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

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| 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 | ) | **AFFIDAVIT OF NORMAN C. YOUNG** |

STATE OF IDAHO )
) ss:
COUNTY OF ADA )

I, Norman C. Young, after being duly sworn upon oath, states as follows:

## A. QUALIFICATIONS

1. My name is Norman C. Young. My business address is 3314 Grace Street, Boise, Idaho 83703.

2. Information on my education and experience is included in Paragraphs 2 through 6 on Pages 1 and 2 of an affidavit filed in this matter on September 26, 2007.

3. I have reviewed records maintained at the Idaho Department of Water Resources ("IDWR") central office located in Boise, Idaho related to the promulgation of the Conjunctive Management Rules ("CMRs"), IDAPA 37.03.11 in 1993 and 1994. The records show that a notice of intent to adopt rules was published on July 6, 1993, announcing IDWR's intention to pursue informal, negotiated rule making for the conjunctive management of interrelated surface and ground water sources within the Snake River Basin. An issue paper was distributed in September 1993, public information meetings were held on the issue paper later that month, with the assistance of an advisory committee rules were drafted, additional public meetings were held during March 1994, temporary rules were adopted in April 1994, and final rules were adopted with an effective date of October 7, 1994. The 1995 Idaho Legislature reviewed the rules and, because no formal action was taken, the rules remain in effect as adopted by IDWR.

4. As Administrator, Water Management Division, during this time period, I was involved in the rule adoption process, including drafting the issue paper, holding or participating at various public meetings and meetings of the advisory committee and drafting and revising versions of the rules.

5. During my employment at IDWR, and in particular during the rulemaking associated with the CMRs, part of my responsibility was to assist then Director Higginson in the compilation of comments to draft rules distributed by IDWR. As a part of that work I gained an understanding of the intent of the Director as he promulgated the rules and of the parties participating in the rulemaking. I do not recall that Mr. Sullivan participated in the negotiating sessions or submitted comments on his own behalf or on behalf of any interested party.

6. I have reviewed the following information in the preparation of this Affidavit:

    a. Direct testimony and expert reports entered in this matter on behalf of the City of Pocatello ("Pocatello") and Idaho Ground Water Appropriators, Inc. ("IGWA").
    b. Idaho's statutes concerning administration of water pursuant to the prior appropriation doctrine (herein referred to as "by priority of right").
    c. Rules adopted by IDWR for administration of water by priority of right, including the CMRs.
    d. IDWR guidelines, draft rules, issues papers, and written policies for administration of water by priority of right.

## B. ISSUES CONCERNING DISTRIBUTION OF WATER IN WATER DISTRICT NOS. 34, 110, 120 and 130.

The direct testimony and reports that have been filed in this matter by Gregory K. Sullivan, for City of Pocatello ("Pocatello") and Ronald Dean Carlson, for Idaho Ground Water Appropriators, Inc. ("IGWA") raise the following issues concerning administration of the distribution of water in Idaho:

### ISSUE No. 1. What is the Appropriate Procedure for Implementing Management Under the CMRs?

Gregory K. Sullivan ("Sullivan") suggests a procedure for addressing calls made under the CMRs. In his Direct Testimony, September 26, 2007 page 65 at line 3, Sullivan asserts:

> "In my opinion, the framework for conjunctive administration that is set forth in Exhibit 3031 is a reasonable, objective, and transparent approach for evaluating and administering the SWC delivery call."

**Response to Issue No. 1.**

The procedure proposed by Sullivan does not comply with the CMRs primarily because it recommends a process that would continue untimely water right regulation to the detriment of senior surface water right holders. He suggests the use of "replacement water plans," annual shortage estimates subject to revision during the irrigation season, and after-the-fact mitigation that does not address the injury to a senior priority water right.

The Eastern Snake Plain Aquifer ("ESPA") is defined as an area of "common ground water supply" (CMR 50.01) and is recognized as being interconnected with springs and reaches of the Snake River. Water contained within the ESPA, however it may have been added to the contents thereof, is ground water subject to allocation and distribution in accordance with priority of right under the laws of the state. The Snake River Basin Adjudication ("SRBA") Court has issued partial decrees for water rights diverting from the ESPA and entered orders authorizing interim administration in accordance with the partial decrees and Director's reports. The ESPA has been divided into water districts (Water District Nos. 100, 110, 120, 130, 140 and portions of existing Water District 34) created to accomplish regulation of hydraulically connected ground water rights by priority of right.

All pre-conditions necessary for IDWR to commence regulation by priority of right in the ESPA and its interconnected sources under the CMRs have been fully implemented and there is no further action needed to commence such regulation in accordance with the CMR procedures. In an area meeting these pre-conditions, as now are in place for the ESPA, the CMRs provide the following procedures for responding to priority calls by holders of senior priority surface water rights against holders of junior priority ground water rights (Ref. CMR 20.07):

1. If the ground water rights are from areas having a common ground water supply in an organized water district and the senior priority right upon which the call is based is found to be suffering material injury in accordance with CMR 42, IDWR shall, through the watermaster, require surface and ground water rights to be regulated by priority of right (CMR 40.01.a.) unless a mitigation plan has been approved by IDWR (CMR 40.01.b.). CMR 40.01.a. provides that the Director may, by order, allow curtailment to be phased in over 5 years if material injury is delayed or long range. When the order is effective, the watermaster is required to curtail junior ground water diversions if an approved mitigation plan is not in place.

2. A holder of a junior ground water right can file a mitigation plan for approval to avoid curtailment. The plan must be filed and reviewed in accordance with CMR 43. The timing of filing and approval of a mitigation plan is not dependent upon whether or not a call has been made or curtailment of junior ground water diversions is being required. The plan must address and fully compensate for the

long-term and delayed effects of pumping. It is the preparation and evaluation of a mitigation plan that requires material injury to be quantified in accordance with CMR 42.

3. CMR 40.02. provides the procedure for regulation of surface and ground water rights from areas having a common ground water supply in an organized water district. CMR 40.02.a. requires the watermaster to "assure that water is being diverted and used in accordance with the priorities of the respective rights from the surface water source." CMR 40.02.b. requires the watermaster to "regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director."

Sullivan's proposed implementation plan does not comply with the CMR procedure because:

1. Under Sullivan's proposed procedure, regulation is delayed until IDWR quantifies material injury using information submitted by the senior user. This shifts the burden of quantifying the material injury from the junior user to the senior user and prevents a timely response to a call for priority distribution of water.

2. Water replacement plans are prepared only during and for years that water supplies are forecasted to be short. The effect is to replace the permanent mitigation plan contemplated by the CMRs with a never-ending sequence of annual water replacement plans proposed and approved after the irrigation season has started. Water replacement plans as proposed by Sullivan are not defined, authorized or described in the CMRs.

3. Sullivan's proposed plan does not describe how and under what conditions curtailment will occur. His provision allowing a holder of a junior priority ground water right who fails to provide the required mitigation water to carry over the deficit to the following year would have the effect of preventing curtailment from ever being required.

4. Sullivan's proposal is deficient in the details of how the water supply forecast is initiated and who is responsible to carry out the various tasks required. For example, does the SWC have to anticipate that the year will be water short and file a call to trigger the water supply/water demand review? The plan does not include details on how the mitigation water will be provided. There are no deadlines dictating when mitigation water will be procured and made available for use. The absence of these details suggests that, at best, the mitigation water will be supplied after-the-fact, perhaps not until the following season. There are no contingency plans if storage or other water supplies cannot be procured to provide the required amount of mitigation.

5. A water replacement plan prepared and adopted only after an annual determination of shortage cannot provide assurance of replacement in kind, at the

time, place and in the amount needed as required by the CMRs. Senior users are forced to take the risk that the junior users will be able to procure replacement water when needed and that IDWR will faithfully require that it is provided.

6. A water replacement plan developed in accordance with the procedure proposed by Sullivan, contrary to the CMRs, is predicated on allowing short falls in replacement supplies to be made up in a subsequent year. After-the-fact mitigation is not effective to provide the water supplies needed by the senior user at the time it is needed. Because the quantity of mitigation water estimated in accordance with his plan is based upon minimum supplies needed to produce a crop, failure to deliver the required mitigation water will injure not only the senior priority water right, but damage the crops relying on the water right. Assuming that water is available the following year to "make-up" for the shortfall (and there is no assurance that it will be), the "extra" mitigation is of limited value to the senior user because the junior user is already obligated to provide adequate mitigation each year for shortages caused by ground water depletions. However, the junior user is forgiven the debt of repaying the required carryover mitigation if the senior user's space fills. Thus, all of the benefit of the proposed mitigation carryover policy is to the junior user failing to meet the mitigation obligation with no corresponding benefit to the senior user shorted by the junior's failure to supply mitigation.

7. A water replacement plan developed in accordance with the procedure proposed by Sullivan fails to provide for reasonable carryover storage as required by the CMRs.

**<u>ISSUE No. 2.</u> Is Regulation Within a Water District Based Upon Record Rights or Do the CMRs Provide for Re-evaluation of Recorded Rights During Regulation?**

The following excerpts demonstrate Sullivan's misunderstanding of recorded water rights as the basis for water right administration and instead supports a process whereby IDWR disregards a water right's quantity and priority in administration:

Sullivan, Direct Testimony, September 26, 2007 page 29 at line 5.

> "...I understand that the SWC is claiming that any reduction in their "paper" water right – that is the amount to which they are entitled through their license or non-SRBA decree - is injury to them."

Sullivan, Direct Testimony, September 26, 2007 page 23 at line 13:

> " Thus, it wasn't enough to compare the projected supplies with the licensed or decreed amounts – the delivery call inquiry also required a determination of how much water the individual SWC members would *need* [emphasis in the original] to meet their irrigation water requirements."

**Response to Issue No. 2.**

Contrary to Sullivan's assertions, the SWC entities understand that regulation of junior priority rights is only to the extent necessary to provide water at such times as the senior priority rights are calling for water for use in accordance with the senior water rights. This occurs on a daily basis in Water District 01. A senior's decreed right is entitled to protection in administration. Junior rights do not have the benefit to contest a senior's "need;" instead, the junior rights are curtailed to satisfy the senior's right. The SWC entities also understand that regulation of water under all rights, whether senior or junior priority, must be for the authorized beneficial use and without unreasonable waste. The following references document that regulation in accordance with the recorded quantity and priority of water rights is the basis for satisfying these regulatory objectives.

1. **Customary Understandings.** Wells A. Hutchins authored textbooks and treatises detailing the development and use of the Prior Appropriation Doctrine in Idaho and the other western states. The following references indicate that water right regulation is based upon the priority and quantity recorded for the rights:

- A prior appropriator is allowed to exercise his right to the fullest extent within the authorized beneficial use but the use must be reasonable. (*Water Rights Laws in the Nineteen Western States*, Volume 1, 1971, Wells A. Hutchins (page 649))

- A prior appropriator is held to the quantity of water he is able to divert and use at a particular time, within the limits of his appropriation. (*The Idaho Law of Water Rights*, 1956, Wells A. Hutchins, page 35)

- While factors of economy and reasonableness of use are required, these are not to be pushed to the point of unreasonableness upon the appropriator. (Ibid. page 35)

- Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of the water user and economy is not synonymous with minimum use. (Ibid. page 36)

- Determinations are case-by-case. (Ibid. page 53)

- It is generally true that watermasters are solely guided by the recorded rights. (Ibid. page 83)

- As with diversion and conveyance of water, the appropriator is not compelled to irrigate his land in the most scientific manner known. The system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as a standard, even though a more economical method might be installed at a higher cost to the irrigator. In the attainment of this aim, it is *unnecessary* waste that is not countenanced. [emphasis in the original] (*Water*

*Rights Laws in the Nineteen Western States*, Volume 1, 1971, Wells A. Hutchins (page 649))

**2. <u>Idaho Statutes.</u>** The permit, license or decree is the legal definition of a right for purposes of distribution of water by IDWR and watermasters, and is subject to revision only in accordance with provisions of law.

The following sections describe references in Idaho statutes providing for distribution in accordance with rights as they are recorded by permit, license and decree:

- It is the duty of the watermaster "to distribute the waters of the public stream, streams or water supply comprising a water district, among the several ditches taking water there from according to the prior rights of each respectively …". (Section 42-607, Idaho Code)

- IDWR is given the following responsibility in reporting claims to water rights to the court: "The director shall determine the following elements, to the extent the director deems appropriate and proper, to administer the water rights acquired under state law: … (c) the quantity of water used describing the rate of water diversion … or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right." (Section 42-1411(2), Idaho Code)

- Prior to entry of a final decree on claims to water rights, the court has the following authority: "The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code: (a) in accordance with the director's report or as modified by the court's order; (b) in accordance with applicable partial decree(s) for water rights acquired under state law; …". (Section 42-1418, Idaho Code)

- Upon entry of a final decree, "…the director shall administer the water rights by distributing water in accordance with the final decree and with title 42, Idaho Code." (Section 42-1413(2), Idaho Code)

These statutes describe regulation based upon the quantity and priority recorded for the right, not on a subjective determination of an estimated shortage continually open to challenge and revision that is never finalized until after-the-fact. Idaho law addresses and quantifies the beneficial use recognized in water right regulation as the rights are permitted, licensed and decreed. The following list references the provisions in Idaho statutes requiring determination of the amount of water required for the authorized beneficial use as rights are established in accordance with law and confirmed by decree.

- A determination of beneficial use is made in the issuance of a permit. (Section 42-202(1), Idaho Code);

- Proof of Beneficial Use requires a demonstration of beneficial use in accordance with the permit. (Section 42-217, Idaho Code);

- A determination of beneficial use is made in the issuance of a license. (Section 42-219, Idaho Code);

- "Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; ...". The statute further provides that "the right to continue the beneficial use shall never be denied or prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water, or for other reasons set forth in this title...". It also sets out the duty of water for irrigation and notes that use of water under the right is subject to local or community customs, rules and regulations. (Section 42-220, Idaho Code);

- The amount of water required for beneficial use under a water right is determined as the right is licensed or adjudicated. "... Such license shall be issued under the seal of the office of the department of water resources, and shall state the name and post-office address of such user, the purpose for which such water is used, the quantity of water which may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied. ... " (Section 42-219(1), Idaho Code. "In allotting the waters of any water system by the district court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied ...The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes ...". (Section 42-1402, Idaho Code);

- A determination of beneficial use is made in the adjudication of rights. (Section 42-1411(2), Idaho Code) This statute provides: "The director shall determine the following elements, to the extent the director deems appropriate and proper, to administer the water rights acquired under state law: ... (c) the quantity of water used describing the rate of water diversion or ... or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right.

The rights held by the SWC entities have been confirmed by licenses or decrees and are subject to adjudication in the SRBA. The SRBA is a judicial proceeding determining the nature and extent of beneficial use of all water rights as well as those matters necessary for the administration of the rights. It is a comprehensive determination structured to meet the requirements of the federal statute commonly called the "McCarran Amendment," that requires the court's determination to be final and conclusive for all rights within the scope of the proceeding. The SRBA determination of beneficial use provides value and certainty to the rights decreed. If beneficial use was made subject to adjustment as IDWR regulates diversion and use by priority of right, value and certainty

for these rights would be lost. Owners of water rights and those considering purchase of real property having water rights, whether from surface water or ground water, could not be certain of the use that can be made under the water right and of the conditions and constraints that may be attached to that use.

## 3. Idaho Court Decisions

- *American Falls Reservoir District No. 2 v. IDWR* (2007)
  - Nowhere do the Rules [CMRs] state that the senior must prove material injury before the Director will make such a finding. (page 14)
  - Clearly a timely response is required when a delivery call is made and water is necessary to respond to that call. (page 15)
  - The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post adjudication factors which are relevant to the determination of how much water is actually needed. (page 20)
  - The Rules [CMRs] may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. (page 20)
  - The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has. (page 20).

- *Musser v. Higginson, 125 Idaho at 396, 871 P.2d 809* (1994) – The court noted that it failed to see how the reasonable use doctrine (i.e.; the reasonable use provisions of the Ground Water Act) could have any application in the case because the Mussers have an 1892 water right which predates the enactment of the Ground Water Act and amendment in 1953. Rights held by the SWC entities predate the Ground Water Act.

- The SRBA District Court issued orders on January 8, 2002 authorizing interim administration for areas now in Water Districts 120 and 130. These orders authorized regulation in accordance with the Director's reports and partial decrees, pursuant to Chapter 6, Title 42, Idaho Code based upon the court's determination that such interim administration is necessary to protect senior priority water rights.

## 4. IDWR Policies and Procedures

- Practices in Water District 01 and other Districts provide for automatic delivery based upon recorded water rights without further analysis of the use of water. These practices are structured to allow the watermaster to perform timely and promptly the ministerial duties required without the watermaster having to be a professional economist, agronomist, judge or any of the other professional disciplines required to quantify and legally re-determine beneficial use. This

would be required each time a call is made or a call is challenged for any or all of the many rights in the water district if the quantity and priority of a right is not determined by the water right document evidencing the right. The following excerpts from Carlson's Direct Testimony confirm his understanding of the automatic nature of regulation by quantity and priority of the recorded rights:

Carlson, Direct Testimony, September 26, 2007, page 20 at line 5:

> "First they [surface water rights] are administered based upon the source of the water. Second, they are administered based upon the quantity of water authorized under the water right and the date of priority. When the water supply in a given reach has been allocated, the last water right to receive water is shown in the accounting as "the last right filled.""

Carlson, Direct Testimony, September 26, 2007, page 17 at line 15:

> "The amount shown on the "paper right" is simply the maximum amount of water that can be allocated to the right holder under certain conditions. Rates of diversion authorized pursuant to the water rights are not quantity entitlements that are guaranteed to be available. Instead, authorized rates of diversion are the maximum rates at which water can be diverted under a right when there is sufficient water available to fill that priority. ..."

- Watermasters Handbook. Watermasters are directed throughout the handbook to distribute water in accordance with the list of water rights provided by IDWR. For example, on page 21, "After the natural flow has been determined, the watermaster must compute the allocation of flow to the respective users. In general, this is done by deducting the various amounts of the water rights calling for water (ranked from senior to junior) from the amount of the natural flow until the entire natural flow has been allotted. All diversions with a date of priority junior to the last water right for which water is available must be shut off or charged with the use of storage water if the user owns storage which is available."

## 5. Practical Considerations

- Timeliness of action by IDWR and watermaster requires distribution in accordance with recorded rights.

- IDWR is bound by the decisions of the court and by the license documents it has issued in accordance with law.

- Re-determination of the extent of beneficial use, annually or even more frequently if the beneficial use is challenged, is not possible or practical because of the delay and cost. Timely, orderly administration requires the certainty of recognizing the binding determinations made by the court and IDWR as evidenced by the decree or license.

- Unreasonable waste when observed can be stopped by administrative or judicial action.

- Canal companies and irrigation districts have a duty to deliver water to their water users. These entities must be prepared to provide water to the full extent of shares and acres entitled to receive water under the water rights within their defined service areas.

**ISSUE No. 3. What is Material Injury and How is it to be Determined Under the CMRs?**

The following excerpts describe an understanding of material injury that is not in accordance with Idaho law and the CMRs:

Sullivan, Direct Testimony, September 26, 2007 page 17 at line 13:

> "Yes, the SWC claims that essentially all pumping by junior ground water users is causing injury to their water rights. They have claimed that anytime their natural flow water rights are not being delivered in full that they are being injured by junior ground water users, even though their immediate need for water may be less than the amount of their water right, or they may have plenty of water in storage to meet their demands."

Sullivan, Direct Testimony, September 26, 2007 page 27 at line 20:

> "Well there are different ways to define a water shortage. One definition expressed by the SWC representatives is a diversion that is less than it was in the past. That doesn't rise to the level of a material water shortage. My definition of a material water shortage is one where the available supply is insufficient to meet the crop requirements resulting in crop yield reduction."

Carlson, Direct Testimony, September 26, 2007, page 27 at line 25:

> "Material injury in my opinion occurs when the entity making the call has done everything reasonable to reduce waste and increase delivery efficiency, yet still is left with an inadequate supply. The whole idea of material injury is a complicated concept when one remembers that a water right only allows the user the tangible benefit specified in the water right [.] Material injury cannot occur unless the right holder actually loses production."

**Response to Issue No. 3.**

Sullivan and Carlson are in error that material injury is determined by loss in crop production. Because of the vagaries in weather and water supply, material injury as defined by Sullivan and Carlson cannot be known until after the irrigation season or until the senior's field burns up, hence no regulation of junior priority ground water rights until that occurs. This is an untimely approach to water regulation and is not based upon the water rights. Idaho law bases material injury on the impact to the water right. The following rules adopted by IDWR base determination of injury on the effect on the senior priority water right.

CMR 10.14 defines "Material Injury" as:

> "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."

CMR 42.01. provides, in pertinent part, as follows:

> "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:
>
> a. ...
> b. The effort or expense of the holder of the water right to divert water from the source.
> c. Whether 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.
> 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.
> e. The amount of water being diverted and used compared to the water rights.
> f. ...
> 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; ...
> 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."

CMR 40.03 provides that:

> "In determining whether diversion and use of water under rights will be regulated under Rules 40.01.a., or 40.01.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."

Criteria for determining whether a proposed use will reduce the quantity of water under existing water rights are listed in the "Water Appropriation Rules," IDAPA 37.03.06. Rule 45.01.a. provides. "A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

a. The amount of water available under an existing water right will be reduced below the amount recorded by the permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.
b. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or
c. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense."

**<u>ISSUE No. 4.</u> Is "Achievable Farm Efficiency" a Basis for Determining Reasonable Use under a Water Right?**

The following opinions suggest an evaluation of reasonable use that includes a determination of water use efficiency that is not supported by law or practical water management considerations.

Sullivan, Direct Testimony, September 26, 2007 page 47 at line 21:

> "It [achievable farm efficiency] represents a reasonable upper limit of the amount of water delivered to the farm, expressed as a percentage, that can be made available for consumption by the crop, assuming a high level of irrigation management."

Proposed Conjunctive Administration Framework for Surface Water Coalition Delivery Call, Exhibit 3031, Section 2.c.v., page 3, attached to. Sullivan, Direct Testimony .

> "Diversion Demand – Forecast the seasonal diversion demand for each of the SWC members based upon the Crop Irrigation Water Requirement Volume (2.b.iv) divided by the aggregate achievable system irrigation efficiency for each of the SWC members shown in Table __ (***table to be developed based on conveyance losses and achievable farm irrigation efficiencies for each SWC member).***"

**Response to Issue No. 4.**

These standards are not relevant and should not be applied for the following reasons:

- Neither "achievable farm efficiency" nor "achievable standard" are used in Idaho statutes, the CMRs, or in the descriptions of the water rights held by the SWC entities. As such these terms are irrelevant in a delivery call. What is "achievable" is not required to be met before a senior water right holder is entitled to priority distribution. If that were the requirement, all water right regulation in Idaho would be stopped for the benefit of holders of junior priority rights taking water out-of-priority until holders of senior priority rights met the "achievable" standard. Even if the senior succeeded in meeting such a standard, his right to call for water could still be subject to challenge based upon ever advancing technology.

- Achievable standard is related to cropping patterns that cannot be fully determined until the water supply available for the year is determined. SWC entities are responsible for delivering water available under their water rights to their water users; they do not have the authority or responsibility to determine cropping patterns.

- Canal companies and irrigation districts do not have authority to require their water users to institute water use methods needed to meet "achievable standards."

- The achievable standard is a farm-by-farm, field-by-field determination that has not been evaluated and determined for SWC entities. The burden of demonstrating that application methods to meet an achievable standard are technically and financially feasible is on the junior users.

- "Achievable farm efficiency" is not described in CMR 42 or elsewhere in the CMRs. The procedure laid out in CMR 42 is for actual delivery methods and efficiencies at the time irrigation is occurring.

**ISSUE No. 5. Does the Determination of Reasonable Use Require Full Use of All Water Supplies?**

Sullivan, Direct Testimony, September 26, 2007 page 29 at line 19:

> "Well, for one thing, the SWC has asserted injury any time their natural flow water rights are not being fully satisfied. The conjunctive management rules dictate that all supplies available to a water user may be considered in assessing whether injury is occurring (Rule 42.01.g and h.). Obviously, this would include any storage supplies available to the user, as well as any ground water supplies. The SWC members all have substantial storage water supplies, and several of them have supplemental wells that supply portions of their service areas. The point of this provision is that junior users should not be curtailed if the senior user claiming injury has other supplies available."

**Response to Issue No. 5.**

Sullivan suggests that junior priority ground water rights should be able to divert out-of-priority to the detriment of senior priority rights as long as the holder of the senior priority right can "self-mitigate" with other existing supplies. This reading misinterprets CMR 42.01.ix.. This rule reads, in pertinent part, as follows:

> "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:
>
> ix. 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; ..."

This rule, read in the context of the principles of the doctrine of prior appropriation, applies only to the water supplies and facilities associated with the senior rights upon which the call is based. Regulation in accordance with priority of right provides for a call to be made by the holder of a senior priority water right for distribution of water under that right. It is not a call for distribution under other rights or sources of supply that the senior might have or might be able to acquire. Thus, the determination of injury is to the senior right upon which the call is based, and not a determination of injury based upon all of the water supplies held by the senior right holder. Sullivan's opinion that material injury cannot occur if the holder of the senior priority right has other sources of supply clearly contradicts the prior appropriation doctrine.

Most of the SWC entities do not own wells or ground water rights to supply water within their service areas receiving water under the calling rights. Exceptions are that Milner Irrigation District has a ground water right for 2.5 cfs (less than 1% of its surface water diversion rate) and other entities recover seepage for reuse. It is accurate that some

individual water users within the service area of the SWC entities hold rights to divert and use ground water to supplement their water supplies during times that the SWC entity is unable to make adequate deliveries. There is even less basis for attempting to include ground water owned by water users within a SWC entity's service area as part of the total supply available to the SWC entity. Privately-owned wells are not, "*existing facilities*" owned/operated by the "*holder of a senior priority water right*" as required by CMR 42.01.

CMR 42.01.g, in pertinent part, reads as follows:

> 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 …

This rule applies to the facilities and water supplies of the holder of the senior priority water right making the call because the "holder of a water right" is defined as 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 (CMR 10.11). It does not apply to facilities and water supplies held by others.

Rule 42.01.h reads as follows:

> The extent to which the requirements of the senior-priority 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.

This rule requires consideration of whether it is reasonable to meet the petitioner's water requirements by changing or transferring the point of diversion for the *petitioner's* right. It does not provide for consideration of water supplies that might be made available using private wells and private water rights.

Irrigation districts and canal companies are obligated to provide water, to the extent that is available under the rights and supplies held by the entity, when the water users of the entity call for water. Such entities have no authority to dictate application and use methods and sources of water supply to its water users.

The idea that all possible sources and supplies must be included in an analysis of injury becomes even more problematic when it is stretched to include sources and supplies that are not owned or controlled by the entity making the call. In this regard, a SWC entity has no authority to require the use of individual ground water rights and other private supplies held by water users within the entity's service area. An effort by a SWC entity to encourage or require its water users to divert and use ground water to reduce the need to deliver water from the entity's canal system would be contrary to state policies

promoting use of surface water prior to use of ground water. In addition, promoting additional ground water pumping would exacerbate the problem of junior ground water rights injuring the SWC senior surface water rights.

Requiring full use of privately-owned ground water rights within a SWC entity would create management and policy problems that cannot be resolved under the legal powers now available to such entities by forcing a SWC entity to provide unequal service to its members. It would mean that its water users with supplemental ground water rights would not be entitled to full delivery of surface water under the SWC water rights, and these water users would be required to bear the cost of pumping and other significant costs associated with delivery of water to meet shortages using ground water. This would require the water users of the SWC entities to bear the burden of shortages caused by junior ground water irrigator diversions in addition to paying the cost of surface water irrigation annual dues. Likewise, because each SWC entity distributes its water supplies pro-rata to all of its water users, it would be unfair to determine that the overall supply must be reduced to the detriment of all water users because some of the water users have separate, private sources of water that cannot be controlled by the SWC entity.

**ISSUE No. 6 Must Storage be Fully Used Without any Carryover for Material Injury to Occur?**

The experts for the ground water users are incorrect that water held in storage is not a beneficial use and that any amount of storage carried over in the account of a SWC entity is proof that the entity had a full water supply for the year.

Sullivan, Direct Testimony, September 26, 2007 page 26 at line 20:

> "Yes, the SWC should not be entitled to storage for the sake of storage, because having water in storage is not a beneficial use."

Sullivan, Direct Testimony, September 26, 2007 page 52 at line 24:

> "Well - if there is a computed shortage for a SWC member in a particular year, then I wanted to see if they had water left in storage at the end of the year. In my opinion, the SWC should not be able to claim injury from a water shortage if they still have water in storage – water that they could have used to avoid the shortage."

**Response to Issue No. 6.**

There is a legal entitlement for the SWC entities to carry over unused storage water. The contracts that the SWC entities have with the United States Bureau of Reclamation ("USBR") allow space holders to carry over water to the following year. The water rights, including IDWR's recommendation to the SRBA Court, for the upper Snake River Reservoirs operated by the USBR authorize storage as a beneficial use and provide for carry over of storage. The rights include as a listed beneficial use "Irrigation Storage"

from January 1 to December 31. "Irrigation from Storage" during the period April 1 to November 1 is listed on these rights as a separate beneficial use. IDWR includes carryover storage along with new accrual of storage to the users space in its allocation of storage water to the accounts of water users in Water District 01 and other water districts. IDWR specifically recognizes in the CMRs the right of a holder of a surface water right to carry over water. CMR 42.01.g. provides that "...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."

There are several reasons for a SWC entity to have carry over storage water even in a year that it suffers a material injury to its natural flow rights. These include:

1. The storage space was purchased with the intent of providing a more secure supply for extended droughts. The purchase was intended to provide water for a period of more than one dry year. It was not intended to make up for natural flow depletions caused by junior priority rights.

2. Concern that the following year will also be water short. A prudent water manager addresses this risk by carrying over part of the storage allocation to spread limited storage supplies over multiple years. Without the confidence provided by an assured water supply from carryover storage, a water user's cropping options are limited if the winter/early spring months are dry. Without carryover, the water user and his banker would not take the risk of planting a high value crop such as potatoes, sugar beets or corn because such crops are more costly to plant and require a larger amount of water and a longer irrigation season than lower value crops such as spring grain. This type of conservation and wise water management is punished under Sullivan's approach that junior ground water pumping is not regulated as long as there is carryover. That approach discourages conservation, negatively affects the reliability of reservoir refill because with reduced carryover more of the natural flow during the following year would be required to refill the space drafted because of this proposed policy, and water availability would be reduced for water users with priorities junior to the reservoir storage rights.

3. Early frosts, unexpectedly large rainstorms late in the irrigation season, and other unpredictable events may shorten the irrigation season or reduce water demand allowing storage water to be carried over that had been intended to be used to finish the season. This will cause the SWC entity to have carryover storage even though the available natural flow and the prudently pro-rated storage allocations during the season were inadequate to avoid material injury.

4. Accounting errors and after the season adjustments of the water use records by IDWR can alter the storage records to indicate that storage has been carried over even though the SWC entity had curtailed deliveries based upon the storage account information available during the season. Because of accounting uncertainties, a SWC entity manager must retain some storage water at the end of

the season to avoid having the after-the-fact adjustment of the records show that the entity had overused its allotment.

**ISSUE No. 7. When Must Mitigation Water be Supplied?**

Sullivan and Carlson propose procedures allowing shortfalls in mitigation amounts in one year to be made up by providing additional mitigation water in the following year.

Sullivan, Direct Testimony, September 26, 2007 page 61 at line 23:

> "Carry over to any unreplaced shortages or excess replacement for resolution in the next year."

Carlson, Direct Testimony, September 26, 2007, page 36 at line 3:

> "If the final accounting for 2007 which will be available in early 2008 for Water District 1 shows that Twin Falls diverted less than 1,075,900 acre-feet, no carry-over storage and had an excess use showing in the Watermaster's final Accounting for 2007 the ground water districts under their approved Replacement Water Plan will have to make up the shortfall."

**Response to Issue No. 7.**

Mitigation water provided the following irrigation season does not prevent material injury to the holders of senior-priority water rights. An effective mitigation plan, approvable under CMR 43, must provide water at the time and place needed by the senior appropriator. Mitigation water supplied the next season does not meet this requirement, is not timely to prevent material injury during the season the injury occurs, and depending upon weather conditions the following winter and irrigation season, may be surplus to the needs of the senior right holder and therefore of no value to the senior right holder. The approach suggested by Sullivan and Carlson rewards junior ground water users not complying with mitigation requirements to defer a mitigation debt to the next year or longer.

CMR 43.03.b. provides, in pertinent part, the following factor for evaluation of a proposed mitigation plan:

> 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.

Carlson, in his Direct Testimony, September 26, 2007, on page 36 at line 3 describes that Water District 01 does not allow a water user to continue diversion of water after the user's natural flow rights are out of priority and the user's storage account is depleted.

Even with assurances from the ground water users under a water replacement plan that water will be replaced the next year, a SWC entity will not be allowed to continue to divert and use water out of priority when the storage allocated to the entity's account is used up. When this happens, the SWC entities will curtail deliveries needed to satisfy the requirements of its water users. Make-up mitigation water, even if actually provided the following year, cannot undo the injury that occurred the prior year. Finally, it is incongruous to provide for mitigation obligations to be carried over to the next season while refusing to recognize the right of senior users to carryover their storage allocations.

**ISSUE No. 8. What are the Water Rights of the SWC that Provide a Basis for the Call?**

Carlson, Direct Testimony, September 26, 2007, page 37 at line 11:

> "Second, after reviewing Findings of Fact that appear under the heading, *Water Rights Held by or for the Benefit of Members of the Surface Water Coalition*, many of the water rights are not accurate. Exhibit 4001 more accurately reflects the current status of those water rights as recommended in the SRBA."

**Response to Issue No. 8.**

Carlson is premature in applying the recommendations in the Director's Report for the SWC entities' water rights. The SWC rights in January 2005 when the call was made and to the present day are represented by the existing licenses and decrees. The list of rights held by the SWC entities presented in Table ES-1 on page ES-23 of the expert report submitted by the SWC is an accurate description of the rights upon which the call is based.

The claims to water rights in Basin 01, including those held by the SWC entities, were recommended by the Director in 2005 and 2006, objections have been filed and the subcases involving these claims are pending before the SRBA Court.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 7TH day of NOVEMBER 2007.

Norman C. Young

SUBSCRIBED AND SWORN to before me this 7th day of November 2007.

STACI WELSH NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at: Meridian, Idaho
My Commission Expires: 2/3/2011