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

CLEAR SPRINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT,

Cross-Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

DAVID K. TUTHILL, JR., in his capacity as Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

Case No. CV-2008-444

GROUND WATER USERS' REHEARING REPLY BRIEF

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148

(Clear Springs Delivery Call)

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively, the "Ground Water Users"), respectfully submit this reply brief, pursuant to the Court's *Amended Scheduling Order on Petitions for Rehearing* dated August 20, 2009, in response to *Blue Lakes Trout Farm, Inc.'s and Clear Springs Foods, Inc.'s Brief in Support of Joint Petition for Rehearing* dated August 21, 2009 ("*Spring Users' Rehearing Brief*").[1]

ARGUMENT

I. The Court should not substitute its judgment for that of the Director on the issue of material injury to water right nos. 36-7210 and 36-4013A.

The Spring Users ask the Court to adopt findings (but not conclusions) of the Hearing Officer instead of the findings and conclusions of the Director concerning material injury to water right nos. 36-7210 and 36-4013A. (*Spring Users' Rehearing Br.* 3-14.) It is their position that the Hearing Officer exercised better judgment than the Director with respect to the seasonal fluctuations in the Spring Users' water supplies, and that "[t]he Court should therefore affirm the Hearing Officer's injury findings for these water rights." *Id.* at 9. In other words, the Spring

[1] Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs") have been referred to collectively throughout this proceeding as the "Spring Users."

Users ask the court to weigh the evidence in the record and decide whether it agrees more with the judgment of the Director or the Hearing Officer.

The Spring Users' request is beyond the authority of the Court. Judicial review of agency action is controlled by the Idaho Administrative Procedure Act, which gives reviewing courts two options for disposing of the case. Idaho Code § 67-5279. The court may either a) "affirm the agency action," or b) "[i]f the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." *Id.* The reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." *Id.* Thus, the Court has no authority to weigh the evidence to determine whether it thinks the Director or the Hearing Officer exercised better judgment. Rather, the Court's review of the record is limited to a determination of whether the Director's decision is "supported by substantial evidence on the record as a whole." *Id.*

"Substantial and competent evidence" is "relevant evidence which a reasonable mind might accept to support a conclusion." *Lamar Corp. v. City of Twin* Falls, 133 Idaho 36, 43 (1999) (quoting *Mancilla v. Greg*, 131 Idaho 685, 687 (1998)). "The Court [] defers to the agency's findings of fact unless they are clearly erroneous." *Urrutia v. Blaine County*, 134 Idaho 353, 357 (2000) (citing *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926 (1998)). The Court must sustain the Director's decision "even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Fischer v. City of Ketchum*, 141 Idaho 349, 352 (2005) (quoting *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429 (1998)).

In determining whether the Director's decision is supported by substantial evidence, the Court's "statutory mandate is to review the final decision of the [Director], not the decision

proposed by the hearing officer." *Dept. of Health and Welfare v. Sandoval*, 113 Idaho 186, 189 (1987). "[A]n agency which is statutorily designated to be the ultimate fact-finder need not accept the hearing officer's factual determinations." *Woodfield v. Bd. of Prof'l Discipline of the Idaho State Bd. of Medicine*, 127 Idaho 738, 746 (1995). "[T]he hearing officer's ruling is merely a proposal which may be supplanted by a different decision by the [Director]." *Id.* "When the [Director's] findings disagree with those of the officer issuing the recommended order, the question for the reviewing court remains whether the [Director's] findings are supported by substantial evidence." *Id.*

The Spring Users attempt to prove that the Director's decision is clearly erroneous by making an entirely unfounded allegation that the "the Director identified no facts to support his reversal of Hearing Officer Schroeder's injury finding for Blue Lakes' 1971 water right and Clear Springs' 1955 water right." (*Spring Users' Opening Br. on Rehearing* 10; emphasis in original.) The record unmistakably proves otherwise.

In this case, the Director, the Hearing Officer, and the former Director (Dreher) all agreed that curtailment should not extend to Blue Lakes' 1971 priority water right (36-7210) and Clear Springs' 1955 priority right (36-4013A). *Final Order* ¶ 12, R. Vol. 16 at 3953 ("The hearing officer agreed with the Director that water right nos. 36-4013A held by Clear Springs and 36-07210 held by Blue Lakes were not injured"), ¶ 15, R. Vol. 16 at 3954 ("The Director agrees with the hearing officer's ultimate finding that curtailment should not extend to water right nos. 36-04013A held by Clear Springs and 36-07210 held by Blue Lakes, but arrives at this finding differently.") They simply arrived at the conclusion differently.

The former Director (Dreher) determined that water right nos. 36-7210 and 36-4013A were not materially injured "taking into account the variations in spring flows between months

that have existed since the date of appropriation." (*Order of May 19, 2005* ¶ 64, R. Vol. 1 at 58; *Order of July 8, 2005* ¶ 61, R. Vol. 3 at 500.) The Hearing Officer recommended that this finding be revised based on evidence that the rights were filled continuously at the time of appropriation, but still concluded that "it is not recommended that the curtailment extend to those dates." (*Responses to Petitions for Reconsideration and Clarification and Dairymens' Stipulated Agreement* 9; R. Vol. 16 at 3847.) In the *Final Order*, the Director agreed that there is no material injury to water right nos. 36-7210 and 36-4013A, but he provided different reasoning for his decision. (*Final Order* ¶¶ 13-28; R. Vol. 16 at 3953-55.)

The Director thoroughly considered the evidence supporting the Hearing Officer's recommendation (the same evidence upon which the Spring Users' rely on rehearing), quoting it at length. (*Final Order* ¶ 13, R. Vol. 16 at 3953-54.) But the Director found more persuasive the former Director's analysis of historic measurements and water availability. The Director specifically explained his concern with the reliability of Exhibits 205 and 128A, cited substantial testimony from the hearing, and concluded that "[b]ased on review of the record developed at the hearing, there is insufficient credible evidence presented to find that water right no. 36-07210 (and 36-4013A) was injured." *Id.* at ¶¶ 13-18, R. Vol. 16 at 3953-55.[2] The evidentiary basis for the Director's decision is further detailed in the *Respondents' Brief* filed in this case by the Idaho Department of Water Resources ("IDWR"). (*Respondent's Br.* 44-57.)

While there may be conflicting evidence in the record, the Director's decision is unquestionably based on "relevant evidence which a reasonable mind might accept to support a conclusion." *Lamar Corp.*, 133 Idaho at 43. Moreover, the decision was made only after

[2] Without diminishing Hearing Officer Schroeder's remarkable capabilities, it must be recognized that the Director is a licensed engineer with vastly more experience evaluating water supply data and administering water resources under Idaho law.

specifically considering the same arguments and evidence repeated by the Spring Users on rehearing. (*Cf. Joint Petition for Partial Reconsideration*, R. Vol. 16 at 3751, and *Spring Users' Rehearing Brief* 9-14.) Contrary to the Spring Users' allegation, the Director did not "ignore[] [the] hearing officer's 'factual finding, instead relying solely on its 'specialized knowledge and experience' to reach the opposition conclusion,' without providing an explanation for its contrary finding." (*Spring Users' Rehearing Br.* at 9; quoting *Alter v. Idaho Bd. of Occupational Licenses*, 144 Idaho 281, 285 (2007)). Quite the opposite. The Director included in his *Final Order* a straightforward review of the Hearing Officer's findings of material injury, and an explanation of why he disagreed with the Hearing Officer's recommendation, supported by exhibits and testimony in the record. (*Final Order* ¶¶ 13-28, R. Vol. 16 at 3953-55.)

That the Director's judgment differed from the recommendation of the Hearing Officer, or that there is evidence to support the Hearing Officer's recommendation, does not make the Director's judgment "clearly erroneous." *Urrutia*, 134 Idaho at 357. The Director considered the evidence in the record (specifically including conflicting evidence and arguments), made a judgment call based on the evidence before him, and explained the basis for his decision. His decision is supported by substantial evidence in the record as a whole and should be sustained.

II. If the Court sets aside the Director's decision on seasonal variability, the Court should remand the issue for further analysis by the Director, not make its own determination of material injury as suggested by the Spring Users.

The Spring Users further argue that if the Court sets aside the Director's decision, remand is unnecessary on the basis that "further findings of fact would not affect the outcome of the case." (*Spring Users' Rehearing Br.* 9.) In their view, "the [Director] has already decided that it cannot undertake the analysis recommended by the Court on remand." *Id.* at 12. That argument is mistaken for at least three reasons. First, the cases cited by the Spring Users do not justify

foregoing remand under the circumstances of this case. Second, the IDWR has confirmed that the Director *can* undertake the requested analysis, and would prefer to do so if his decision on seasonal variability is set aside. Third, the Director's analysis of seasonal variability gives rise to interrelated material injury factors and the law of full economic development which must be considered simultaneously by the Director.

The Spring Users cite *Alter* in support of its argument, but in that case the court provided no explanation for its finding that remand was unnecessary, stating only that its finding was "based on the evidence presented before the hearing officer." 144 Idaho 281, 286 (2007). The decision sheds no light on when remand is or is not necessary.

The Spring Users cite *Bonner General Hospital v. Bonner County*, 133 Idaho 7 (1999), for the proposition that remand is unnecessary "if the subsidiary facts are obvious or easily inferred from the record and the general fact finding." (*Spring Users' Rehearing Br.* at 9.) Yet *Bonner* says nothing of inferring facts. 133 Idaho at 11. In *Bonner*, the court declined remand simply because it believed remand would be futile. *Id.* ("there is no indication in the record that further findings of fact could be made from the paucity of the evidence that would affect in the outcome of this case.") In contrast, there is significant evidence in this case concerning seasonal variability that is both technical and complex and may certainly affect the outcome if the case.

The Spring Users also cite to *Woodfield*, yet in that case the court *did* remand the case to the Board for further findings. 127 Idaho at 747. Although the record contained all of the evidence necessary to decide the issue, the court found the Board did not adequately delineate its decision, and therefore remanded the case to the Board with instructions "to identify facts, as well as inferences drawn from the facts upon the application of its expertise and judgment, which underlie its decision." *Id.* Likewise, if the Court determines that the Director's written decision

is not adequately justified, the Court should not presume the record is devoid of substantial evidence to provide adequate justification.

The fact that the record may contain the evidence necessary to decide an issue does not mean that the Director properly considered it. *Mercy Med. Ctr. v. Ada* County, 192 P.3d 1050, 1056 (Idaho 2008). In *Mercy*, the Ada County Board of Commissioners concluded that a patient was ineligible for indigent medical assistance benefits because the patient was not a resident of the county. *Id.* at 1052. On appeal, the Idaho Supreme Court found evidence in the record to support the patient's eligibility, but nevertheless remanded the issue, explaining that

> the agency record contains information ... which would tend to support a finding of eligibility on remand. However, when a board fails to make a factual determination on a necessary issue, the district court must not make its own factual determination but must rather remand the case to the board to make that determination.

Id. at 1056 (citing *Univ. of Utah Hosp. v. Clerk of Minidoka County,* 114 Idaho 662, 665 (1988)) (emphasis added). Thus, even if the record contains all information on the historic availability of water right nos. 36-4013A and 36-7210, the Director should be given the opportunity to reconsider the issue in light of the instructions given by the Court.

The IDWR has confirmed the Director's ability to perform additional review of seasonal variability if necessary, and has additionally expressed interest in having the Spring Users provide all information on the historic availability of water right nos. 36-4013A and 36-7210, as was initially anticipated by former Director Dreher. (*IDWR Response Br. on Rehearing* 7-8.) The Idaho Supreme Court has affirmed the Director's right to entertain additional evidence on remand. *Woodfield*, 127 Idaho at 745 ("On remand, either party should be allowed an opportunity to introduce additional evidence ....")

Finally, remand is necessitated by the fact that seasonal variability is only one aspect of the material injury analysis. In *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* ("*AFRD2*"), the Idaho Supreme Court affirmed the Director's conclusion that "depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42." 143 Idaho at 868, 876.[3] There are interrelated material injury factors (such as the amount of water needed, alternative means of diversion, etc.) that must be considered in concert with seasonal variability. *See* CM Rule 42. In addition, the Director's analysis of seasonal variability affects full economic development of the Eastern Snake Plain Aquifer ("ESPA"). Idaho Code § 42-226; CM Rule 20.03. Accordingly, any remand should also instruct the Director to make findings and conclusions concerning full economic development. It is not the job of the Court to weigh the evidence in the record and make these determinations, which is why remand is necessary if the Director's decision on seasonal variability is set aside.

III. In the conjunctive management context, Due Process requires a hearing before curtailment.

Lastly, the Spring Users ask this Court to create new law that would require the Director to order curtailment in the conjunctive management context before holding a hearing to consider evidence, hear objections, etc. (*Spring Users' Rehearing Br.* 14-20.) The Spring Users' request

[3] One of the issues on appeal in *AFRD2* was the following conclusion of the Director: "Because the amount of water necessary for beneficial use can be less than the decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury." 143 Idaho at 868. The Court affirmed the Director's conclusion by explaining that "even with decreed water rights, the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development." *Id.* at 876. The Court continued,

> Clearly, even as acknowledged by the district court, the Director may consider [material injury] factors such as those listed above in water rights administration. ... If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.

Id.

not only defies the practical realities of conjunctive management, it contradicts the Idaho Supreme Court's *AFRD2* decision.

In *AFRD2*, counsel for Clear Springs argued that the CM Rules "reverse 'first in time, first in right' by forcing seniors to make a 'delivery call' and proceed through administrative 'contested cases' before any administration occurs." (*Pls.' Br. in Resp. to Def.'s and IGWA's Brs.* 16, *AFRD2*, 143 Idaho 862.) Clear Springs advanced the same position in that case as the Spring Users advance in this case, that "a curtailment order must be implemented without delay to protect injured senior water rights." (*Spring Users' Rehearing Br.* 15.) As explained below, the Idaho Supreme Court already rejected that argument in its *AFRD2* decision.

The Spring Users rely upon a surface water administration case, *Nettleton v. Higginson*, 98 Idaho 87 (1977), to support their position that curtailment should precede a hearing in the conjunctive management context. (*Spring Users' Rehearing* Br. 17-18.) Yet *Nettleton* only confirms that due process justifies a hearing *before* curtailment when it comes to ground water administration.

The Idaho Supreme Court affirmed in *Nettleton* that "individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state," and that "except in 'extraordinary circumstances' where some valid governmental interest justifies the postponement of notice and a hearing, due process requires an adversary proceeding before a person can be deprived of his property interest." 98 Idaho at 90 (citing Idaho Const. Art. 15, § 4; quoting *Fuentes v. Shevin*, 407 U.S. 67 (1972)). There are three clearly-defined requirements to establish the "extraordinary circumstances" necessary to justify postponement of a hearing:

> First * * * the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for

> very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standard of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Nettleton, 98 Idaho at 92 (quoting *Fuentes*, 407 U.S. at 92). In *Nettleton* the Idaho Supreme Court found to be met "in the present case" (surface water administration). *Nettleton*, 98 Idaho at 92. The Court's decision does not apply equally to conjunctive management.

In *AFRD2*, the Idaho Supreme Court rejected a holding of the district court that was based on precedent in *Moe v. Harger*, 10 Idaho 302 (1904), because "*Moe* ... was a case dealing with competing surface water rights and this case involves interconnected ground and surface water rights." 143 Idaho at 877. The Court recognized that "[t]he issues presented are simply not the same" in conjunctive management. *Id.*

Issues unique to conjunctive management bear directly on two of the requirements that must be met to curtail without a prior hearing. First, the curtailment must be "necessary to secure an important governmental or general public interest." *Fuentes*, 407 U.S. at 92. In *Nettleton* the Court cited the governmental and general public interest "of securing the maximum use and benefit of its water resources." 98 Idaho at 90. As between surface water users, that is accomplished by application of doctrine that "first in time is first in right." In contrast, while "first in time is first in right" has a place in the conjunctive management context, the Legislature has mandated that the doctrine "shall not block full economic development of underground water resources." Idaho Code § 42-226.

The law of full economic development gives rise to public interest and economic considerations that are not susceptible to quick, easy and straightforward determination. Further, the conjunctive administration of surface and ground water rights is far more technically complex than the relatively simple prioritization administration of surface water rights. Whereas

essentially all of a curtailed surface water right reaches the calling senior, the curtailment of a ground water right has a radial effect, resulting in the calling senior receiving only a fraction of the curtailed junior water use. Consequently, the Idaho Supreme Court expressly recognized that conjunctive administration cannot be reduced to a simple ministerial act, but instead

> requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water rights are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources. That is precisely the reason for the CM Rules and the need for analysis and administration by the Director

AFRD2, 143 Idaho at 877 (quoting *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422 (1997)).

Secondly, due process can be satisfied without a hearing prior to curtailment only when "there has been a special need for very prompt action." *Fuentes*, 407 U.S. at 92. In surface water administration, the effects of curtailment are relatively easy to predict, usually well-established, and essentially immediate, which enables the IDWR to provide an immediate response to delivery calls, and allows seniors to receive an immediate benefit from curtailment. In contrast, the effects of ground water curtailment are very difficult to predict and typically take years and even decades to be realized. Immediate curtailment does not provide an immediate benefit to the calling senior. Moreover, ground water curtailment is a long-term, often permanent arrangement, whereas surface water curtailment is seasonal, with each surface right beginning anew the following spring.

Consequently, "the state policy of securing the maximum use and benefit of its water resources," *Nettleton*, 98 Idaho at 90, is accomplished differently in conjunctive administration than in surface water administration. Surface water administration is governed by priority with few limitations. Conjunctive management, on the other hand, is governed by the CM Rules

which account for the hydrologic complexities of ground water administration as well as the law of full economic development. Given such differences, the Idaho Supreme Court rejected the argument made in the *AFRD2* case (and repeated by the Spring Users' here) that the Director should order curtailment before holding an administrative hearing in the conjunctive management context. The Idaho Supreme Court explained that what is "timely" simply means something different in conjunctive administration than it does in surface water management:

> While there must be a timely response to a delivery call, neither the Constitution nor the statues place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

143 Idaho at 875.

This Court has it right in its conclusion that "[a]fter an initial order is issued and pursuant to the requirements of due process, the parties pursuant to notice and upon request are entitled to a hearing before junior rights are curtailed." (*Order on Petition for Judicial Review* 49.) Junior priority ground water users cannot be expected to divine when and where delivery calls may come from or to have a mitigation plan in place for every conceivable delivery call. This supports the Court's conclusion that "a more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making that order final, and then hold a hearing on the order of curtailment and material injury ... and the mitigation plan at the same time." *Id.* at 51. This process affords both parties due process and a timely hearing, and best implements the

CM Rules and the legislative mandate that exercise of the doctrine of "first in time is first in right" not block full economic development of ground water resources.

The Spring Users' complain that "the process itself has become the decision," (*Spring Users' Rehearing Br.* 19), yet it is the Ground Water Users that have spent more than $12 million to survive while they seek to remedy mistakes that would arguably had been averted had the Director held a hearing before ordering curtailment. The Director's commitment to immediate curtailment resulted in hasty evaluation of complex technical and legal issues of first impression without the benefit of a full evidentiary record or alternative perspectives. Despite legitimate defenses raised by the Ground Water Users, the Spring Users have received mitigation while the Ground Water Users have struggled against the inertia of a final order that gained momentum for three years before a hearing was ever held.[4]

Admittedly, holding a hearing before curtailment may result in some delay in curtailment (if curtailment turns out to be justified), leaving the Spring Users without their full water supply (but still receiving nearly their full supply) for a time. But in "balancing [] both the nature of the government function and the private interests affected," *Nettleton*, 98 Idaho at 90, that risk is far outweighed by the risk of massive and potentially irreversible harm that results from the type of widespread curtailment that occurs in conjunctive management.[5] The Idaho Supreme Court certainly realized that holding a hearing before curtailment may result in delayed implementation if curtailment turns out to be justified, but still accepted that a hearing before curtailment is a more appropriate course, explaining that "concepts like beneficial use, waste, reasonable means

[4] It must also be remembered that unlike the Spring Users, who made their appropriations with knowledge that the spring flows had increased dramatically from natural levels which would not be absolutely protected, the Ground Water Users invested in land, wells and pumps with the expectation that curtailment would not occur unless the source is being "mined" or minimum Snake River flows are not being met, neither of which has yet to occur.

[5] If a hearing is held before curtailment is ordered, the Spring Users still receive almost their entire water supply (since their shortage is just a small percentage of their total water supply). In contrast, if curtailment is ordered before a hearing, the Ground Water Users' water rights are deprived entirely, resulting in no beneficial use and potentially irreversible harm.

of diversion and full economic development ... are highly fact driven and sometimes have unintended or unfortunate consequences" (as opposed to stating that "first in time is first in right" has unintended and unfortunate consequences). *AFRD2*, 143 Idaho at 869.

In sum, the CM Rules demand careful and deliberate water administration decisions, not the "curtail now, ask questions later" approach re-proposed by the Spring Users. The technical and policy-based determinations that must be made by the Director in conjunctive administration simply do not accept the familiar yet ill-fitting timeframes of surface water administration.

CONCLUSION

For the reasons explained above, the Ground Water Users ask the Court to not substitute its judgment for that of the Director, but to sustain the Director's determination that Blue Lakes and Clear Springs have not suffered material injury under water right nos. 36-7210 and 36-4013A, respectively. However, if the Court does set aside the Director's decision on seasonal variation, the Ground Water Users ask that the matter be remanded to the Director for further analysis, including instructions to consider other material injury factors as well as full economic development of the East Snake Plain Aquifer. Finally, the Ground Water Users ask the Court to affirm its decision that due process warrants the holding of a hearing prior to ordering curtailment in the conjunctive management context.

RESPECTFULLY SUBMITTED.

DATED this 18th day of September, 2009.

RACINE OLSON NYE BUDGE & BAILEY, CHARTERED

Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2009, the above and foregoing document was served in the following manner:

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