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

In the Matter of)
)
 DISTRIBUTION OF WATER TO)
 WATER RIGHT NOS. 36-02356A,)
 36-07210, AND 36-07427)
 (Blue Lakes Delivery Call))
 _____)

**MEMORANDUM IN SUPPORT
 OF PETITION FOR
 RECONSIDERATION,
 PETITION FOR
 DECLARATORY RULING, AND
 MOTION FOR SUMMARY
 JUDGMENT**

In the Matter of)
)
 DISTRIBUTION OF WATER TO)
 WATER RIGHT NOS. 36-04013A,)
 36-04013B, AND 36-07148 (SNAKE)
 RIVER FARMS); AND TO 36-07083,)
 36-07568 (CRYSTAL SPRINGS FARMS))
 (Clear Springs Delivery Call))
 _____)

COME NOW Idaho Ground Water Appropriators, Inc. (“IGWA”), North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively the “Ground Water Users”), through counsel, and hereby submit this memorandum in support of their *Petition for Reconsideration of the*

Director's June 15, 2007, Curtailment Order, and Petition for Declaratory Ruling, and Motion for Summary Judgment filed herein.

INTRODUCTION

The *Director's June 15, 2007, Curtailment Order* (the "Curtailment Order") and all prior orders upon which it is predicated, together with all delivery calls underlying such orders, should be dismissed by reason of one or more of the affirmative defenses asserted in the Ground Water Users' Petition for Reconsideration. This memorandum sets forth the legal bases supporting each affirmative defense.

The Ground Water Users are entitled to reconsideration of the Curtailment Order pursuant to Idaho Administrative Code § 37.01.01.740.02.a and Idaho Code § 42-1701A(3). On reconsideration, the Director "should take into account any new facts presented by the moving party that bear on the correctness" of the order. *Nationsbank Mortgage Corp. of New York v. Cazier*, 127 Idaho 879, 884, 908 P.2d 572, 577 (Ct. App. 1995); *Coeur D.Alene Mining Co. v. First National Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

Further, summary judgment is entirely proper for disposition of the distinct legal questions presented by the Ground Water Users' affirmative defenses. Summary judgment is warranted when "the pleadings, dispositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c); *McCoy v. Lyons*, 120 Idaho 765, 769 (1991).

This memorandum additionally sets forth the legal basis warranting a declaratory ruling that no Idaho law precludes the Ground Water Users from utilizing replacement

water from alternate sources to mitigate compensable shortages to the above-stated water rights.

ARGUMENT

The Curtailment Order is based upon delivery calls made by certain water users (collectively the “Spring Users”) and seeks to deliver water to water rights which all have as their source various springs located in the Hagerman, Idaho, region (collectively the “Spring Users’ Water Rights”). The following grounds for reconsideration and summary judgment warrant the Director’s dismissal of the Curtailment Order and all prior orders upon which the Curtailment Order is predicated.

I. THE SPRING USERS’ WATER RIGHTS ARE SUBORDINATE TO THE GROUND WATER USERS’ RIGHTS.

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.” (Ex. S to Aff. of Ronald Dean Carlson (“Carlson Aff.”)). 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. The State of Idaho and Idaho Power executed the Swan Falls Agreement with the mutual understanding that the Snake River would be administered based on specific minimum stream flows at the Murphy Gauge. (Ex. W to Carlson Aff. at 27, 38, and 39.)

The Swan Falls Agreement protects ground water development on the Eastern Snake Plain from curtailment during the irrigation season so long as flows in the Snake

River at the Murphy Gauge meet or exceed 3,900 cubic feet per second (cfs). In other words, the Spring Users' Water Rights are subordinated to the Ground Water Users' water rights as a matter of law so long as minimum stream flows are maintained at the Murphy Gauge. (Carlson Aff. ¶¶ 22, 24-25.) Representations made by the State of Idaho and the Idaho Water Resource Board at the public hearings held to explain the Swan Falls Agreement confirm the State's subordination of the Spring Users' Water Rights. (Ex. B to Carlson Aff. at 30, 35, 37, 41.)

The Swan Falls Agreement's subordination of the Spring Users' Water Rights was not particularly notable; it simply reflected the policy of the State of Idaho that spring discharge levels for use at aquaculture facilities (fish farms) located in the Thousand Springs region are not protected against upstream water development. (Ex. B to Carlson Aff. at 38, 39, 60.) The 1976 and 1982 Idaho State Water Plans expressly protected groundwater development on the Eastern Snake Plain.¹ The Idaho State Water Plan adopted by the Idaho Water Resource Board on December 29, 1976, states:

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

¹ The Idaho Supreme Court confirmed the Idaho Water Resource Board's authority to formulate a State Water Plan. *Idaho Power Co. v. Dep't of Water Resources*, 104 Idaho 570, 572, 661 P.2d 736, 738 (1983). The State of Idaho has an obligation 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. I.C. §42-1734B(4).

(Ex. T to Carlson Aff. at 118) (Emphasis added). The Idaho State Water Plan adopted by the Idaho Water Resource Board on January 19, 1982, affirmed the State's protection of upstream ground water development:

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.

(Ex. U to Carlson Aff. at 44) (Emphasis added). Thus, the Swan Falls Agreement was executed with a clear, global understanding that ground water pumping within the Eastern Snake Plain Aquifer would be permitted to reduce the flow of springs tributary to the Snake River to the extent minimum flows are maintained at the Murphy Gauge. The 1986 State Water Plan memorialized the intent of the Swan Falls Agreement by confirming the subordination of the Spring Users' Water Rights so long as minimum stream flows are maintained at the Murphy Gauge:

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.

(Ex. V to Carlson Aff. at 38) (Emphasis added). It was 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 junior-priority ground water users. The State of Idaho intentionally placed responsibility on the Spring Users, not ground water users, to ensure adequate flow for their fish facilities.

Pursuant to the Swan Falls Agreement and the Idaho State Water Plan, the Spring Users' Water Rights are clearly subordinate to ground water rights, including Ground Water Users' water rights, so long as the minimum stream flows at the Murphy Gauge are maintained. As a result, the Spring Users' Water Rights have adequate water supply as a matter of law so long as minimum flows at the Murphy Gauge are maintained. To hold otherwise would permit Idaho Power to circumvent and defeat the minimum stream flows established in the Swan Falls Agreement and enhance its water supply via the curtailment of ground water rights.

The Curtailment Order improperly forces the curtailment of ground water rights to which the Spring Users' Water Rights are subordinated. Further, the Order violates the State of Idaho's obligations embodied in the Swan Falls Agreement and relevant State Water Plans. The Curtailment Order is unlawful, invalid, and must be dismissed.

II. I.D.W.R. FAILED TO CONVENE A LOCAL GROUND WATER BOARD.

Idaho law clearly requires the convening of a local ground water board prior to any curtailment of junior-priority ground water users:

[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. . . .

I.C. § 42-237b (Emphasis added).

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.

I.C. § 42-237d (Emphasis added). Further, a local ground water board is the only entity authorized to order curtailment of junior-priority ground water users:

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.

Idaho Code § 42-237c (Emphasis added). The statutes are unambiguous on their face and must be applied “as written.” *Lopez v. Idaho*, 136 Idaho 174, 178, 30 P.3d 952, 956 (2001). If a senior-priority water user believes that a junior-priority ground water user is adversely affecting the former’s water right, the Department shall convene a local ground water board and shall issue a notice setting hearing. A curtailment of junior-priority ground water user can occur only after a hearing if the local ground water board finds that the junior ground water user is in fact adversely affecting the use of the senior rights.

The Curtailment Order patently fails to comply with the statutory provisions governing the curtailment of ground water users. 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. And no hearing has been conducted before a local groundwater board or IDWR. Consequently, the Curtailment Order fails to comply with Idaho law, exceeds IDWR’s authority, and therefore must be dismissed.

III. THE SPRING USERS' WATER RIGHTS RELY UPON UNREASONABLE MEANS OF DIVERSION WHICH ARE NOT PROTECTED.

Idaho law protects water rights only to the extent they utilize reasonable means of diversion and application to beneficial use. *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). Indeed,

the right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right. ... 'It must be exercised with reference to the general condition of the country and the necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.'

Schodde, 224 U.S. at 120-121 (quoting *Basey v. Gallagher*, 87 U.S. 670, 683 (1874)). The "rule of reasonableness" inherently precludes monopolistic appropriations: "An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water" IDAPA 37.03.11.020.03; *Schodde*, 224 at 121; *see also*, *Empire Water & Power Co. v. Cascade Town Co.*, 205 F. 123, 129 (8th Cir. 1913). Citing *Schodde*, the Colorado Supreme Court pointed out that an appropriator

is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole to which he is entitled. This principle applied to diversion of underflow or underground water means that priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches to such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below

City of Colorado Springs v. Bender, 148 Colo. 458, 462, 366 P.2d 552, 555 (1961). The Oregon Supreme Court relied upon principles of reasonableness in ruling that "the method of diversion by way of natural overflow is a privilege only and cannot be insisted

upon ... if it interferes with the appropriation by others of the waters for a beneficial use. *Warner Valley Stock Co. v. Lynch*, 215 Ore. 523, 538, 336 P.2d 884, 891 (1959). Likewise, the Utah Supreme Court specifically considered the rights of an appropriator of pressurized groundwater, holding the “rule of reasonableness” guarantees no right to artesian pressure. *Wayman v. Murray City Corp.*, 23 Utah 2d 97, 105, 458 P.2d 861, 866 (1969).

In each of the aforementioned cases the courts rejected a prior appropriator’s right to hoard the public’s water resources, finding the means of diversion unreasonably interfered with maximum beneficial use of the state’s water resources. Idaho law certainly adheres to the same policy: “while the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.” I.C. § 42-226; *see also, Baker* 95 Idaho at 584 (“Full economic development of Idaho’s ground water resources can and will benefit all of our citizens.”); *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) (policy of the state of Idaho is to secure the “maximum use and benefit and least wasteful use” of the water resource.); *Schodde*, 224 U.S. at 120 (An attempt to own the entire “current of the stream,” which is akin to owning the entire level of the ESPA, would impermissibly prevent the state from developing the water source for the benefit of the public.).

The Spring Users’ Water Rights rely upon pressurized ground water. Reliance upon such means of diversion is patently unreasonable, particularly in light of the fact that the Spring Users’ Water Rights were developed at peak discharge levels resulting from an artificially inflated aquifer. (See section IV, *infra, The Curtailment Order is*

Based on Alleged Shortages of Waste Water.) It is physically impossible and entirely impractical to recreate the decades of inefficient irrigation practices that resulted in peak, artificially-inflated spring discharges from which the Spring Users' Water Rights were licensed. Such would require eliminating efficient sprinkler irrigation, removal of the storage reservoirs and returning to flood irrigation with year-round canal flows. Furthermore, to protect the Spring Users' level of artesian flow would require maintaining a massive surplus of unused storage water in the Eastern Snake Plain Aquifer which could never be appropriated. That would positively *minimize* beneficial use of Idaho's water resources and forever blockade "full economic development of underground water resources." I.C. 42-226.

As in *Warner Valley*, the Spring Users' reliance on pressurized ground water must be deemed a privilege only and cannot be insisted upon by the Spring Users because it unreasonably interferes with maximum beneficial use of the waters of the Eastern Snake Plain Aquifer. Idaho law simply cannot impose upon junior-priority ground water rights the impossible and inequitable burden of guaranteeing artificially inflated levels of artesian flow which resulted from decades of inefficient farming practices and winter canal flows which cannot physically be recreated. To guarantee such flow would place the Spring Users in position to hold the entire Eastern Snake Plain Aquifer hostage and to unlawfully usurp the State's rightful authority to manage its ground water resources for the protection of all of Idaho's citizens and for the promotion of the maximum and most beneficial use of the state's water resources. Idaho law does not support the Spring Users' monopoly of the resource.

The State of Idaho has long-recognized the unreasonableness of the Spring Users' means of diversion, as manifest by the Swan Falls Agreement and multiple State Water Plans which specifically protect ground water development on the Eastern Snake Plain while placing the burden upon the Spring Users to change their means of diversion if necessary to ensure adequate flow to their facilities. (See Section I, *supra*, *The Spring Users' Water Rights are Subordinate to Ground Water Users' Ground Water Rights*.) The Spring Users' Water Rights do not rely on reasonable, legally-protected means of diversion, and are therefore unauthorized to force the curtailment of Ground Water Users' water rights. Thus, the Curtailment Order is based upon invalid delivery calls and must be dismissed.

IV. THE CURTAILMENT ORDER IS BASED ON ALLEGED SHORTAGES OF WASTE WATER.

The Curtailment Order is invalid because it is based upon shortages of waste water. While Idaho law recognizes that "drain, waste and seepage waters may be appropriated and put to beneficial use," *A&B Irrigation v. American Falls-Aberdeen Ground Water District*, 141 Idaho 746 (2005), "it is the policy of the law of this state to prevent the wasting of water," *Colthrop v. Mountain Home Irrigation District*, 66 Idaho 173, 180 (1945) citing *State v. Twin Falls Canal Co.*, 21 Idaho 410, 411 (1911). Consequently, "no appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former." *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 681 (1980). Rather, "public policy demands that whatever be the extent of a proprietor's right to use water until his needs are supplied, his right is dependent upon his necessities, and ceases with

them.” *Colthrop*, 66 Idaho 180 (citing *Glavin v. Salmon River Canal Co., Ltd.*, 44 Ida. 583). To waste Idaho’s water resources is not simply discouraged, it is prohibited.

Waste water is distinct from natural flows, being defined as “excess water flowing from irrigated lands, either on the surface or seeping under it.” *A&B Irrigation v. American Falls-Aberdeen GWD*, 141 Idaho 746, 751 (2005). While there is “no distinction ... to be drawn between waste water appropriated after it has been put to irrigation use and waste water seeping from irrigation canals,” *Hidden Springs*, 101 Idaho at 680, Idaho law does in fact distinguish between natural subterranean flows and underground waste water. See, *Reynolds Irrigation District v. Sproat*, 70 Idaho 217 (1950). Users of ground water are expressly authorized to fill their rights so long as the rate of withdrawal does not exceed the “reasonably anticipated rate of future natural recharge.” I.C. § 42-237a (g) (emphasis added). Thus, where underground water is supplied from waste water rather than a natural subterranean stream, there is “no right to insist the water table be kept at the existing level in order to permit [an appropriator] to use the underground waters.” *Nampa & Meridian Irr. Dist. v. Petrie*, 37 Idaho 45, 51 (1923); see also, *Reynolds*, 70 Idaho 217.

The Spring Users’ Water Rights are supplied by waters from the East Snake Plain Aquifer (the “Aquifer”) which emerge from springs in the Snake River Canyon wall. The Rights are in large part supplied by waste water resulting from flood irrigation and winter canal flows on the Eastern Snake Plain on lands lying above and upstream from the Snake River Canyon wall from which the subject springs emerge. Aff. of Charles M. Brendecke (“Brendecke Aff.”) ¶¶ 26, 34-38. More than 100 years of irrigation of lands on the Eastern Snake Plain overlying the Aquifer substantially increased the amount of

water contained in the Aquifer via incidental seepage of “waste water” from flood irrigation practices and winter canal flows. Flood irrigation began in the 1800s and peaked in the 1950s, but has since continued to diminish as irrigation efficiencies have become more readily available. Ex. Q to Brendecke Aff. Winter canal flows on the Eastern Snake Plain occurred annually from November through March, but ceased upon the completion of the Palisades Reservoir Project in 1961.

Discharges from the springs which supply the Spring Users’ Water Rights increased congruent with flood irrigation and winter canal flow practices on the Eastern Snake Plain. Brendecke Aff. ¶ 34. Spring discharges likewise receded congruent with reductions in flood irrigation and the termination of winter canal flows. *Id.* ¶¶ 39, 40, 48 and 49, and Exhibit Q. The construction of storage reservoirs at Jackson Lake, Palisades, Grassy Lake, Island Park and American Falls further contributed to the decline in spring discharges as the result of stored flows and the termination of winter canal flows. *Id.*, Carlson Aff. ¶ 9. Current spring discharge levels remain well above baseline historic natural discharge levels. Brendecke Aff. ¶ 50-52. However, the Spring Users’ Water Rights were licensed and decreed at the peak of artificially inflated spring discharges. *Id.*, Carlson Aff. ¶ 19.

The alleged shortages upon which the Curtailment Order is based are due to the recession of waste water discharged from the springs supplying the Spring Users’ Water Rights. As a matter of law the Spring Users can only make a lawful delivery call for natural water supplies provided from the ESPA which have not diminished. The Spring Users have no lawful basis to call out and curtail Ground Water Users’ water rights to secure a supply of waste water that no longer exists due to changed irrigation practices.

Notwithstanding, the Curtailment Order mandates that Ground Water Users ensure artificially inflated spring discharge levels, implicitly commanding wasteful irrigation practices in direct violation of Idaho water law. Further, the Curtailment Order demands that Ground Water Users' maintain a massive surplus of storage water in the Aquifer which could never be appropriated in violation of Idaho law compelling "full economic development of underground water resources." I.C. 42-226; *Baker* 95 Idaho at 584. The Order utterly contravenes the fundamental principal of "reasonable pumping levels," and instead entitles the Spring Users to absolute protection of peak spring discharges which resulted from wasteful irrigation practices and which are impossible to restore. The orders further violate Idaho law by imposing upon Ground Water Users' an unlawful and impossible burden of ensuring a rate of aquifer recharge in excess of the reasonably anticipated rate of future natural recharge. Because the Curtailment Order unlawfully requires Ground Water Users to provide enormous quantities of waste water which is physically impossible and directly contrary to Idaho law, the Order must be dismissed and the delivery calls upon which it is based denied.

V. THE CURTAILMENT ORDER EXCEEDS I.D.W.R.'S STATUTORY AUTHORITY AND IS AN ABUSE OF DISCRETION.

Idaho Code § 42-607 governs the distribution of water among appropriators and gives the watermaster, under the direction of the IDWR, 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). Idaho law demands the orderly and sound administration of Idaho's water resources such that IDWR cannot curtail any water rights without reasonable certainty that such curtailment will in fact supply prior rights. Constitutional principles further militate against the curtailment of water rights without such certainty.

IDWR issued the Curtailment Order without reasonable certainty that its curtailment will specifically increase discharges from the springs which supply the Spring User's Water Rights. The Curtailment Order quantifications are based upon 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 the Ground Water Users' water rights will in fact increase discharges from a particular spring in a timely manner or a quantity that is useable by the Spring Users. "While [the Model] was developed using accepted scientific and engineering approaches and utilized extensive data sets of water uses, flow, and reach gains, it cannot be relied upon to accurately predict the changes in flows of specific springs that might result from administrative curtailment or other water management activities." Brendecke Aff. ¶ 47. IDWR's own analysis and technical experts agree that the Curtailment Order does not ensure any specific amount of increased discharge to a particular spring as a result of the proposed curtailment of ground water pumping. Brendecke Aff. ¶¶ 46, 47.

Since IDWR cannot make any certain prediction that curtailment of Ground Water Users' water rights 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, any relief that would be intended by the proposed Curtailment Order is unknown and speculative and exceeds statutory and constitutional provisions requiring reasonable certainty that a curtailment

will actually supply water to the senior water right holder. The proposed Curtailment Order is legally insufficient to support curtailment of Ground Water Users' lawful and vested water rights and must be dismissed.

VI. NO REASONABLE PUMPING LEVEL HAS BEEN ESTABLISHED.

In the event the Spring Users' Water Rights are deemed to utilize reasonable means of diversion, as a matter of law they should properly be administered as ground water rights according to Idaho Code §§ 42-226 et seq. The Spring Users' Water Rights were in fact historically treated and regarded as ground water by IDWR. (Exhibit R to Carlson Aff.; Carlson Aff. ¶ 17.) The Spring Users' Water Rights are supplied by pressurized ground waters from the Eastern Snake Plain Aquifer which emerge from springs in the Snake River Canyon wall. (Ex. Q to Brendecke Aff.; Carlson Aff. ¶¶ 16-17.) In addition, the Spring Users' Water Rights properly constitute artesian wells pursuant to the definition of artesian wells pursuant to I.C. § 42-1604.² Consequently, the Spring Users' Water Rights should properly be administered as ground water in accordance with Idaho Code §§ 42-226 et seq.

Idaho law protects water rights supplied by ground water only “in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources.” I.C. § 42-226 (emphasis added); *see, Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575 (1973). The “use of the phrase ‘reasonable pumping level’ means that senior appropriators are not necessarily entitled to maintenance of historic pumping levels.” *Baker*, 95 Idaho at 584. Rather, the Ground Water Act “contemplates that in some situations senior appropriators may have to accept

²The Spring Users' Water Rights emerge from the Snake River Canyon wall from locations more than 18 vertical feet below the Eastern Snake Plain.

some modification of their rights in order to achieve the goal of full economic development.” *Id.*

That the Spring Users’ Water Rights are supplied by artesian pressure does not exclude them from the “reasonable pumping level” rule. Idaho law expressly recognizes the existence of water rights supplied by artesian pressure, I.C. § 42-1604, yet the “reasonable pumping level” statute does not distinguish between users of artesian ground water and non-pressurized ground water flows, but instead applies to all users of underground waters. Indeed, the very purpose of the reasonable pumping level rule necessarily precludes any distinction between pressurized and non-pressurized flow. Neither type of ground water rights can be permitted to blockade full economic development of Idaho’s ground water resources.

The Spring Users cannot establish injury until such time as they have reached reasonable pumping levels as established by IDWR. Yet 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.

VII. THE DELIVERY CALLS UPON WHICH THE CURTAILMENT ORDER IS BASED CONSTITUTE “FUTILE CALLS.”

Curtailment is improper in response to a “futile call,” which is a “delivery call made by the holder of a senior-priority surface or ground water right that, for physical or hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resources.” IDAPA 37.03.11.08; *Gilbert v. Smith*, 97 Idaho 735, (1976). The delivery calls upon which the Curtailment Order is based are futile as a

matter of law because there is no assurance that the proposed curtailment of Ground Water Users' water rights will specifically increase the amount of water available to the Spring User's Water Rights in quantities and timeliness that can be put to beneficial use. The Model upon which the Curtailment Order is based does not demonstrate any specific increased discharge from the springs which supply the Spring Users' Water Rights. (Brendecke Aff. ¶ 47.) The relief contemplated by the Curtailment Order is speculative and cannot show that any water will result to the Spring Users as a result of curtailing Ground Water Users water rights. Therefore, the delivery calls are "futile" as a matter of law and the Curtailment Order must be dismissed.

VIII. THE CURTAILMENT ORDER EFFECTUATES A TAKING WITHOUT DUE PROCESS AND JUST COMPENSATION.

It is well established in Idaho 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." *Nettleton v. Kigginson*, 98 Idaho 87, 90 (1977) (citing Idaho Const. Art. 15, § 4; *Anderson v. Cummings*, 81 Idaho 327 (1959); *Follett v. Taylor Brothers*, 77 Idaho 416 (1956)). The constitutional guarantee of procedural due process requires a pre-deprivation notice and hearing except in "extraordinary circumstances" where some valid governmental interest justifies the postponement of the notice and hearing. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Nettleton*, 98 Idaho 90. A person must receive notice and "an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations." *Lowder v. Minidoka County Joint Sch. Dist. No. 331*, 132 Idaho 834, 840 (1999) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

In all procedural due process cases, the interest of the individual, the risk of an erroneous deprivation of the individual's interest, and the interest of the government must be balanced. *Lowder*, 132 Idaho 840 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Factors to be considered in determining the adequacy of process are “the importance of the private interest at stake, the risk of an erroneous deprivation of rights given the processes at hand, the probable value, if any, of additional or substitute procedural safeguards and the government’s interest and ‘including the function involved and the fiscal and administrative burdens that the additional and substitute procedural requirements would entail.’” *In re Snake River Basin Adjudication Case No. 6 LU Ranching Co. v. United States*, 138 Idaho 606, 608 (2003) (citing *Mathew v. Eldridge*, 424 U.S. 319, 335 (1976)).

The water rights proposed to be shut off by the Curtailment Order are owned by the Ground Water Users’ and constitute private property rights that cannot be taken or impaired without due process of law. By proposing to shut off the Ground Water Users’ water rights without a hearing and in excess of its statutory authority and in violation of I.C. §§ 42-237b-d, the Curtailment Order violates the Ground Water Users’ right to due process, and physical implementation of the Order will constitute a taking in violation of constitutions of the State of Idaho and of the United States. Curtailing the Ground Water Users’ water rights without authority or in violation of Idaho law constitutes a physical taking of the Ground Water Users’ water rights. In the alternative, curtailing the Ground Water Users’ water rights without authority or in violation of Idaho law constitutes a regulatory taking of the Ground Water Users’ water rights. The magnitude of the taking

and fact that no notice of curtailment was provided until *after* the Ground Water Users had prepared for and planted their crops further compromises their right to due process.

The Ground Water Users are entitled to a hearing on this matter of law. IDWR's continual failure to hold the requested hearings deprives the Ground Water Users of due process of law and the curtailment of the Ground Water Users' water rights deprives them of their property rights in violation of due process. The Ground Water Users' affirmative defenses to curtailment raise legitimate legal issues which bear on the legality of the Curtailment Order. Further, there is a reasonable likelihood that the Ground Water Users will succeed on the merits of one or more of its affirmative defenses. Consequently, if IDWR proceeds to physically implement the Curtailment Order without first affording the Ground Water Users' a hearing to raise these affirmative defenses to curtailment, such curtailment it will be in violation of the Ground Water Users' constitutional due process rights and will constitute a taking for which just compensation is required.

PETITION FOR DECLARATORY RULING

The Curtailment Order, if sustained, may place an obligation on the Ground Water Users to mitigate compensable shortages to the Spring Users' Water Rights. Therefore, the Ground Water Users request a declaratory ruling under Idaho Code § 67-5232 and IDAPA 37.01.01.400 that no Idaho law precludes them from utilizing replacement water from alternate sources to mitigate compensable shortages to the Spring Users' Water Rights.

Idaho law authorizes junior-priority water users "to prevent or compensate for material injury to holders of senior water rights caused by the diversion and use of water

by the holders of junior priority ground water rights.” I.C. § 42-5201. This may be accomplished via a “mitigation plan” pursuant to IDWR’s administrative rules for the conjunctive management of surface and ground water (the “CM Rules”), which expressly authorize junior-priority water users to provide replacement water to mitigate compensable shortages to senior-priority water rights. IDAPA 37.03.11.043.03. An appropriator’s right to take water from one source so long as it is replaced by other water from the same or another source is well established. I.C. § 42-105(1).

Overarching policies calling for maximum beneficial use and full economic development of Idaho’s underground water resources demand that junior-priority ground water users be able to avoid curtailment via providing replacement water to senior users.

Thus, Idaho courts have long-supported the authority of IDWR

to substitute the waters of one stream for those of another It can make no difference to the appropriator of water, whether he gets his water from one stream or another ... so long as it is delivered to him at his headgate at the times and under the priorities to which his location and appropriation entitle him.

In the Matter of the Petition of the Board of Directors of Wilder Irrigation District, 64 Idaho 538, 551 (1943). The prior appropriation doctrine grants water users a right in the *quantity* and *timeliness* of their appropriation: “The source of the water supply is immaterial ... so long as the landowners and waterusers receive the quantity of water as of the date of their priorities for beneficial use.” *Id.* at 554.

Maximum beneficial use of the Idaho’s water resources inherently precludes water users from a vested right in the specific chemical make-up of appropriated waters. As shown, *supra*, Idaho law clearly provides for the substitution or replacement of water

from different sources.³ That practice is commonly authorized in other western states that also seek maximum beneficial use of scarce water resources. Like Idaho, Colorado and Oregon have adopted statutory provisions authorizing an appropriator “to use stored, surface or ground water from another source in exchange for supplying replacement water in an equal amount to satisfy the prior appropriations from the other source” Or. Rev. Stat. 540.5333(1); *see also*, Colo. Rev. Stat. 37-83-101. The Colorado Supreme Court thoroughly considered a claim “that the delivery of clear water instead of silty water would result in substantial damage to the individual [appropriators].” *A-B Cattle Company v. United States*, 196 Colo. 539, 542, 589 P.2d 57, 59 (1978). In that case the appropriators claimed injury resulting from “substituting water of a quality which is not as useful to [the appropriator] as the natural stream water customarily diverted by [the appropriator].” *Id.* at 543, 59. Yet the Court refused to recognize a compensable interest in the chemical make-up of the water source, stating “our constitution makes *water*—not silt and not silt and water—the *property* which is subject to appropriation.” *Id.* (italics in original). The Court reasoned that to hold otherwise

would seriously inhibit any subsequent upstream or downstream appropriation. ... Applied in its extreme, an appropriator located on lower reaches of a stream with a very early appropriation date could put a call on the river for the receipt of its natural silt concentration, which would have the practical effect of halting all upstream use and commanding substantially the entire stream flow to satisfy its appropriation.

³ The Ground Water Users do not address whether an appropriator is protected against the introduction of foreign pollutants into the water source, as that is not relevant to this case. Rather, the Ground Water Users focus on the principle that an appropriator is entitled to receive water from one natural waterway by compensating prior appropriators via a substitution of an equivalent amount of water from another natural waterway. There is no legal basis to support the Spring Users claim their water rights entitle them to water temperatures and clarity that can only be supplied from spring water flows.

Id. at 546. The New Mexico Supreme Court likewise held that an appropriator “does not have a right to receive a particular silt content that has existed historically.” Similarly, the Utah Supreme Court refused to recognize a compensable interest in the particular salt content of an appropriation. *Deseret Livestock Co. v. State*, 110 Utah 239, 171 P.2d 401 (1946).

Idaho policies favoring maximum beneficial use of its water resources militate against a constitutionally-protected property right in the precise mineral content that may be suspended or carried by Idaho’s water resources. Therefore, the Ground Water Users’ request a declaratory ruling that no Idaho law or CM Rule precludes the Ground Water Users from utilizing surface water flows from the Snake River or elsewhere to mitigate compensable shortages to the Spring Users’ Water Rights.

CONCLUSION

For the foregoing reasons, the Ground Water Users request that the Director reconsider the *Directors June 15, 2007, Curtailment Order*, and all prior orders upon which it is based. Further, that an order be entered granting summary judgment in favor of the Ground Water Users as a matter of law, denying and dismissing the Spring Users delivery calls and rescinding all prior curtailment orders. The Ground Water Users further request a declaratory ruling that Idaho law does not preclude the Ground Water Users from utilizing surface water to mitigate compensable shortages to the Spring Users’ Water Rights.

RESPECTFULLY SUBMITTED.

