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

**IN THE MATTER OF APPLICATIONS
FOR PERMIT NO. 35-14240, 35-14241,
35-14242, 35-14243 and 35-14244 IN THE
NAME OF LANCE AND/OR LISA FUNK
PARTNERSHIP**

**COALITION'S REQUEST FOR
DEPARTMENT MEMORANDUM
ADDRESSING QUESTIONS**

COME NOW, the Protestants, A&B Irrigation District ("A&B"), American Falls Reservoir District #2 ("AFRD#2"), Burley Irrigation District ("BID"), Minidoka Irrigation District ("MID"), Milner Irrigation District ("Milner"), North Side Canal Company ("NSCC") and Twin Falls Canal Company ("TFCC") (cumulatively the "SWC" or "Coalition"), by and through their undersigned counsel of record, and petition for the preparation of a Department Memorandum addressing certain questions.

The following questions are proposed:

1. **Department's Analysis of Short Term Mitigation:** As to the processes, policies and regulations, used by the Department for the analysis of sufficiency, obligations and impacts of short term mitigation for new water right(s):

- a. Are the Department's processes, policies and regulations for determining the impacts of short term mitigation for new water right(s) based on its analysis of water bank applications, transfer applications or some other process?
- b. If the Department's analysis of short term mitigation is based on its analysis of transfer applications, what is the justification for that analysis of short term mitigation?
- c. If the Department's analysis of short term mitigation is based on its analysis of water bank applications, what is the justification for that analysis and how does the Department perform the injury analysis required under I.C. 42-1763?
- d. If the Department's analysis is based on some other process, what is that process and what is the justification for that process?
- e. If the result for the analysis using either the transfer analysis, water bank analysis or some other analysis provides different results, what is the justification for the different results?
- f. If the water right proposed for mitigation is not owned by the owner of the new water right(s), under what authority does the Department authorize the use of the water right for mitigation?

2. **Department's Analysis of Impacts of Mitigation:** As to the Department's analysis of impacts relative to the water right(s) used for short term mitigation, please answer the following questions:

- a. How does the Department analyze the delayed steady state impacts of new water right(s) where (i) the use of short term mitigation is approved, (ii) the short term mitigation expires, (iii) the water right(s) used for short term mitigation are diverted at a different location, and (iv) no new mitigation is secured for the new water right(s)?
- b. How does the Department analyze the effects of short term mitigation where the mitigation right(s) authorize a diversion rate that is significantly less than the diversion rate sought under the new water right(s) (i.e. 8.5 c.f.s. vs. 35 c.f.s.)?
- c. How does the Department analyze the impacts of proposed short term mitigation for a new water right where the short term mitigation right(s) authorize a diversion volume over a year round season of use and the new water right seeks

to divert the same volume over an irrigation season (approx. 4 month season of use)?

3. **Analysis/Notice of Future Mitigation:** What is the Department's process for analyzing future proposed mitigation when the short term mitigation approved for the new water right expires or is no long available, including the process for notifying potentially impacted water users of the proposed new mitigation?

On July 14, 2014, the Hearing Officer entered the *Interlocutory Order Addressing Legal Question*, concluding that "the lease agreement between Funk and Magnida may form the basis of a proposed mitigation plan." The *Order* further stated that "arguments relating to the sufficiency of the mitigation plan to offset impacts" is a "fact-dependent issue that can only be addressed through an administrative hearing." So too, according to the Hearing Officer, is the issue of whether or not the proposed short term mitigation is "sufficient to offset delayed impacts caused by groundwater diversions." A hearing is set for December 11-12, 2014.

In order for the Coalition to appropriately prepare for hearing and defend its interests in this matter, it must understand how the Department intends to analyze short term mitigation for new water rights. The process, and the justification for that process, is not clear. For example, for the last two irrigation seasons, Funk has rented the Magnida water rights from the State Water Supply Bank for use on his property during the pendency of these applications for permit. Through the water bank process, Funk has been limited to the irrigation of approximately 450 acres under the Magnida water rights. However, the applications for permit seek to use the same water to authorize the irrigation of over 1,800 acres – an increase of nearly 400%.

During briefing on the legal issue, Funk represented that, although the specific mitigation plan has not been approved, the Department agrees that this is an appropriate use of the Magnida water:

The SWC's position also ignores the fact that Funk and his consultants met with IDWR officials to discuss the conceptual mitigation plan even before the Applications were submitted. The purpose of the meeting was to ensure, before expending the resources pursuing a mitigation plan and the irrigation equipment associated with the water use, that the conceptual mitigation plan was not legally defective in the Department's view from the get-go. Neither Jeff Peppersack, Pam Skaggs, nor Monica VanBussum of the Department indicated that the lease with Magnida in place at the time of their meeting was insufficient legal access to the mitigation water rights.

Response to Coalition's Opening Brief, at 8-9. It appears, therefore, that the Department is taking two positions relative to the use of the Magnida water for irrigation – limiting it to 450 acres through the Water Supply Bank, but allowing up to 1,800 acres through the application/mitigation process. This is a primary issue at hearing on this matter and should be clarified.

Answering the above questions will streamline these proceedings. If the parties understand the Department's process for analysis the use of short term mitigation, they will be better prepared to address the remaining issues. Unless the parties understand the Department's anticipated processes, then the parties will not be able to appropriately address the sufficiency of the proposed mitigation.

Requesting a department memorandum is not a unique process. In the proceedings relative to Transfer No. 78268, the Department prepared a memorandum addressing certain issues with the use of modeling in transfers. That memorandum greatly assisted the parties in their briefing and ultimate settlement of protests in those proceedings. Similarly, a memorandum discussing the above questions would greatly assist the parties in preparing for hearing and further settlement discussions.

Accordingly, the Hearing Officer should order the preparation of a memorandum to address the above questions prior to hearing. The Coalition respectfully requests that this memorandum be filed and submitted to the parties no later than Friday September 26, 2014.

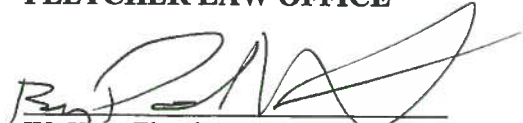
DATED this 4th day of September, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of September, 2014, I served true and correct copies of the foregoing upon the following by the method indicated:

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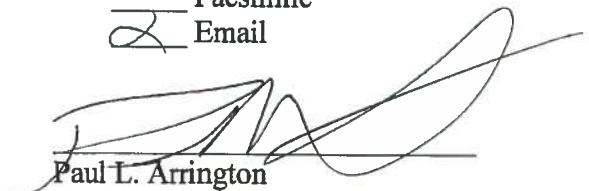
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