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 N:\RCBV22 - IGWA\THOUSAND SPRINGS DELIVERY CALL-MITIGATION PLAN (34146)\PLEADINGS\COMPLAINT FINAL.DOC

DISTRICT COURT  
 FIFTH JUDICIAL DIST  
 JEROME COUNTY, IDAHO

2007 MAY 7 PM 1 05  
 Michelle Emerson

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MAY 09 2007  
 DEPARTMENT OF  
 WATER RESOURCES

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

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

Plaintiffs, )

vs. )

THE IDAHO DEPARTMENT OF WATER )  
 RESOURCES and DAVID R. TUTHILL, JR., )  
 IN HIS OFFICIAL CAPACITY AS )  
 DIRECTOR OF THE IDAHO DEPARTMENT )  
 OF WATER RESOURCES, )

Defendants. )

Case No. CN2007-526

**COMPLAINT FOR DECLARATORY  
 RELIEF, WRIT OF PROHIBITION,  
 TEMPORARY RESTRAINING  
 ORDER AND PRELIMINARY  
 INJUNCTION**

COMES NOW the Plaintiffs, IDAHO GROUND WATER APPROPRIATORS, INC.,  
 MAGIC VALLEY GROUND WATER DISTRICT, and NORTH SNAKE GROUND WATER  
 DISTRICT on behalf of their members (collectively referred to herein as "Plaintiffs"), by and through

COMPLAINT FOR DECLARATORY RELIEF, WRIT OF PROHIBITION, TEMPORARY  
 RESTRAINING ORDER AND PRELIMINARY INJUNCTION

counsel, and submit this Complaint for Declaratory Relief, Writ of Prohibition, and Request for Temporary Restraining Order and Preliminary Injunction against the Idaho Department of Water Resources and David R. Tuthill, Jr., in his official capacity as Director of the Idaho Department of Water Resources (collectively referred to herein as "IDWR").

### **PARTIES**

1. Plaintiffs bring this action in their representative capacity on behalf of their members who own lawful and vested ground water rights that will be adversely affected by the proposed May 14, 2007, Curtailment Order of IDWR (the "Curtailment Order"). The Curtailment Order is referenced in IDWR's April 30, 2007, *Notice of Potential Curtailment of Ground Water Rights in the Thousand Springs Area*. A copy of said Notice and the attached maps, owner list, and water rights list are attached hereto as Exhibit A and incorporated by reference.

2. Plaintiff Idaho Ground Water Appropriators, Inc. ("IGWA") is an Idaho nonprofit corporation whose members include American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, municipal water providers, commercial and industrial entities, and individuals operating within the state of Idaho who depend upon ground water from the Eastern Snake Plain Aquifer for irrigation, municipal, commercial, industrial, and other authorized beneficial uses.

3. Plaintiff Magic Valley Ground Water District is a ground water district organized and existing pursuant to Idaho Code § 42-5201 et seq., and represents approximately 330 owners of ground water rights serving irrigation, municipal, commercial, industrial and other beneficial uses,

including the irrigation of approximately 125,000 acres of farmland in southern Idaho in Minidoka, Lincoln, Jerome and Blaine Counties.

4. Plaintiff North Snake Ground Water District is a ground water district organized and existing pursuant to Idaho Code § 42-5201 et seq., and represents approximately 400 owners of ground water rights serving irrigation, municipal, commercial, industrial and other beneficial uses, including the irrigation of approximately 106,600 acres of farmland in southern Idaho in Gooding, Jerome and Lincoln Counties.

5. Magic Valley Ground Water District and North Snake Ground Water District operate as political subdivisions of the state of Idaho under Idaho Code § 42-5224(6) and are authorized thereby to represent district members with respect to their individual water rights in legal and administrative proceedings.

6. The locations and boundaries of Magic Valley Ground Water District and North Snake Ground Water District are depicted on the map attached hereto as Exhibit B and incorporated by reference.

7. Defendant Idaho Department of Water Resources is an executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701 et seq.

8. Defendant David R. Tuthill, Jr., is the Director of the Idaho Department of Water Resources and is an Idaho resident.

### JURISDICTION AND VENUE

9. Jurisdiction is proper in this District Court pursuant to Idaho Code §§ 7-401 et seq. (writ of prohibition) and 10-1201 (declaratory judgment), Idaho Rule of Civil Procedure 65 (injunctive relief), and in its capacity to provide equitable relief.

10. This Court, sitting in Jerome County, is the proper venue for this matter pursuant to Idaho Code §§ 5-402 and 67-5272 because the proposed Curtailment Order affects real property located in Jerome County and because affected members of the Magic Valley Ground Water District and North Snake Ground Water District reside in Jerome County.

### ALLEGATIONS COMMON TO ALL COUNTS

11. On March 16, 2005, Billingsley Creek Ranch sent a letter to IDWR requesting delivery of water. On March 22, 2005, Blue Lakes Trout sent a letter to IDWR requesting delivery of water. On May 2, 2005, Clear Springs Foods on behalf of its Snake River Farm and Crystal Springs Farm facilities submitted letters to IDWR requesting water rights administration. On May 10, 2005, John W. Jones by a letter dated April 12, 2005, sent a request to IDWR for delivery of water. These letters will be collectively referred to herein as the "2005 Delivery Calls." Following the 2005 Delivery Calls, IDWR issued a series of orders, including the following two orders for curtailment of ground water rights: Order of May 19, 2005, in the *Matter of Distribution of Water Right to Water Right Nos. 36-02356A, 36-07210, and 36-07427 (Blue Lakes)* and Order of July 8, 2005, in the *Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B, and 36-07148 (Snake River Farm)*; and to *Water Right Nos. 36-07083 and 36-07568 (Crystal Springs Farm)* (referred to herein as the "2005 Orders").

12. Rangen, Inc., Blue Lakes Trout Farm, Inc., Clear Lakes Trout Company and Rim View Trout Company submitted letters to IDWR dated January 17, 2007, and January 19, 2007, requesting that IDWR curtail Plaintiffs' use of their water rights. These letters are referred to collectively herein as the "2007 Delivery Calls." Copies of the 2005 Delivery Calls and the 2007 Delivery Calls are attached hereto as Exhibit C and are referred to collectively herein as the "Delivery Calls." The entities listed in Paragraph 11 above and the entities listed in this Paragraph 12 are referred to collectively herein as the "Spring Users."

13. The Delivery Calls allege injury to the Spring Users' water rights identified in Exhibit D attached hereto (collectively the "Spring Users' Water Rights").

14. The Spring Users' Water Rights are used for year-round fish propagation purposes and have as their source ground water from the Eastern Snake Plain Aquifer ("ESPA") which is supplied by artesian pressure from various springs, or surface streams created by such springs, located in the vicinity of Hagerman, Idaho.

15. The ground water right holders against whom the Delivery Calls are directed are all located within Water District 120, Water District 130, and Water District 140, which districts were created by IDWR pursuant to Idaho Code § 42-604. The locations and boundaries of said Water Districts are depicted on the map attached hereto as Exhibit B.

16. Magic Valley Ground Water District partially lies within Water Districts 130 and 140. North Snake Ground Water District lies wholly within Water District 130.

17. On April 30, 2007, IDWR issued a Curtailment Notice stating that certain ground water diversions in Ground Water Districts 120 and 130 will be curtailed pursuant to the Curtailment Order.

18. The Curtailment Order will result in the curtailment of water rights owned by certain members of Magic Valley Ground Water District and North Snake Ground Water District located within Water Districts 120 and 130. According to IDWR, the proposed curtailment will eliminate the supply of irrigation water to an estimated 33,000 acres.

19. According to IDWR, the proposed curtailment may increase surface water discharges to the Snake River somewhere between the Devil's Washbowl and the Buhl Springs reach by an estimated 30 cubic feet per second (cfs), and may increase surface water discharges to the Snake River somewhere between the Buhl Springs reach and the Thousand Springs reach by an estimated 23 cfs this year. However, there is no guarantee of increased water supply to the points of diversion for the Spring Water Users' Water Rights. Accordingly, the Delivery Calls are futile as a matter of law and present no legal basis for curtailment.

20. The Curtailment Order would result in immediate, irreparable and direct harm to Plaintiffs who have no adequate remedy at law and would provide no demonstrable benefit to the Spring Users.

### **REQUEST FOR DECLARATORY RELIEF**

#### **COUNT I**

#### **IDWR IS WITHOUT AUTHORITY TO ISSUE THE PROPOSED CURTAILMENT ORDER**

21. Idaho Code § 42-237b provides, in relevant part:

[w]henver any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority . . . such person, as claimant, may make a written statement under oath of such claim to the director of the department of water resources . . . Upon receipt of such statement . . . the

director. . . shall issue a notice setting the matter for hearing before a local ground water board. . . .

(Emphasis added).

22. Further, I.C. § 42-237d provides, in relevant part:

if the statement of the claimant is deemed sufficient by the director of the department of water resources and meets the requirements of section 42-237b, the said director of the department of water resources shall forthwith proceed to form a local ground water board for the purpose of hearing such claim.

(Emphasis added).

23. Thus, Idaho law clearly requires the convening of a ground water board as a pre-requisite to any curtailment of junior-priority ground water users.

24. Idaho Code § 42-237c provides, in relevant part:

If the board finds that the use of any junior right or rights so affect the use of the senior rights, [then] it may order the holders of the junior right or rights to cease using their right during such period or periods as the board may determine and may provide such cessation shall be either in whole or in part or under such conditions for the repayment of water to senior right holders as the board may determine.

(Emphasis added).

25. Thus, a local ground water board is the only entity authorized to curtail junior-priority ground water users.

26. The Delivery Calls filed by the Spring Users are inadequate to establish material injury and have not been deemed adequate by the Director. No local ground water board has been convened or created by IDWR as required by I.C. §§ 42-237b and 42-237d. The required hearing before a local groundwater board has never been conducted. Therefore, the 2005 Orders and the proposed Curtailment Order are null, void and without legal effect.

## COUNT II

### **THE DELIVERY CALLS ARE INVALID BECAUSE THE SPRING USERS' WATER RIGHTS ARE SUBORDINATE TO GROUND WATER RIGHTS**

27. Plaintiffs restate the allegations of Paragraphs 1-20 and incorporate the same by reference as though set forth fully herein.

28. Under Idaho law, the holder of a senior-priority date water right cannot lawfully make a delivery call and force curtailment of a junior priority-date water right to which the senior is subordinated.

29. The Spring Users' water rights were subordinated as a matter of law to all junior ground water rights in conjunction with a settlement agreement entered into between the State of Idaho and Idaho Power Company on October 25, 1984, commonly known as the "Swan Falls Agreement," a copy of which is attached hereto as Exhibit E and incorporated by reference. The Swan Falls Agreement was approved and codified by the Idaho legislature in 1985. *See* I.C. 42-203, 42-203A, 42-203B, 42-203C, 42-203D, 42-1406A et. seq., 42-1734A, 1734B, 42-1736B, and 42-1805. Among other things, the Swan Falls Agreement protected upstream ground water development from curtailment during the irrigation season so long as flows in the Snake River at the Murphy Gauge meets or exceed 3,900 cfs.

30. Further, as part of the Swan Falls Agreement, the State of Idaho agreed to honor its commitments and to adhere to the policies set forth in the State Water Plan issued by the Idaho Water Resource Board and approved by the Idaho Legislature. Swan Falls Agreement Exhibit E at ●4; see also I.C. §42-1734B(4).



31. The Idaho State Water Plan adopted by the Idaho Water Resource Board on December 29, 1976, states in relevant part:

No specific allocation of water is made for aquaculture uses. Water necessary to process aquaculture products is included as a component of the municipal and industrial water allocation. Aquaculture is encouraged to continue to expand when and where water supplies are available and where such uses do not conflict with other public benefits. Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, aquaculture interests may need to construct different water diversion facilities than presently exist

p. 118 (Emphasis added). This portion of the Idaho State Water Plan is attached hereto as Exhibit F and incorporated herein.

32. The Idaho State Water Plan adopted by the Idaho Water Resource Board on January 19, 1982, provides in relevant part:

No specific allocation of water is made for aquaculture uses. Water necessary to process aquaculture products is included as a component of the municipal and industrial water allocation. Aquaculture is encouraged to continue to expand when and where water supplies are available and where such uses do not conflict with other public benefits. Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, aquaculture interests may need to construct different water diversion facilities than presently exist.

p. 44 (Emphasis added). This portion is attached hereto as Exhibit G and incorporated herein.

33. The 1986 Idaho State Water Plan, adopted by the Idaho Water Resource Board on December 12, 1986, in Policy 5G, provides in relevant part:

The minimum flows established for the Murphy gauging station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist.

p. 38 (Emphasis added). This portion is attached hereto as Exhibit H and incorporated herein.

34. Pursuant to the Swan Falls Agreement and the Idaho State Water Plan, the Spring Users' Water Rights are subordinate to ground water rights, including Plaintiffs' water rights, so long as the minimum flows at the Murphy Gauge are met.

35. The Spring Users' Water Rights have adequate water supply as a matter of law so long as minimum flows are met at the Murphy Gauge. Otherwise, the water rights of Idaho Power Company would be increased by reason of the curtailment of ground water users in violation of the Swan Falls Agreement, which would circumvent and defeat the very purpose of the minimum stream flows established in the Swan Falls Agreement.

36. As a part of the Swan Falls Agreement it was understood and agreed that ground water pumping within the Eastern Snake Plain Aquifer could reduce the flow of springs tributary to the Snake River to the extent minimum flows at the Murphy Gauge met or exceeded 3,900 cfs. It was further understood that the Spring Users may be required to change their diversion facilities to maintain or improve their water supplies, but that the Spring Users could not curtail other ground water users.

37. The Idaho Water Resource Board acknowledged the requirement that the Spring Users may be required to change their diversion facilities in its 1976 and 1982 State Water Plans and again in its 1986 State Water Plan Policy 5G:

It is recognized, however, that future management and development of the Snake River Plain aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities.

(Emphasis added). See Exhibit H.

38. By reason of the foregoing, the Spring Users' Water Rights are subordinate to Plaintiffs' ground water rights. Therefore, the Spring Users have no lawful right to make a delivery call and the Director's 2005 Orders and the proposed Curtailment Order is invalid as a matter of law.

39. Based on the foregoing, the 2005 Orders and the proposed Curtailment Order are null, void and without any legal effect.

### **COUNT III**

#### **IDWR'S 2005 ORDERS AND THE PROPOSED CURTAILMENT ORDER EXCEED ITS AUTHORITY**

40. Plaintiffs restate the allegations of Paragraphs 1-20 and incorporate the same by reference as though set forth fully herein.

41. Idaho Code § 42-607 governs the distribution of water among appropriators and gives the watermaster, under the direction of the IDWR, the authority to "distribute waters of the public stream, streams, or water supply, comprising a water district," and "to shut and fasten, or cause to be shut or fastened . . . the headgates of the ditches or other facilities for diversions 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 . . ." (emphasis added).

42. IDWR's 2005 Orders and the Proposed Curtailment Orders are based on the latest version of the Eastern Snake River Aquifer Model (the "Model"). However, the Model cannot guarantee with any certainty that the proposed curtailment of Plaintiff's water rights will increase discharges from a particular spring.

43. IDWR cannot make any certain prediction that curtailment of junior-priority ground water users will actually supply water to the Spring Users' Water Rights in a timely manner or in a

quantity that is useable by the Spring Users. Accordingly, IDWR's proposed Curtailment Order is without supporting factual or legal basis as a matter of law.

44. Any relief that would be intended by the proposed Curtailment Order is unknown and speculative and exceeds the IDWR's statutory authority which requires that the curtailment actually supply water to the senior water right holder. Thus, the proposed Curtailment Order is legally insufficient to support any curtailment of the lawful and vested water rights of Plaintiffs.

45. The proposed Curtailment Order will result in immediate, irreparable and direct harm to Plaintiffs who have no adequate remedy at law and would provided no demonstrable benefit to the Spring Users.

#### **COUNT IV**

#### **THE DELIVERY CALLS ARE INVALID BECAUSE THE SPRING USERS' WATER RIGHTS ARE SUPPLIED BY WASTE WATER**

46. Plaintiffs restate the allegations of Paragraphs 1-20 and incorporate the same by reference.

47. The Spring Users' Water Rights are supplied in part from natural discharges and in part from artificially increased aquifer levels resulting from waste water incidental to flood irrigation and winter canal flows. The incidental losses from flood irrigation practices on the Eastern Snake Plain occurred from the late 1800s, with maximum flood irrigation in the early 1950s. The practice of flood irrigation on the Eastern Snake Plain diminished starting in the 1950s and has continued to diminish as irrigation efficiencies have become more readily available. The winter canal flows occurred annually from November through March until completion of the Palisades Reservoir Project in 1961.

48. The alleged shortage in the Spring Users' Water Rights which forms the basis of their delivery calls is the result of a recession in artificially increased aquifer levels and spring discharges. The increased spring discharges peaked in the early 1950s and thereafter declined to current discharge levels—which still remain well above base-line historic natural discharge levels. This recession of artificially increased spring discharges occurred as the result of the gradual conversion from flood to sprinkler irrigation practices on the Eastern Snake Plain on lands lying above and upstream from the Snake River Canyon wall from which the subject springs emerge. In addition to improved irrigation delivery efficiencies, the construction of storage reservoirs at Jackson Lake, Palisades, Grassy Lake, Island Park and American Falls contributed to the decline in the current spring discharges as the result of stored flows and the termination of winter canal flows.

49. The Spring Users' Water Rights were licensed and decreed at a time when spring discharges peaked congruent with peak flood irrigation and winter canal flow practices. Consequently, the Spring Users' Water Rights were artificially inflated by flood irrigation and winter flow waste water.

50. As a matter of law the Spring Users can only make a lawful delivery call for natural supplies historically provided from the aquifer which have not diminished. The Spring Users have no lawful basis to call out and curtail groundwater users to secure a supply of waste water that no longer exists due to changed irrigation practices.

51. Based on the forgoing, the 2005 Orders and the proposed Curtailment Order are null, void and without legal effect.

COUNT V

**2005 ORDERS AND THE PROPOSED CURTAILMENT ORDER ARE  
INVALID BECAUSE NO REASONABLE PUMPING LEVEL  
HAS BEEN ESTABLISHED**

**THE SPRING USERS' WATER RIGHTS ARE  
GOVERNED BY IDAHO CODE 42-226 et seq.**

52. Plaintiffs restate the allegations of paragraphs 1-20 and incorporate the same by reference as though set forth fully.

53. As an alternative cause of action, Plaintiffs allege that the Spring Users' Water Rights should properly be administered as ground water rights according to Idaho Code §§ 42-226 et seq. As such, the Spring Users exercise of their water rights is only protected to the extent of a reasonable pumping level. See I.C. § 42-226, and *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).

54. Historically, the Spring Users' Water Rights were considered by IDWR as ground water.

55. Thus, the Spring Users cannot establish injury until such time as they have reached reasonable pumping levels as established by IDWR. No reasonable pumping level has been established. Therefore, no finding of material injury is valid and any curtailment order is arbitrary and capricious and without a basis in law or fact.

56. Furthermore, and in addition, the Spring Users' Water Rights properly constitute artesian wells pursuant to the definition of artesian wells provided in I.C. § 42-1604 and are thus governed by I.C. § 42-226 et seq.

57. Based on the forgoing, the 2005 Orders and the proposed Curtailment Order are null, void and without legal effect.

## COUNT VI

### SPRING USERS' MEANS OF DIVERSION ARE UNREASONABLE

58. Plaintiffs restate the allegations of Paragraphs 1-20 and incorporate the same by reference as though set forth fully.

59. The Spring Users' Water Rights divert water from developed spring sources. The means of diversion upon which the Spring Users rely is by pressurized ground water or artesian pressure which causes water to flow from the Snake River Canyon wall in the Hagerman area.

60. Reliance upon on pressurized ground water or artesian pressure is neither a reasonable means of diversion nor a legally protected means of diversion. Junior-priority ground water rights cannot be lawfully curtailed to guarantee artesian flow or pressure.

61. The Spring Users are required to have a reasonable means of diversion. *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911) and *State ex rel. Crowley v. District Court*, 89 P.2d 23 (1939). See also, *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 2007 WL 677947 (Idaho March 5, 2007). The Spring Users' current means of diversion is unreasonable.

62. The Spring Users' current means of diversion which unreasonably relies on pressurized ground water or artesian flow results in the Spring Users unlawful control of the entire ESPA.

63. The Idaho State Water Plans contemplated that the Spring Users must change their means of diversion. See Exhibits F-H attached hereto. At the very least, the Springs Users are estopped from making any delivery call until such time that they have made the necessary changes in the diversions facilities as contemplated by the Idaho State Water Plans.

64. Idaho law promotes the maximum use and benefit of the state's water resources. I.C. §§ 42-226, 42-1731, 42-1734A(1). Relying on an unreasonable means of diversion unlawfully usurps

the State's rightful authority to manage the State's ground water resources for the protection of all of Idaho citizens for the purpose of promoting the maximum and most beneficial use of the state's water resources. *See Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

65. Based on the forgoing, the 2005 Orders and the proposed Curtailment Order are null, void and without legal effect.

## COUNT VII

### **THE DELIVERY CALLS ARE FUTILE**

66. Plaintiffs re-allege and incorporate paragraphs 1-20 by reference as though set forth fully herein.

67. Even if the 2005 Orders are valid and the proposed Curtailment Orders were to be issued, no appreciable amount of water would result in the spring sources upon which the Spring Users' Water Rights rely.

68. The Model upon which the 2005 Orders and the proposed Curtailment Orders rely cannot predict that an amount of water will result in the actual spring source from which the Spring Users' Water Rights rely. The basis upon which IDWR determined the area and priority date of the alleged injury by groundwater users to the Spring Users Water Rights is without supporting basis and therefore arbitrary, capricious and invalid.

69. Any curtailment of Plaintiffs' water rights would be futile as a matter of law for the reason that the proposed curtailment would not result in an amount of water that could be beneficially used by the Spring Users and would violate the requirements under Idaho law of full economic development and maximum beneficial use.

70. Based on the forgoing, the 2005 Orders and the proposed Curtailment Order are null, void and without legal effect.



COUNT VIII

**THE PROPOSED CURTAILMENT ORDERS  
WOULD CONSTITUTE A TAKING  
WITHOUT DUE PROCESS AND JUST COMPENSATION**

71. Plaintiffs re-allege and incorporate the preceding paragraphs by reference as though set forth fully herein.

72. The water rights proposed to be shut off by the 2005 Orders and the proposed Curtailment Order are owned by Plaintiffs' members and constitute private property rights that cannot be taken or impaired without due process of law.

73. By proposing to shut off Plaintiffs' water rights without a hearing and in excess of its statutory authority and in violation of I.C. §§ 42-237b-d, IDWR's actions violate Plaintiffs' right to due process and would constitute a taking in violation of constitutions of the State of Idaho and of the United States.

74. Shutting off diversion under Plaintiffs' water rights without authority or in violation of Idaho law constitutes a physical taking of Plaintiffs' water rights.

75. In the alternative, shutting off diversion under Plaintiffs' water rights without authority or in violation of Idaho law constitutes a regulatory taking of Plaintiffs' water rights.

76. Plaintiffs have repeatedly requested yet have been deprived by IDWR of a hearing on the 2005 Orders, which Plaintiffs are entitled to and is necessary to assert the defenses set forth in this Complaint. Attached hereto as Exhibit I and incorporated herein by reference are copies of the *Petition for Reconsideration of Director's May 19, 2005 Order; Request for Hearing and Motion for Stay (Blue Lakes Delivery Call); and IGWA's Petition for Reconsideration of July 8, 2005, Order and Request for Stay (Clear Springs)*. In addition, Plaintiffs in good faith have provided replacement water plans for the past three years in which they have repeatedly made specific requests for a

hearing. Most recently in North Snake Ground Water District and Magic Valley Ground Water District's Joint Replacement Plan for 2007, copy of which is attached as Exhibit J, Plaintiffs again reiterated their request for a hearing.

77. Plaintiffs are entitled to a hearing on this matter of law. IDWR's continual failure to hold the hearings on the 2005 Orders deprives Plaintiffs of due process of law and curtailing their water rights deprives them of their property rights in violation of due process.

78. Because IDWR has failed, refused, and continues to refuse to hold an evidentiary hearing on the 2005 Orders, and yet is proceeding to issue the Curtailment Order based on the 2005 Orders, Plaintiffs are deprived of presenting administratively their defenses and legal positions. Thus, Plaintiffs are without any speedy and adequate remedy in the ordinary course of law.

79. IDWR cannot take private property rights without due process and without first paying just compensation for the private property rights so taken.

### **WRIT OF PROHIBITION**

80. Plaintiffs re-allege and incorporate the preceding paragraphs by reference as though set forth fully.

81. Issuance of the proposed Curtailment Order exceeds IDWR's statutory authority where IDWR intends to act (1) without having complied with Idaho Code §§ 42-237a-g or 42-607; (2) in breach and violation of the State of Idaho's contractual obligations under the Swan Falls Agreement; (3) based upon invalid Delivery Calls; (4) without having provided Plaintiffs with a meaningful notice and opportunity to be heard in violation of Plaintiffs' due process rights; (5) arbitrarily and capriciously because the proposed curtailment order is improperly based on a Model that cannot predict increased discharges to the Spring Users; and (6) without conducting any analysis of which water users in fact are senior to Plaintiffs.

82. Plaintiffs lack a plain, speedy and adequate remedy in the ordinary course of law, which would protect them from the immediate resulting harm if IDWR issues the Curtailment Order and shuts off Plaintiffs' wells.

83. Pursuant to Idaho Code • 7-401 et seq., Plaintiffs are entitled to a writ of prohibition that restrains IDWR from issuing the Curtailment Order until further order from the Court, or, alternatively, for an order requiring IDWR to show cause before the Court why IDWR should not be absolutely restrained from issuing the proposed Curtailment Order.

**PRELIMINARY AND PERMANENT INJUNCTION**

84. Plaintiffs re-allege and incorporate the preceding paragraphs by reference as though set forth fully herein.

85. IDWR is unlawfully proceeding to enforce its 2005 Orders and the proposed Curtailment Order in excess of its statutory authority and in violation of I.C. §§ 42-237b-d and 42-607.

86. Plaintiffs have no adequate remedy at law.

87. IDWR's proposed Curtailment Order is intended to be issued without any pre-deprivation hearing in violation of Plaintiffs' due process rights.

88. If permitted, the proposed Curtailment Order will cause Plaintiffs immediate and irreparable harm by:

- a. preventing the lawful diversion and use of ground water to beneficial use under licensed, decreed and constitutionally appropriated water rights;
- b. impairing Plaintiffs' access to capital for continued business operations;
- c. foreclosing any further enrollment in certain federally and state funded agricultural programs;
- d. impairing the ability of certain municipalities to provide for the public welfare and safety of citizens;
- e. causing the death and destruction of livestock;

- f. forcing numerous industries and commercial businesses to cease production and close causing *untold harm to the economy* of the State of Idaho and to the southern region of the state in particular;
- g. resulting in the loss of already planted crops; and
- h. causing grave economic loss to Plaintiffs.

89. If permitted to issue the proposed Curtailment Order IDWR will cause Plaintiffs additional irreparable harm by depriving them of their property right to divert ground water essential to their lawful agricultural, municipal, commercial, industrial, domestic and other beneficial uses.

90. The economic impact of proposed curtailment could approach a negative \$34 million to Plaintiffs in addition to substantial economic loss to the surrounding communities and the State of Idaho, for which there is no adequate remedy at law.

91. Based on the forgoing and pursuant to I.R.C.P. 65, Plaintiffs and their ground water user members are entitled to the entry of a Temporary Restraining Order pending hearing and, following hearing, a Preliminary Injunction precluding IDWR from issuing the Curtailment Order and ordering IDWR to maintain the status quo and prevent irreparable harm and injury during the pendency of this action.

#### **REQUEST FOR ATTORNEYS' FEES AND COSTS**

92. IDWR's proposed actions are without reasonable basis in law or fact.

93. Plaintiffs have retained counsel to prosecute this action on their behalf and request that the Court award them reasonable attorneys' fees and costs pursuant to Idaho Code §§ 12-117, 12-120, 12-121 and 12-123 or other applicable law.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request the following relief:

A. For the immediate entry of a Temporary Restraining Order restraining Defendants from issuing any curtailment order based on the Spring Users' Delivery Calls pending hearing on Plaintiffs' request for Preliminary Injunction.

B. For the issuance of an order compelling Defendants to appear and show cause why a Preliminary Injunction should not be issued enjoining Defendants from issuing any curtailment order based on the Spring Users' Delivery Calls and to maintain the status quo and prevent irreparable harm and injury to Plaintiffs during the pendency of this action.

C. For the entry of a Writ of Prohibition and Permanent Injunction restraining Defendants from issuing any curtailment orders against Plaintiffs and their ground water user members based upon any call by the Spring Users.

D. For the entry of a Declaratory Judgment that Defendants are without authority to issue the proposed Curtailment Orders as a matter of law for the reasons set forth in this Complaint.

E. For the entry of a Declaratory Judgment that the Delivery Calls are invalid as a matter of law for the reasons set forth in this Complaint.

F. For the entry of a Declaratory Judgment stating that the Spring Users' Water Rights upon which the proposed Curtailment Order is based are subordinate to Plaintiffs' water rights as a matter of law based upon the Swan Falls Settlement Agreement.

G. For the entry of a Declaratory Judgment that the Spring Users' Water Rights are governed by I.C. § 42-222 et seq. and must comply with the reasonable pumping levels and reasonable means of diversion standards before a Curtailment Order may issue.

H. For the entry of a Declaratory Judgment that the Delivery Calls are futile as a matter of law and therefore any curtailment order is wrongful and unlawful.

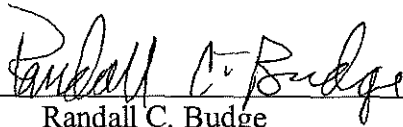
I. For the entry of a Declaratory Judgment the Defendants' proposed actions violates Plaintiffs' right to due process under the Idaho Constitution and United States Constitution and constitutes a taking for which compensation is due.

J. For the entry of an Order awarding attorneys' fees and costs pursuant to Idaho Code §§ 12-117, 12-120, 12-121, 12-123, and other applicable authority.

K. For such further relief as the Court determines is just and proper under the circumstances.

DATED this 7<sup>th</sup> day of May, 2007.

RACINE OLSON NYE BUDGE & BAILEY

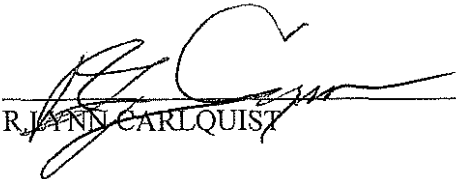
By:   
Randall C. Budge  
Attorneys for Plaintiffs

VERIFICATION

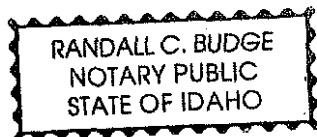
STATE OF IDAHO                                    )  
  )  ss:  
County of Bannock    )

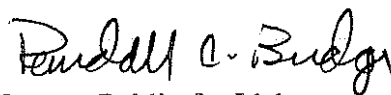
I, LYNN CARLQUIST, being first duly sworn upon oath, depose and state that I am the Chairman of North Snake Ground Water District and that I have read the foregoing Complaint, and based on my personal knowledge believe the facts stated therein to be true and correct.

DATED this 4<sup>th</sup> day of May 2007.

  
\_\_\_\_\_  
LYNN CARLQUIST

SUBSCRIBED AND SWORN TO before me this 4<sup>th</sup> day of May, 2007,



  
Notary Public for Idaho  
Residing at Pocatello, Idaho  
Commission Expires: 10-11-1-12

VERIFICATION

STATE OF IDAHO )

SS:

County of Bannock )

I, Orlo Maughan, being first duly sworn, upon oath, deposes and says that I am the Chairman of Magic Valley Ground Water District, and that I have read the foregoing Complaint, and based on my personal knowledge believe the facts stated therein to be true and correct.

DATED this 4<sup>th</sup> day of May, 2007.

*Orlo Maughan*

Orlo Maughan

SUBSCRIBED AND SWORN TO before me this 4<sup>th</sup> day of May, 2007,

*Randall C. Budge*

Notary Public for Idaho  
Residing at Pocatello, Idaho  
Commission Expires: 10-11-2012

