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April 15, 2005

Via Email & U.S. Mail

Karl J. Dreher, Director
Idaho Department of Water Resources
The Idaho Water Center
322 E. Front Street
P. O. Box 83720
Boise, Idaho 83720-0098

Re: Memorandum in Support of Surface Water Coalition's Request for Water Right Administration (Water District 120)

Dear Director Dreher:

This memorandum is being filed on behalf of members of the Surface Water Coalition[1] in support of their request for water right administration in Water District No. 120 that was filed with the Department on January 14, 2005. Subsequent to the filing of the Coalition's request, several parties have petitioned to intervene in the proceeding, including the Idaho Ground Water

[1] The Coalition consists 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.

Appropriators (IGWA), the Idaho Dairyman's Association, Idaho Power Company, and the United States Bureau of Reclamation.[2] IGWA's petition was granted immediately on February 14, 2005. The remaining petitions were granted on April 6, 2005, except for the petition of Idaho Power Company, notwithstanding the fact Idaho Power holds rights to stored water in American Falls Reservoir which have been severely impacted by ground water diversions and other factors. IGWA also filed formal motions requesting authorization for discovery and for an order of summary judgment, despite the Department's use of informal procedures in this proceeding. Objections to the filing of a formal motion for summary judgment were made, and IGWA's motion was denied, without prejudice, in the April 6, 2005 Order.

According to your April 6, 2005 Order, it is the Coalition's understanding that you have read IGWA's motion for summary judgment and the affidavit of Charles M. Brendecke, but that you do not "intend to rely upon the information contained therein" in making an "injury" determination in the forthcoming order responding to the Coalition's request for water right administration.[3] However, since you have admittedly reviewed the motion and affidavit, it is evident that you have at least considered those materials prior to responding to the Coalition's request. Therefore, the Coalition is submitting this memorandum to address the key points in support of its water right administration request and make the Director aware of initial questions and omissions related to the Brendecke Affidavit.[4]

The issue facing the Director in this matter can be succinctly summarized. Junior ground water right holders continue to divert and use water that would otherwise be available for diversion and use by surface water users under their senior water rights. As a result, senior surface water right holders are suffering "injury" by reason of these junior ground water right depletions. Idaho law, including the SRBA District Court's order granting the State of Idaho's motion for interim administration, requires the Department to administer junior ground water rights by priority, including during periods of drought, for the benefit of senior surface water rights.

The State of Idaho Administers Water Rights According to Priority

The Idaho Department of Water Resources (Department), to the best of the Coalition's knowledge, has ***never*** curtailed a junior ground water right to satisfy a senior surface water right. Despite over a century of established water right administration across the state, no junior ground water right has ever been held to the standard required by Idaho's prior appropriation doctrine. Accordingly, it is no surprise that junior ground water right holders continue to resist the law today, and even attempt to argue that Idaho is not a "true" prior appropriation state. Contrary to this resistance and argument, the Department is mandated with a clear legal duty to administer

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[2] Despite any claimed capacity to represent their members, to the best of the Coalition's knowledge, neither the Idaho Ground Water Appropriators, Inc. or the Idaho Dairyman's Association hold water rights that would be subject to the Coalition's request for water right administration.
[3] *See* February 14, 2005 *Order* 31, ¶ 37 (explaining intention to issue order after April 1st forecasts are reviewed).
[4] This memorandum is not and should not be deemed as the Coalition's formal response to the documents filed by IGWA since the motion for summary judgment was denied.

the State's water resources, ***including ground water***, pursuant to the Idaho Constitution, Idaho statutes, governing case law, and the Director's prior orders which all plainly provide:

> "Priority of appropriations shall give the better right as between those using the water;" Idaho Constitution, Art. XV, § 3.
>
> "As between appropriators, the first in time is first in right." Idaho Code § 42-106.
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> "It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, . . . according to the prior rights of each respectively, and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . ." Idaho Code § 42-607.
>
> "[T]he law of this territory is that the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld . . . If persons can go upon tributaries of streams whose waters have all been appropriated and applied to a useful and legitimate purpose, and can take and control the waters of such tributaries, then, indeed, the sources of supply of all appropriated natural streams may be entirely cut off, and turned away from the first and rightful appropriators. To allow this to be done would disturb substantial vested rights, and the law will not permit it." *Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411, 414-15 (1888).
>
> "While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, based upon facts like those in this case, has been so often decided adversely to such claim, and in favor of the prior appropriation, that the maxim, "First in time, first in right," should be considered the settled law here. Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity." *Drake v. Earhart*, 2 Idaho 750, 753 (1890).
>
> "10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:
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> * * *
>
> d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director."

Final Order Creating Water District No. 120, at 5 (February 19, 2002).

There is no question the Department has a mandatory duty to distribute water in Water District No. 120 according to priority. It is further undisputed that the Coalition members hold water rights for natural flow and storage senior to those ground water rights within Water District No. 120. Therefore, under Idaho law, the Department is obligated to administer the water supply by priority and deliver water to satisfy the senior rights.

Although Idaho's water code has undergone some revisions and amendments since 1881, the bedrock principle of water right administration, "first in time, first in right" has not wavered. For example, the Idaho Supreme Court has consistently reaffirmed this guiding principle in the State's water law. *Silkey v. Tiegs*, 51 Idaho 344, 353 (1931)("a valid appropriation first made under either method will have priority over a subsequent valid appropriation"); *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9, (1944)("It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water."); *Nettleton v. Higginson*, 98 Idaho 87, 91 (1977)("it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation; i.e. first in time is first in right."); *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982)("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.").

In its most basic terms the prior appropriation doctrine requires senior water rights to be satisfied prior to junior water rights. With respect to the distribution of water within an organized water district, such as Water District No. 120, Idaho law expressly requires the Department to follow the rule of priority:

> 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 rights to the users thereof.***

Idaho Code § 42-603 (emphasis added).

> ***It shall be the duty of said watermaster to distribute the waters*** of the public stream, streams or water supply, . . . ***according to the prior rights of each respectively***, and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do ***in order to supply the prior rights of others*** in such stream or water supply . . .

Idaho Code § 42-607 (emphasis added).

The Idaho Supreme Court has further defined the Director's obligation to administer water rights within a water district by priority as a "clear legal duty." *Musser v. Higginson*, 125 Idaho 392, 395 (1994). In times of shortage, as is expected in 2005, the Water District 120 watermaster must distribute water according to the priority dates of the respective water rights,

as set forth by decree or license. *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20 (1935). Any adopted rules or regulations, or subsequent actions by the Department or its agents, that stray from this mandate are patently illegal.[5]

To accomplish priority distribution within Water District 120, Idaho law requires the watermaster to distribute water according to the list of decreed, licensed, and permitted rights. I.C. § 42-607. The Idaho Supreme Court has similarly required such a duty from the state's watermasters:

> We think the position is correct, and we are also satisfied that in a case like this where the decree upon its face is explicit as to the stream from which the waters are to be distributed, that the water-master cannot be required to look beyond the decree itself.

Stethem v. Skinner, 11 Idaho 374, 379 (1905).

This priority distribution includes administration of hydraulically connected tributary ground water rights located in water districts that affect surface water supplies in neighboring districts. *See* March 10, 2004 *Amended Order* In the Matter of Distribution of Water to Water Rights Nos. 36-15501, 36-02551, and 36-07694 (order requiring curtailment of junior ground water rights within Water District No. 130 to satisfy the water delivery call of senior surface water rights in Water District No. 36-A).

Finally, priority distribution demands protection of all senior water rights, including storage water rights. A critical misunderstanding the Coalition has with the February 14, 2005 Order is the linkage between natural flow rights and storage rights. A number of the entities making calls are primarily storage right holders. A & B Irrigation District made a call on its storage right. There are only early season natural flow rights, senior though to the ground water rights, associated with those lands. AFRD#2 relies heavily upon storage water. North Side Canal Company has an early priority natural flow for part of its project, but relies primarily on storage for the majority of its lands. For those entities that do rely primarily upon natural flow, it was only after a number of years of operation in which they saw the potential shortages in the system and that they obtained storage as some assurance to delivering a full supply of water. This potential shortage was premised upon natural conditions, low snow pack, drought, etc., not the diversion by a junior water user. Did the Coalition members acquire storage to mitigate for a continued illegal diversion by a junior surface or ground water user? The answer is an emphatic "no." Entities that purchased storage space did so with their own individual financial consequences. Additional assessments were imposed upon their water users.

When the natural flow right is impaired by the actions of a junior water right holder, the remedy is against that junior water right holder, not as against the storage right. The storage rights were acquired later in time and without limitation as to whether and when the rights had to

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[5] Indeed, the rules governing this call proceeding are just such an example, and are at issue in a district court case in Ada County.

be used. Further, both Reclamation and the individual spaceholders have interests in the storage rights. Carryover has been, and remains a critical part of the storage system in the Upper Snake River Basin. Historically, the reason the system has operated so efficiently was that water users have been careful not to overburden the system and have been able to carryover water supplies for the following year. To now state that all storage water must be completely exhausted before an entity can claim injury to the natural flow right places the operation of the entire Upper Snake River Basin reservoir system at risk.

According to the Idaho Constitution, relevant state statues, and the Director's order creating Water District No. 120, the Director has a clear legal duty to curtail junior water rights to satisfy senior rights, including storage rights, in times of shortage.

Junior Appropriators Carry the Burden to Prove Non-Interference With Senior Appropriators

The Department recognizes the ESPA and hydraulically connected surface water sources are overappropriated, including in Water District 120. *Final Order Creating Water District No. 120* at 4.[6] Moreover, new appropriations seeking a consumptive use from the ESPA are prohibited by the Department's moratoriums.[7] Consequently, in time of shortage, water rights must be curtailed by priority, and the burden falls squarely upon a junior appropriator to prove that its diversion and use of water does not injure a senior appropriator. In other words, since the ESPA and its hydraulically connected surface water sources such as the Snake River and its tributaries are overappropriated, depletions under junior water rights are presumed to injure senior water rights. The Idaho Supreme Court set forth this rule of law over a century ago:

> This court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right; and it would take more than a theory, and, in fact, clear and convincing evidence in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we could depart from a rule so just and equitable in its application and so generally and uniformly applied by the courts. . . . The subsequent appropriator who claims that such diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence.

Moe v. Harger, 10 Idaho 302, 303-04 (1904).

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[6] The Idaho Legislature also recognizes that water supplies in the ESPA are overappropriated resulting in water shortages. *See* House Concurrent Resolution No. 28, 58th Legislature, 1st regular session 2005 (". . . ground water pumping has resulted in reduced spring discharges and reduced gains to the Snake River from the Eastern Snake Plain Aquifer . . . and have resulted in insufficient water supplies to satisfy existing beneficial uses relying on spring discharges and Snake River flows;").

[7] *See May 15, 1992 Moratorium Order*; *January 6, 1993 Moratorium Order*; *April 30, 1993 Amended Moratorium Order*. The latest moratorium was recently continued and reaffirmed by Governor Dirk Kempthorne through Executive Order No. 2004-02 on March 20, 2004.

The rule extends equally to those juniors who would divert water from tributary sources to the Snake River, such as the ESPA:

> It seems self evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should, as we observed in *Moe v. Harger*, 10 Idaho 305, 77 Pac. 645, produce "clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion." The burden is on him to show such facts.

Josslyn v. Daly, 15 Idaho 137, 149 (1908).

Similar to the rule of prior appropriation, the rule requiring a junior to justify his use as against a senior has been reaffirmed by the Idaho Supreme Court on several occasions. *Jackson v. Cowan*, 33 Idaho 525, 528 (1921)("The burden of proving that [the water] did not reach the reservoir was upon the appellants . . . and this they fail to do."); *Cantlin v. Carter*, 88 Idaho 179, 186 (1964)("A subsequent appropriator attempting to justify his diversion has the burden of proving that it will not injure prior appropriations); *Silkey v. Tiegs*, 54 Idaho 126, 129 (1934)("adherence to rule requiring protection of the prior appropriator, precludes relief to [the junior ground water user]"). Stated another way, a senior appropriator is ***entitled*** to have its water right ***protected from interference by junior appropriators***, and the Department has a "clear legal duty" to distribute water on that basis.

Should a junior appropriator continue to interfere with a senior's use under a prior right, the senior is entitled to have the junior diversion curtailed. For example, where, as in the ESPA, diversions under junior ground water rights interfere with the water supplies necessary to fulfill the Coalition's senior natural flow and storage rights, such diversions must be curtailed until the senior rights are fulfilled. *Arkoosh v. Big Wood Canal Company*, 48 Idaho 383, 396 (1929)("We believe that if by the construction of its dam, and its use of the natural channel of the river, appellant has interfered with respondents' rights, and by such use, unless restrained, will continue to interfere with respondents' rights and deprive them of water to which they are entitled by reason of their prior appropriation, such action is wrongful and may be enjoined.").

The rule that prohibits junior ground water diversions from interfering with senior surface water rights is even firmly announced in Idaho's Ground Water Act. Idaho Code § 42-237a(g) specifically provides for the Director, in furtherance of the State's policy to ***conserve*** ground water, to determine that ground water is not available for diversion and use when withdrawing that water would "affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right . . .". Therefore, it follows that junior ground water rights within the ESPA are limited by the superior right of senior users, such as the Coalition's water rights. In addition, Idaho law prohibits those diversions under junior ground water rights from "affecting" or "interfering" with water that can be used by a senior, either through direct diversions of natural flow or diversions to storage.

IGWA's Constitutional Arguments are Misplaced and Contrary to Idaho's Prior Appropriation Doctrine

IGWA confuses provisions in the Idaho Constitution to claim that Idaho is not a "true" prior appropriation state for purposes of water right administration. Instead, IGWA argues that the Department must perform some unspecified "balancing" test to determine how water is distributed among the state's various users. This argument is contrary to Idaho's Constitution and is simply an attempt to create "new law" in the area of water right administration.[8] This approach was clearly rejected by the Idaho Supreme Court in *Kirk v. Bartholomew*, 3 Idaho 367 (1892).

IGWA acknowledges Idaho's priority system of water distribution set forth in Article XV, Section 3, but then goes on to mischaracterize remaining sections in the constitution in an effort to erode the rule of prior appropriation. First, IGWA alleges that Article XV, Sections 4 and 5 somehow "qualify" the prior appropriation doctrine as applied between senior surface water delivery organizations and individual junior ground water right holders. A plain reading of those sections clearly indicates that they only apply to separate water right appropriations "among" users within water delivery organizations, not between those appropriations and other junior appropriations made by individuals outside the projects.

First, IGWA basically ignores the plain language of Section 4, which states:

> Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, ***under a sale, rental, or distribution thereof***, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, ***such person . . . shall not thereafter, without his consent, be deprived of the annual use of the same, when needed . . to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law.***

Idaho Const. Art. XV, § 4 (emphasis added).

The provision simply states that a shareholder of a canal company, or a landowner within an irrigation district, who is entitled to have water distributed to his or her lands for irrigation purposes, shall not be denied that distribution as long as payment is made and they comply with "equitable terms and conditions as to the quantity used and times of use." Notably, IGWA does

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[8] To the extent the Department's conjunctive management rules adopt the same "theories" espoused by IGWA with respect to Art. XV, §§ 4,5, and 7, they too are contrary to Idaho law and the rule of prior appropriation. IDAPA 37.03.11.020.03. Since the rules are presently at issue in litigation before the District Court in Ada County (*Rim View Trout Co. v. Dreher et al.*, Case No. CV-03-01755D, the Coalition will not address these deficiencies under the rules at this time.

not cite any such laws that set forth such "equitable terms and conditions as to the quantity used and times of use" for canal company shareholders or irrigation district landowners.

Although shareholders within canal companies and landowners within irrigation districts must follow the respective laws and regulations relating to their respective water delivery entities, and the entities' water rights must be used in accordance with their respective elements set forth by decrees and licenses, nothing transforms this provision into a "limitation" on an entity's water right as against individual junior ground water rights. Admittedly, IGWA provides no supporting statutes or case law that would demonstrate otherwise.

Similarly, IGWA misconstrues Article XV, Section 5 as standing for some "universal" reasonable use limitation on senior surface entities' water rights when compared to individual junior ground water rights. IGWA claims that the Coalition members have an obligation to accept "reasonable limitations" in times of shortage in order to benefit junior ground water rights. Again, IGWA ignores the critical language in the provision in an effort to interpret it out of context in its application. Article XV, Section 5, when read in its entirety, plainly states:

> Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, ***as among such persons, priority it time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same***, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of us ***as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement***, may by law prescribe.

Idaho Const., Art. XV, § 5 (emphasis added).

Similar to Section 4, the above section plainly applies "among" those persons ***within*** water delivery organizations such as canal companies and irrigation districts.[9] IGWA ignores the controlling condition that states "as among such persons" within those irrigation projects. Nothing implies that any "reasonable limitations" the Legislature might prescribe, which it hasn't, applies to junior appropriators that are not part of the irrigation project. Moreover, the only law that appears to address this question is Idaho Code § 42-904, which essentially affirms the prior appropriation doctrine as between different classes of users within an irrigation project.[10]

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[9] *See Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 604 (1904)(Sullivan, C.J., *dissenting*)("The provisions of said section 5 contemplate that ditch owners must furnish water to the extent of their ability to all settlers under their ditches in the numerical order of their settlements or improvements, thus contemplating that the rental right to the use of such waters should be given to the settlers in accordance with the priority of their settlement or improvement, carrying out the theory that the first settler in time was first in right.").

[10] *See Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 543 (1963).

Finally, contrary to IGWA's effort to stretch the application of Art. XV, Sections 4 and 5 outside the boundaries of water delivery entities' projects, the Idaho Supreme Court has expressly recognized they do not:

> As we read this decision, it construes section 4 and 5 of article 15 of the constitution as creating a priority among consumers from a canal analogous to that which exists among appropriators from a natural stream.

Geber v. Nampa & Meridian Irr. Dist., 19 Idaho 765, 768-69 (1911).

> The framers of our constitution evidently meant to distinguish settlers who procure a water right under a sale, rental or distribution from that class of water users who procure their water right by appropriation and diversion directly from a natural stream. The constitutional convention accordingly inserted secs. 4 and 5, in art. 15, of the constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes to be used "under a sale, rental or distribution" ***and to point out the respective rights and priorities of the users of such waters***. It was clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes. And so sec. 4 is dealing chiefly with the ditch or canal owner, while sec. 5 is dealing chiefly with the subject of priorities ***as between water users and consumers who have settled under these ditches and canals*** and who expect to receive water under a "sale, rental or distribution thereof." The two sections must therefore be read and construed together.
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> * * *
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> "Mr. Claggett: Mr. Chairman, both of these sections [4 and 5] apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are 'appropriated or used for agricultural purposes under a sale, rental, or distribution.'

Mellen v. Great Western Sugar Beet Co., 21 Idaho 353, 359, 361 (1912)(emphasis added).

> The provisions of the constitution [Art. XV, § 4] . . . have peculiar application to persons or corporations organized for the purpose of appropriating water for sale, rental, or distribution and have no application to an irrigation district, except as hereinafter noted.

Yaden v. Gem Irrigation Dist., 37 Idaho 300, 307 (1923).

Pursuant to the decisions listed above, it is obvious that Sections 4 and 5 of Article XV only apply as between users within a water delivery entity. And contrary to IGWA's claim, the

Legislature has not imposed any "reasonable limitations" on the prior rights within those entities. Notably, IGWA fails to cite any specific law where the Legislature has imposed "reasonable conditions" upon priority rights within water delivery entities, let alone as between those entities and junior ground water right holders. Just the opposite, the Legislature has reaffirmed the priority doctrine as it applies between different classes of water users under a ditch or canal company. I.C. § 42-904. Therefore, IGWA's argument that the constitution requires "reasonable limitations" to be placed on the Coalition's water rights for the benefit of junior ground water rights is without merit and should be disregarded.[11]

Finally, IGWA resorts to claiming that Art. XV, Section 7 somehow allows for junior ground water right holders to divert water ahead of senior appropriators in the name of the "optimum development" of the State's water resources. Section 7, enacted to ward off the State of California's interest in diverting Snake River water from southern Idaho, authorizes the Idaho Water Resource Board to "formulate and implement a state water plan for optimum development of water resources in the public interest." Art. XV, § 7. Contrary to IGWA's claims, the State Water Plan does not call for senior water users to suffer water shortages at the hands of junior appropriators. Instead, the Plan specifically requires conjunctive administration of connected ground and surface water resources. *See State Water Plan* ¶ 1G ("It is the policy of Idaho that where evidence of hydrologic connection exists between ground and surface waters, they are managed conjunctively in recognition of the interconnection.").

Certainly the "optimum development" of the State's water resources does not mean that senior appropriators are not entitled to have their water rights protected and administered by priority. Given the state of the ESPA's declining aquifer levels and reduced reach gains to the Snake River, "optimum development" of the resource may have occurred thirty years ago, prior to the development of thousands of additional irrigated groundwater acres. If "optimum development" hinges on economics and "who" makes more money under certain water uses, then priority has no place in water right administration. Idaho law prohibits the chaos that would ensue under that scenario. Again, nothing in the constitution "limits" or "qualifies" senior surface water rights for the benefit of junior ground water rights. As such, IGWA's arguments with respect to Art. XV, § 7 should also be disregarded.

Idaho's Ground Water Act Does Not Limit Rights of Senior Surface Water Rights

IGWA attempts to carryover its misplaced constitutional arguments into Idaho's Ground Water Act in furtherance of the argument that senior surface water rights are "limited" at the

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[11] IGWA's reliance upon *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912) for the proposition that a prior appropriator is not entitled to his decreed or licensed right contrary to the policy of "reasonable use", and that this case applies to the Coalition's water right delivery call is misplaced. In *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 397 (1929), the Idaho Supreme Court carefully observed that "*Schodde* . . . is clearly distinguishable because therein the interference was not with a water right but the current. In other words, the same amount of water went to Schodde's place as before. . . . this is an action for an injunction to restrain appellant from interfering with respondents' water rights . . ."). Similar to the circumstances in *Arkoosh*, here the Coalition is requesting relief from interference by junior water right holders, not seeking to maintain the velocity characteristic of a "current" as was the case in *Schodde*.

expense of junior ground water rights. Once again, IGWA's arguments run afoul of Idaho's law of prior appropriation and prior decisions of the Idaho Supreme Court. Even the Ground Water Act itself explicitly recognizes the rule of prior appropriation and the Director's duty to protect the State's aquifers such as the ESPA as well as senior water rights. I.C. § 42-231 ("It shall likewise be the duty of the director . . . to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act."); I.C. § 42-233a ("The director, upon a determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a critical ground water area, shall order those water right holders on a time priority basis . . ."); I.C. § 42-237a ("the director . . . is empowered: . . . g. To supervise and control the exercise and administration of all rights to the use of ground waters and . . . initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. . . . Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom . . . 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."). Despite these provisions, IGWA apparently claims the Ground Water Act somehow insulates junior ground water rights from water right administration.

First, IGWA asserts that Idaho Code § 42-226 applies to the Coalition's senior surface water rights, and that an exercise of those rights "shall not block the full economic development of underground water resources." The statute plainly states that the "act shall not affect the rights to the use of ground water in this state acquired before its enactment." This statement applies equally to surface water rights that rely upon tributary ground water.

The Idaho Supreme Court clearly resolved this issue in *Musser v. Higginson*, 125 Idaho 392 (1994), when it stated:

> "Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute. Therefore, we fail to see how I.C. § 42-226 in any way affects the director's duty to distribute water to the Mussers, whose priority date is April 1, 1892."

125 Idaho at 396.

IGWA ignores the Idaho Supreme Court's holding in *Musser* and fails to explain how the statute retroactively applies to the Coalition members' senior water rights acquired prior to 1951. Accordingly, IGWA's argument should be disregarded.

Next, IGWA claims that the Coalition's request for water right administration must proceed before some "local ground water board" pursuant to I.C. § 42-237b. Similar to the claims regarding the "full economic development of the resource," the statute referring disputes the local ground water boards is inapposite since Idaho's Ground Water Act does not apply to

water rights acquired prior to 1951. Idaho Code § 42-226 plainly states, in part: "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." In other words, water rights prior to 1951, like the Coalition's, are not subject to the procedures set forth in the Idaho Ground Water Act. [12]

Moreover, such procedures inherently conflict with the Department's water distribution requirements within organized water districts. *See* I.C. §§ 42-603, 42-607. The Director expressly recognized that administration of both surface and ground water rights would occur by the watermaster in Water District No. 120. *See Final Order Creating Water District No. 120* at 5. Nothing in the Water District No. 120 final order indicates that "local ground water boards" will perform the watermaster's duty and administer water rights. Additionally, it is common practice for senior water right holders in Idaho, even after passage of the Ground Water Act, to request administration through a water district, or directly from a Court when necessary. *See* March 10, 2004 *Amended Order* In the Matter of Distribution of Water to Water Right Nos. 36-15501, 36-02551, and 36-07694; *Baker v. Ore-Ida Foods*, 95 Idaho 575 (1973); *Musser v. Higginson*, 125 Idaho 392 (1994). Specifically, the Idaho Supreme Court affirmed the procedure used by the senior well owner in *Baker v. Ore-Ida Foods*, who filed a direct action in district court to prevent interference from junior ground water users. The *Baker* Court did not remand the proceeding back to a "local ground water board" but instead firmly held that "Idaho's Ground Water Act forbids 'mining' of an aquifer." 95 Idaho at 583. Therefore, IGWA's objection that the Coalition's request for water right administration must proceed before a "local ground water board" is contrary to existing practice and law in Idaho, and should similarly be disregarded.

Futile Call Does Not Apply to the Coalition's Call

Finally, IGWA argues that the Coalition's water delivery call should be dismissed because it would be "futile." The defense is inapplicable in this proceeding since curtailing junior ground water rights would result in water being available for beneficial use by the Coalition members, including for direct natural flow diversions and diversions to storage. *See* Contor, Cosgrove, Johnson, Rinehart and Wylie, Snake River Plain Aquifer Model Scenario: *Hydrologic Effects of Curtailment of Ground Water Pumping "Curtailment Scenario"*, October 2004, Idaho Water Resources Research Institute Technical Report 04-023. The Coalition members can use the water resulting from curtailment of junior ground water rights, hence there would be no "waste" as that complained of by IGWA.

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[12] The SRBA District Court has recently reiterated the Idaho Supreme Court's holding in *Musser* that the groundwater statutes do not affect the Coalition members' water rights, or any other surface or ground water right prior to 1951. *See Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits* at 27 (In Re SRBA: Case No. 39576; Twin Falls County District Court, 5th Jud. Dist.)(Subcase No. 91-00005, Basin-Wide Issue 5)("First, the groundwater management statutes do not apply to water rights prior to their enactment in 1951.").

Initial Questions/Comments Regarding Brendecke Affidavit

The Director may have his own questions regarding statements and data presented in the Brendecke Affidavit. Notwithstanding any of the Director's questions or concerns, the Coalition, after an initial review of the Brendecke Affidavit, would like to point out the following questions and comments for the Director's consideration, even though the Director does not "intend" to rely upon the affidavit for the forthcoming "injury" order.

- The flow of the South Fork of the Snake River does not represent the "total water supply" available for diversion and use by the Coalition members. It is but one "indicator" of the total water supply in any given year.
- The Upper Snake River Basin has experienced drought cycles over time. Storage reservoirs in the basin were constructed in order to provide necessary water supplies in "drought" years. The drought index demonstrates that storage is needed the most in years when the index is below "0", when impacts to water rights caused by junior diversions are exacerbated. Junior water rights do not escape liability for the depletions they cause to senior water rights during a "drought" period.
- If the current drought exhibits a deficit of nearly 2 MAF, that is all the more reason for junior ground water rights to mitigate for depletions caused to senior surface water rights.
- Ground water "withdrawals" are not the same as "depletions" to the ESPA. Pumping of all groundwater rights results in approximately 2.1 MAF of depletions to the ESPA while more water may actually be "withdrawn."
- The data or reports that demonstrate approximately "1.1 MAF" was withdrawn from the ESPA by groundwater pumping in 1980 needs to be revisited or clarified. If current groundwater "depletions" are approximately 2.1 MAF, then that would mean approximately 50% of the groundwater development in the ESPA occurred since 1980. This number appears to contradict the depiction at Exhibit R.
- Exhibit J shows the "average" reach gains on an "annual" basis. The comparison of the "Crandall" data from 1912 to 1933 to IDWR's data needs to be further evaluated. All of the reach gains under the "Crandall" data are lower during the overlap period with the IDWR data, without any explanation or qualification.
- The early drought periods on Exhibit J are not comparable given the above questions about the "Crandall" data. The reach gains these years could have actually been higher as indicated by IDWR's data.
- ¶ 23: What does "strongly related" mean? Is there a "statistically significant relationship" between the PDSI values and the annual reach gain data? Nothing in the affidavit demonstrates that a statistical relationship was conducted.
- Exhibit L. Although visually there appears to be a correspondence between aquifer discharge and Spring Creek, is it "statistically significant"?
- Exhibit M. Is there a "statistically significant relationship" between the PDSI values and the <u>estimated</u> aquifer discharges?
- Exhibits N, O, and P demonstrate a significant drop in aquifer water levels since 2000. Exhibit N: Assuming the average water level drop is 5 feet over a 10,000 square mile aquifer, that results in a 32 MAF reduction in aquifer storage. Assuming the average water level drop is 7.5 feet over a 10,000 square mile aquifer, that results in a 48 MAF

reduction in aquifer storage. Does this result in a "very little net change" in aquifer water levels as suggested?

- ¶ 26 There needs to be further quantitative evaluation of the effect on water levels in the ESPA due to changes in water management versus recorded drought effects.
- ¶ 30 The affidavit fails to recognize that approximately 60% of the reach gain reduction would be realized within 10 years if all rights junior to 1949 were curtailed, and about 50% would be realized within 7 years. Under the 1961 curtailment, approximately 71% of the reduction would be realized within 10 years.
- Exhibit R shows ground water "rights", not diversion and use. The projection of 22,000 cfs of ground water rights exaggerates what is actually being diverted and implies that ground water rights are synonymous with "depletions." Assuming 2.1 MAF of groundwater depletions each year, 5,982 cfs would have to be pumped continuously, 24 hours a day, for 180 days to equal 2.1 MAF.
- ¶ 33 Is the affiant claiming the ESPA model is wrong? It is evident from Exhibit J that there is a declining trend in annual reach gains beginning in the late 1960s.
- ¶ 34 The graph depicts plots of cumulative annual flow which do not reflect any changes in "seasonal" discharges at either station, which needs to be considered when evaluating impacts on natural flow available for senior water rights.
- ¶¶ 36,37 The statistical evaluation of <u>annual</u> reach gains in the Blackfoot to Neeley reach apparently shows no "statistically significant" difference before 1960 and after 1960, however, the data records examined includes 20 years of questionable annual reach gains, i.e. "Crandall" data, plus there is no indication of the criteria for "statistically significant."
- ¶39 The 'close relationship' between climatic conditions and near Blackfoot-Neeley , i.e. PDSI and is not demonstrated statistically and may in fact not be statistically significant.
- ¶44 The conclusion that, because the cumulative natural flow rights of the Surface Water Coalition members exceed 2500 cfs, the junior rights must always have depended on flood flows passing Blackfoot from upstream reaches, neglects two significant hydrologic facts.
    a. There are other inflows to the Snake River between Blackfoot and Milner i.e.: Raft River (historically), Portneuf River, gain between Minidoka and Milner, Bannock Creek, springs below Neeley, Marsh Creek and others.
    b. The use of average annual reach gain as an indicator of dependable level of natural flow neglects natural seasonal fluctuations and induced fluctuations caused by pumping.
- ¶45 Conclusions based on examination of only the 1905 Montgomery Ferry monthly flow and distribution according to natural flow rights of SWC members, is short sighted. Each of the members secured their natural flow water rights and proved up on the discharge to secure a decreed right. The discharge therefore was adequate, at some time, to convince the State that the right could be allocated. A more thorough analysis of early discharge data at both Minidoka (Montgomery Ferry) and Milner is required to reach any conclusion on adequacy of natural flow rights.

- ¶46 Reliance on the PDSI for comparison between isolated years (i.e. 1904 and 1905 vs. 2000-2004 is not warranted. This reliance implies that the PDSI is the only indicator of natural flow yield and/or diversion requirements.
- ¶51 The conclusion that "The only way to justify their requested curtailment of ground water uses is if their objective is to increase the supply above what they historically would have had under similar conditions" implies that ground water pumping has resulted in no depletions to natural flow. This is contrary to the ESPA ground water model simulations and recent declining trends in measured reach gains.
- ¶55 Exhibit AA shows "effects of periodic dry spells" which resulted in lowered initial storage allocations for SWC members. Regardless of the causes of the decreased storage allocations, the impact of reach-gain depletions on natural flow and/or storage impacted SWC member water supplies. The impact of the reach-gain depletions was exacerbated by the 'periodic dry spells' or drought.
- ¶56 Comparison of Twin Falls Northside and Twin Falls Canal Company storage and natural flow diversions (Exhibit BB) shows the impact of low water years and/or ground water pumping on available supplies and the variability over the period of record. However, comparison of the reduced diversions in recent years with a single year, such as 1961, neglects the influences of prior year carryover and previous years incidental recharge and pumping demands. Again statistical evidence of the 'no trend' conclusion is not supplied.
- ¶57 Exhibit CC which purports to depict SWC members' annual diversions per acre compared with average "groundwater usage" and a "crop irrigation requirement " range is at best misleading. The depicted 'ground water usage' is apparently the average ESRPA ground water depletion per acre and not the actual ground water diversion. The actual ground water diversion is not used in the ESRPA ground water model. This comparison neglects the irrigation efficiency of all users. Variations in SWC members annual per acre diversions and the comparison with some sort of 'duty of water' is dependent on the distribution and delivery system configuration of each member, the type of irrigation applications systems and management factors.
- ¶61 Flow past Milner is highly variable and the use of averaging over any period is likely not justified. Extremely high periods such as the early 1980s and 1996-1999 interspersed within drought periods skew the periodic averages (pre-1960 vs. post 1960) and are not indicative of any trends that might be related to water use and management.
- ¶62 Conclusions based upon Exhibits A-EE imply that drought is the cause of declines in reach gains since 1999 and appear to imply that depletions from ground water pumping have not occurred or are not presently impacting reach gains. Impacts from ground water pumping are present and those impacts on irrigation season natural flow and storage availability are further exacerbated by drought.
- These conclusions also imply that surface water users, because they elected to implement better water management practices, are themselves the cause of reach gain declines and, had they not done so, the impacts of ground water development would have been of no consequence. No evidence or analysis is presented to support these conclusions.
- ¶63 Reported increases in reach-gains from curtailment of ground water pumping on the ESPA do not comport with simulated reach-gain increased reported by IWRRI in their report on 'Hydrologic Effects of Curtailment of Ground Water Pumping-Curtailment

Scenario' October 2004. For instance, the Brendecke estimate of steady state curtailment of ground water pumping junior to 1949 indicates a steady state impact of about 1.35 MAF annually whereas the IWRRI simulates a steady state impact of 1.78 MAF. No explanation for the difference is offered. Similarly, the Brendecke estimate of from curtailment 1961 and later ground water pumping is 0.9 MAF whereas IWRRI simulations show 1.2 MAF.

Summary

The Director has a clear legal duty in this proceeding: the administration of water rights according to priority. The Surface Water Coalition filed its request in early January on the basis that shortages were expected in 2005. Those expectations have not changed. A timely decision on the Coalition's request has been delayed for over three months now. In the meantime, holders of junior ground water rights are currently pumping water out of the ESPA that would otherwise be available for diversion and use under the senior water rights held by the Coalition's members.

The Director's lack of action to date is a further cause of "injury" to these senior surface water rights. Without immediate action, this "injury" will continue to accrue with every acre-foot that is pumped and depleted under a junior ground water right, particularly by those ground water rights in close proximity to the American Falls reach. Therefore, the Coalition hereby requests a list of all ground water rights within Water District No. 120, along with the total volume of water pumped out of the aquifer to date. The Director may consider this request as continuing on a weekly basis. The Coalition would further request that the Department conduct ESPA-wide aquifer water level measurements in 2005 since this data has not been updated for three years. In order to ensure ground water rights are not "mining" the aquifer, and to protect senior surface water rights, the Director must continue to monitor the water levels across the ESPA.

In sum, the Director has a clear legal duty to administer water rights by priority and properly manage the resource. It is past time for the Director to carry through with this duty and hold junior ground water rights to the standard required by Idaho law.

DATED this 15th day of April 2005.

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