc. ("IGWA") proposed a replacement water plan, the Director ordered that IGWA submit additional information, and IGWA submitted a revised replacement water plan. The collective information submitted by IGWA will be referred to hereafter as "IGWA's Replacement Water Plan." On June 24, 2005, the Director issued his *Order Approving IGWA's Replacement Water Plan* (referred to hereafter as the "June 24 Approval Order").

IGWA's Replacement Water Plan, approved by the June 24 Approval Order, offered at least 27,700 acre-feet as replacement water for the Predicted Shortage in 2005.

The Director stated in the May 2 Order at page 47, paragraph 10:

The Director will monitor water supply requirements and the water supplies available throughout the irrigation season and may issue additional orders or instructions to the watermasters as conditions warrant.

Based upon the Director's consideration of changes in the water supplies available for the remainder of the 2005 irrigation season, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

## FINDINGS OF FACT

1. Following issuance of the May 2 Order, precipitation in May and June of 2005 was unusually high. In May of 2005, widespread areas in the Upper Snake River Basin received near or above 150 percent of the long-term average precipitation for May; with several locations receiving near or above 200 percent of average, and one location, Idaho Falls, receiving more than 275 percent of average. In June of 2005, widespread areas in the Upper Snake River Basin received well above 150 percent of the long-term average precipitation for June; with several locations receiving near or above 250 percent of average, and one location, Ashton, receiving just above 400 percent of average. *Natural Resources Conservation Service, U. S. Department of Agriculture.*

2. Along with some increase in snow accumulation and increased streamflows in the Upper Snake River Basin, the unusually high precipitation, coupled with cool temperatures in May and June, resulted in significant delay in irrigation demands for natural flow. Through about June 30, 2005, members of the Surface Water Coalition had limited needs to divert water for irrigation, and those limited needs were essentially satisfied with the available natural flow, although there were some small releases from reservoir storage in May and June.

3. The unusually high precipitation and cool temperatures in May and June, and the resulting delay in irrigation demands, also allowed runoff from the melting snow accumulation to be stored in Upper Snake River Basin Reservoirs that under normal conditions would have been diverted for irrigation.

4. On June 30, 2005, maximum storage in the Upper Snake River Basin Reservoirs had accrued. Preliminary accounting on June 30, 2005, showed Jackson, Walcott, American Falls, and the Palisades winter-water-savings accounts had filled to 100 percent. Henrys Lake had a total fill of 37,948 acre-feet (42.2 percent), Island Park had a fill of 133,218 acre-feet (98.7 percent), Grassy Lake had a fill of 10,406 acre-feet (68.4 percent), the Palisades 1939 water right had a fill of 427,701 acre-feet (45.5 percent), and Ririe had filled 2,641 acre-feet (3.3 percent). These reservoir fills included carryover storage from 2004 irrigation.

5. The U. S. Bureau of Reclamation ("USBR") and the U. S. Army Corps of Engineers ("USACE") jointly issue forecasts each year for unregulated inflow through July 31 at the Heise Gage after February 1, March 1, April 1, and May 1. The USBR and USACE do not jointly prepare forecasts for unregulated inflow after May 1.

6. On July 12, 2005, the Department requested that the USBR develop a forecast for the unregulated inflow at the Heise Gage for the period July 1, 2005, through September 30, 2005, the end of the 2005 water year. In response to the request, the USBR prepared a forecast for this period, predicting unregulated inflow at the Heise Gage of 875,000 acre-feet. This forecasted July 1 through September 30 unregulated inflow for 2005 is between the actual unregulated inflow for July 1 through September 30 in 2002 of 804,000 acre-feet and 923,000 acre-feet in 2004.

7. While acknowledging the uncertainty in predicting the remaining amount of unregulated inflow that may be divertible in 2005 under the water rights held by individual members of the Coalition, the average of the natural flow diverted in 2002 and 2004 during the

irrigation year continues to provide a reasonable likely projection of the natural flow that may be available for each member of the Coalition.

8. The average of the natural flow diverted in 2002 and 2004 for each member of the Surface Water Coalition is set forth in Finding 104 of the May 2 Order and is as follows with the allocations between the Burley and Minidoka irrigation districts based on the annual allocations used in the water rights accounting for 2002 and 2004, rather than canal diversions:

	2002 Diversions (acre-feet)	2004 Diversions (acre-feet)	Average Diversions (acre-feet)
A&B Irrigation District:	900	0	500
American Falls Res. Dist. #2:	17,800	100	9,000
Burley Irrigation District:	94,000 <sup>2</sup>	104,100 <sup>3</sup>	99,100
Milner Irrigation District:	5,100	3,600	4,400
Minidoka Irrigation District:	143,500 <sup>4</sup>	139,600 <sup>5</sup>	141,600
North Side Canal Company:	357,000	309,500	333,300
Twin Falls Canal Company:	855,100	883,500	869,300

9. The predicted natural flow diversions for the 2005 irrigation year based on the natural flow diversions averaged for 2002 and 2004 for each member of the Surface Water Coalition set forth in Finding 8 supercede the amounts set forth in Finding 104 of the May 2 Order.

10. On July 6, 2005, the following preliminary storage accruals for the benefit of the members of the Surface Water Coalition and estimated reservoir evaporation were determined by Water District No. 01:

<sup>2</sup> 39.6 percent of total natural flow diversions by Minidoka Project for the 2002 irrigation year.

<sup>3</sup> 42.7 percent of total natural flow diversions by Minidoka Project for the 2004 irrigation year.

<sup>4</sup> 60.4 percent of total natural flow diversions by Minidoka Project for the 2002 irrigation year.

<sup>5</sup> 57.3 percent of total natural flow diversions by Minidoka Project for the 2004 irrigation year.

	2005 Max. Storage (acre-feet)	2005 Evap. (acre-feet)	Preliminary 2005 Net Storage (acre-feet)
Jackson Lake:	847,000	22,000	825,000
Palisades Winter Water Savings:	259,600	6,700	252,900
Other Palisades Reservoir:	427,000	11,100	415,900
Henry's Lake:	34,300	900	33,400
Island Park Reservoir:	134,500	3,500	131,000
Grassy Lake:	0	0	0
Ririe Reservoir:	2,600	100	2,500
Amer. Falls Winter Water Sav.:	156,800	4,100	152,700
Other American Falls:	1,515,800	39,300	1,476,500
Lake Walcott:	95,200	2,500	92,700
Totals:	3,472,800	90,200	3,382,600

11. The preliminary storage accruals in 2005 for the benefit of the members of the Surface Water Coalition set forth in Finding 10 supercede the amounts set forth in Finding 105 of the May 2 Order.

12. Using the Department's accounting program for storage, the preliminary maximum storage, less estimated evaporation for 2005, was allocated among all reservoir storage spaceholders in the Upper Snake River Basin, which resulted in the following preliminary storage allocations for the members of the Surface Water Coalition. When the preliminary storage allocations are added to the natural flow predicted to be available for the 2005 irrigation year, as set forth in Finding 8, the predicted total supply for each member of the Coalition is considered to be a reasonably likely projection of the total amount of water that may be available to each member of the Coalition during the 2005 irrigation year, subject to variations caused by climatic conditions, for the limited purpose of assessing reasonably likely material injury caused by the diversion and use of ground water under junior priority rights. The reasonably likely predicted total supply for the 2005 irrigation year for each member of the Coalition is as follows:

	2005 Natural Flow (acre-feet)	2005 Storage (acre-feet)	Total 2005 Supply (acre-feet)
A&B Irrigation District:	500	77,100	77,600
American Falls Res. Dist. #2:	9,000	383,400	392,400
Burley Irrigation District:	99,100	220,600	319,700
Milner Irrigation District:	4,400	66,200	70,600
Minidoka Irrigation District:	141,600	340,300	481,900
North Side Canal Company:	333,300	837,600	1,170,900
Twin Falls Canal Company:	869,300	239,600	1,108,900

13. The reasonably likely predicted total supply for the 2005 irrigation year for the members of the Surface Water Coalition set forth in Finding 12 supercede the amounts set forth in Finding 106 of the May 2 Order.

14. To predict the shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition for the 2005 irrigation year, the amounts of water diverted for the 1995 irrigation year, as described in the May 2 Order, are deemed to be the minimum amounts needed for full deliveries to land owners and shareholders. If crop evapotranspiration is greater in 2005 or precipitation during the irrigation season is less than in 1995, the amounts of water diverted in 1995 may be less than what is needed for a full supply in 2005. If crop evapotranspiration is less in 2005 or precipitation during the irrigation season is greater than in 1995, the amounts of water diverted in 1995 may be more than what is needed for a full supply in 2005.

15. The shortages in surface water supplies that are reasonably likely for members of the Surface Water Coalition in 2005 are estimated by subtracting the reasonably likely total supplies of natural flow and storage for the 2005 irrigation year, set forth in Finding 12, from the minimum amounts needed for full deliveries based on diversions in 1995 as follows:

	Minimum Full Supply Needed (acre-feet)	Predicted 2005 Supply (acre-feet)	Predicted Shortages in 2005 (- is surplus) (acre-feet)
A&B Irrigation District:	50,000	77,600	-27,600
American Falls Res. Dist. #2:	405,600	392,400	13,200
Burley Irrigation District:	220,200 <sup>6</sup>	319,700	-99,500
Milner Irrigation District:	50,800	70,600	-19,800
Minidoka Irrigation District:	314,300 <sup>7</sup>	481,900	-167,600
North Side Canal Company:	988,200	1,170,900	-182,700
Twin Falls Canal Company:	1,075,900	1,108,900	-33,000

16. Of the members of the Surface Water Coalition, only the American Falls Reservoir District #2 has any remaining reasonably likely predicted shortages in 2005 (13,200 acre-feet). Finding 15 supercedes the amounts set forth in Finding 116 of the May 2 Order.

17. The reasonably likely material injury predicted for 2005 is the sum of the shortages set forth in Finding 15, if any, and the shortfalls in predicted carryover as compared to the reasonable amounts of carryover storage set forth in Finding 119 of the May 2 Order, if any. The following are the predicted amounts of injury and ending carryover storage for 2005 for the members of the Surface Water Coalition, assuming any material injury predicted for 2005 is mitigated with replacement water:

<sup>6</sup> 41.2 percent of total Minidoka Project diversions for the 1995 irrigation year from Water District 01 report.

<sup>7</sup> 58.8 percent of total Minidoka Project diversions for the 1995 irrigation year from Water District 01 report.

	Predicted 2005 Material Injury Shortages + Carryover Shortfalls (acre-feet)	Predicted 2005 Carryover (acre-feet)
A&B Irrigation District:	0	27,600
American Falls Res. Dist. #2:	64,400	51,200
Burley Irrigation District:	0	99,500
Milner Irrigation District:	0	19,800
Minidoka Irrigation District:	0	167,600
North Side Canal Company:	0	182,700
Twin Falls Canal Company:	5,400	38,400
Totals:	69,800	586,800

18. The reasonably likely material injury predicted for the 2005 irrigation year for the members of the Surface Water Coalition set forth in Finding 17 supercede the amounts set forth in Finding 120 of the May 2 Order.

19. The material injury predicted for 2005, as set forth in Finding 17, is reasonably likely. However, climatic conditions for the remainder of 2005 cannot be precisely predicted, meaning that the predicted material injury and the carryover storage, assuming the predicted material injury is mitigated with replacement water, are both likely to be greater or smaller.

20. On July 21, 2005, the National Weather Service Climate Prediction Center issued updated monthly and seasonal forecasts for temperature and precipitation. For the Upper Snake River Basin, which includes the lands irrigated by members of the Surface Water Coalition, the National Weather Service is forecasting that temperatures in 2005 are likely to be above normal during the month of August. The seasonal forecast for temperatures is also above normal for the months of August, September, and October. Additionally, seasonal precipitation in 2005 is forecasted to be below normal for the months of August, September, and October.

### CONCLUSIONS OF LAW

1. Conclusions of Law set forth in the May 2 Order, as applicable, are incorporated into this Supplemental Order.

2. Because of dynamic changes in water supply conditions, the Director must monitor the water supply conditions and determine whether predicted shortages to the water supplies available to individual members of the Surface Water Coalition during the 2005 irrigation year and corresponding predicted material injury to the water rights held by or for the benefit of individual members of the Coalition in 2005 are reasonable.

3. Based on changed water supply conditions, only the American Falls Reservoir District #2 is expected to incur a reasonably predicted shortage in available water supply during the 2005 irrigation season, and only the American Falls Reservoir District #2 and Twin Falls Canal Company are expected to incur reasonably predicted material injury during the 2005

irrigation season. The predicted shortage in the water supply available in 2005 to the American Falls Reservoir District #2 is 13,200 acre-feet, and the predicted material injuries to the American Falls Reservoir District #2 and the Twin Falls Canal Company are 64,400 acre-feet and 5,400 acre-feet, respectively.

4. Because there may or may not be actual shortages in the water supplies available to the individual members of the Surface Water Coalition, and because IGWA is providing replacement water in lieu of curtailment, the Director should hold the minimum amount of replacement water required for 2005 in the form of storage water provided by IGWA to be allocated by the Director among the members of the Coalition to offset actual shortages, as necessary, or to offset shortages in carry-over storage held by individual members of the Surface Water Coalition at the end of 2005, as determined by the Director to be reasonably needed.

5. Although water supply conditions for 2005 have improved, as reflected by the actual preliminary storage water allocations for individual members of the Surface Water Coalition compared with the storage water allocations predicted in the May 2 Order, the minimum amount of replacement water required for 2005 should remain at 27,700 acre-feet, given that the National Weather Service forecasts seasonal above normal temperatures and below average precipitation for the months of August, September, and October.

6. Because there may or may not be actual shortages in the amounts of carry-over storage determined by the Director to be reasonably needed for the individual members of the Surface Water Coalition at the end of the 2005 irrigation season, and because IGWA is providing replacement water in lieu of curtailment, the Director should wait until after the 2005 irrigation season to determine the amount of additional replacement water required to be provided by IGWA beyond 27,700 acre-feet that is necessary to mitigate for material injury determined by the Director in 2005.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that:

1. The minimum amount of replacement water to be provided by IGWA for mitigation in 2005 remains 27,700 acre-feet.
2. The minimum amount of replacement water required is to be provided from natural flow and storage water leased by IGWA or storage water obtained through exchange in 2005. The minimum amount of 27,700 acre-feet of natural flow and storage water is to be assigned by IGWA to the Director for allocation by the Director among the members of the Surface Water Coalition to offset actual shortages in the water supplies available to the individual members of the Coalition, as necessary, or to offset shortages in carry-over storage held by individual members of the Coalition at the end of 2005, as determined by the Director to be reasonably needed.
3. The Director will wait until after the 2005 irrigation season to determine the amount of additional replacement water required to be provided by IGWA that is necessary to mitigate for material injury determined by the Director in 2005 beyond the minimum amount of 27,700 acre-feet and the amounts provided through other approved actions of IGWA.

DATED this 22<sup>nd</sup> day of July, 2005.

  
\_\_\_\_\_  
KARL J. DREHER  
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of July, 2005, 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](mailto:alo@cableone.net)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

W. KENT FLETCHER  
FLETCHER LAW OFFICE  
PO BOX 248  
BURLEY ID 83318-0248  
(208) 878-2548  
[wkfi@pmt.org](mailto:wkfi@pmt.org)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

ROGER D. LING  
LING ROBINSON  
PO BOX 396  
RUPERT ID 83350-0396  
(208) 436-6804  
[lnrlaw@pmt.org](mailto:lnrlaw@pmt.org)

U.S. Mail, Postage Prepaid  
 Facsimile  
 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](mailto:jar@idahowaters.com)  
[tit@idahowaters.com](mailto:tit@idahowaters.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JOHN SIMPSON  
BARKER ROSHOLT  
PO BOX 2139  
BOISE ID 83701-2139  
(208) 344-6034  
[jks@idahowaters.com](mailto:jks@idahowaters.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JEFFREY C. FEREDAY  
MICHAEL C. CREAMER  
GIVENS PURSLEY LLP  
PO BOX 2720  
BOISE ID 83701-2720  
(208) 388-1300  
[cf@givenspurslev.com](mailto:cf@givenspurslev.com)  
[mcc@givenspurslev.com](mailto:mcc@givenspurslev.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

SCOTT CAMPBELL  
MOFFATT THOMAS  
PO BOX 829  
BOISE ID 83701  
(208) 385-5384  
[slc@moffatt.com](mailto:slc@moffatt.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

KATHLEEN CARR  
OFFICE OF THE FIELD SOLICITOR  
550 W FORT STREET MSC 020  
BOISE ID 83724  
(208) 334-1378

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

MATT HOWARD  
US BUREAU OF RECLAMATION  
1150 N CURTIS ROAD  
BOISE ID 83706-1234  
(208) 378-5003  
[mhoward@pn.usbr.gov](mailto:mhoward@pn.usbr.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

RON CARLSON  
LEWIS ROUNDS  
IDWR  
900 N SKYLINE DR  
IDAHO FALLS ID 83402-6105  
(208) 525-7177  
[ron.carlson@idwr.idaho.gov](mailto:ron.carlson@idwr.idaho.gov)  
[lewis.rounds@idwr.idaho.gov](mailto:lewis.rounds@idwr.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 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](mailto:allen.merritt@idwr.idaho.gov)  
[cindy.yenter@idwr.idaho.gov](mailto:cindy.yenter@idwr.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JOSEPHINE BEEMAN  
BEEMAN & ASSOC.  
409 W JEFFERSON  
BOISE ID 83702  
(208) 331-0954  
[jo.beeman@beemanlaw.com](mailto:jo.beeman@beemanlaw.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

MICHAEL GILMORE  
ATTORNEY GENERAL'S OFFICE  
PO BOX 83720  
BOISE ID 83720-0010  
(208) 334-2830  
[mike.gilmore@ag.idaho.gov](mailto:mike.gilmore@ag.idaho.gov)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

TERRY UHLING  
JR SIMPLOT CO  
999 MAIN STREET  
BOISE ID 83702  
[tuhling@simplot.com](mailto:tuhling@simplot.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

SARAH KLAHN  
WHITE JANKOWSKI  
511 16<sup>TH</sup> ST STE 500  
DENVER CO 80202  
[sarahk@white-jankowski.com](mailto:sarahk@white-jankowski.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JAMES TUCKER  
IDAHO POWER CO  
1221 W IDAHO ST  
BOISE ID 83702  
[jamestucker@idahopower.com](mailto:jamestucker@idahopower.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail

JAMES LOCHHEAD  
ADAM DEVOE  
BROWNSTEIN HYATT  
410 17<sup>TH</sup> ST 22<sup>ND</sup> FLOOR  
DENVER CO 80202  
[jlochhead@bhf-law.com](mailto:jlochhead@bhf-law.com)  
[adevoe@bhf-law.com](mailto:adevoe@bhf-law.com)

U.S. Mail, Postage Prepaid  
 Facsimile  
 E-mail



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