IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

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.

RANGEN, 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-2008-0000444

GROUND WATER USERS' REPLY BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

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)

GROUND WATER USERS' REPLY BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, District Judge, Presiding

Randall C. Budge, ISB #1949
Candice M. McHugh, ISB #5908
Thomas J. Budge, ISB #7465
RACINE OLSON NYE BUDGE & BAILEY, CHARTERED
201 East Center Street
Post Office Box 1391
Pocatello, Idaho 83201
(208) 232-6101 - Telephone
(208) 232-6109 - Facsimile

Attorneys for Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

BARKER ROSHOLT & SIMPSON, LLP
Attorneys for Clear Springs Foods, Inc.

RINGERT LAW CHARTERED
Attorneys for Blue Lakes Trout Farm, Inc.

GIVENS PURSLEY, LLP
Attorneys for Idaho Dairymen's Ass'n, Inc.

MAY SUDWEEKS & BROWNING, LLP
Attorneys for Rangen, Inc.

IDAHO ATTORNEY GENERAL
Attorneys for the Idaho Department of Water Resources

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutions and Statutes:

Rules and Regulations:

ATTACHMENT INDEX

ARGUMENT

In *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* ("*AFRD2*"), the Idaho Supreme Court rejected the idea that ground water rights must be administered by priority alone. 143 Idaho 862 (2007). As stated by the Court, "there is a lot more to Idaho's version of the prior appropriation doctrine than just 'first in time.'" *Id*. at 872. Notwithstanding, Clear Springs and Blue Lakes (collectively the "Spring Users") continue to deny that there are any limitations on the exercise of priority in the conjunctive management context. Their opening briefs are riddled with arguments that directly and indirectly aim to force the director to administer water rights by strict priority—arguments that were specifically considered and rejected by the Idaho Supreme Court in *AFRD2*.

The Spring Users' varied "priority-only" arguments defy the Director's duty, reinforced by the Idaho Supreme Court, to "make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development." *Id*. at 876. These considerations impose reasonable limitations on the exercise of priority that are consistent with the Legislature's declaration that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of that right shall not block full economic development of underground water resources." I.C. § 42-226. Not to be deterred, the Spring Users argue that full economic development is nothing more than a convenient theory that has no practical effect on water administration. (Blue Lakes' Opening Br. at 21-25; Clear Springs' Opening Br. at 46-51.) In their view, laws of reasonable water use and full economic development are relevant only to the extent that they do not infringe on administration by strict priority, which is to say

that they are not relevant at all. The Spring Users refuse to recognize the distinct differences between ground water administration and surface water administration, and accept that "[w]hile the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception." *Id*. at 880 (emphasis added).

The strict priority argument is essential to the administrative paradigm that the Spring Users propose—one by which the Director would be required to maintain the water table of the East Snake Plain Aquifer ("ESPA") at peak, unnaturally high levels for the Spring Users' exclusive benefit, with any decline in the water table resulting in immediate, wholesale curtailment of ground water pumping. In their view, the fact that strictly priority administration will drastically minimize beneficial use of the ESPA and exact severe harm on Idaho's agricultural-based economy is of no consequence.

However, as further explained below, the Idaho Supreme Court's *AFRD2* decision clearly rejected the idea that priority alone guides conjunctive water administration in Idaho. While priority is certainly the fundamental tenet of Idaho's prior appropriation doctrine, the Director's duty to administer ground water rights by priority has reasonable limits. Central to this case is the limitation prescribed in Idaho Code § 42-226, which provides that the Director's duty to administer ground water rights by priority ends where such administration will unreasonably interfere with full economic development of the state's ground water resources. In other words, there becomes a point at which the Director by law must refuse to administer ground water rights by priority because to do so would yield unreasonable consequences.

In the event the Spring Users' delivery calls are not denied, then the ultimate question remaining before this Court is whether the scope of curtailment should be narrowed consistent with the legislative directive for full economic development of the ESPA. Specifically, does it cross the line to curtail 52,470 irrigated acres to provide 2.66 cubic feet per second (c.f.s.) to Clear Springs, or to curtail 57,220 irrigated acres to provide 10.05 c.f.s. to Blue Lakes? To give context to the disparity between the amount of water curtailed and the anticipated benefit to the Spring Users, consider that the anticipated benefit to Clear Springs (2.66 c.f.s.) is equivalent to 1,926 acre-feet annually, or the amount of water needed to irrigate approximately 481 acres.[1] Does this Court not find repugnant the thought of curtailing 52,470 acres (more than 145 square miles) of productive irrigated farmland to provide 481 acres worth of water to Clear Springs? The anticipated return to Clear Springs is <u>less than one percent of the quantity curtailed</u>. Further, as acknowledged by the Hearing Officer, "[t]he vast majority of the water curtailed will not go to the Blue Lakes or Snake River Farms facilities. Perhaps it will go to beneficial use in Idaho, perhaps not." (R. Vol. 16, p.3711.)

Surely the legislature intended to avoid the type of gross disparity between the amount of water curtailed and the expected return to the calling senior water user when it declared that a "reasonable exercise [of priority] shall not block full economic development of underground water resources." I.C. § 42-226. This directive is at the heart of the Director's duties in

[1] This calculation presumes a typical diversion of four acre-feet per annum per acre. When comparing the quantity of water curtailed with the anticipated gain to Blue Lakes or Clear Springs, diversion rate must be used as the comparable. Since aquaculture is deemed non-consumptive, a comparison of consumptive use would be useless. And it would certainly be improper to compare diversion on one side with consumption on the other, as they are not one and the same.

responding to delivery calls against ground water rights, yet the Director failed to directly address this critical question, either before issuing the 2005 curtailment orders or on reconsideration. Although the scope of curtailment was limited by implementation of a trim line, the location of the trim line is solely the product of ESPA Model uncertainty. The Director did not independently consider whether full economic development compels a further constriction of the trim line to assure that that the Spring Users' delivery calls do not unreasonably interfere with full economic development of the ESPA. His failure in this regard constitutes an abuse of discretion and a violation of Idaho Code § 42-226.

The Director's failure to completely and carefully apply the law of full economic development in this landmark case is a dangerous precedent that sets the stage for the permanent curtailment of tens of thousands, perhaps hundreds of thousands, of ground water-irrigated acres across southern Idaho in response to delivery calls by Clear Springs, Blue Lakes, and any number of other spring users in the Thousand Springs area. Without a denial of the Spring Users' delivery calls or a substantial narrowing of the scope of curtailment in accordance with the laws of reasonable use and full economic development of the ESPA, widespread and disastrous economic consequences are inevitable.

I. THE IDAHO SUPREME COURT HAS ALREADY REJECTED THE SPRING USERS' ARGUMENT THAT THE DIRECTOR HAS NO AUTHORITY TO CONSIDER PRE-DECREE INFORMATION IN MATTERS OF CONJUNCTIVE WATER RIGHTS ADMINISTRATION.

The Spring Users ask this Court to bar the Director from considering, in response to a water delivery call, any information that pre-dates the issuance of their Snake River Basin Adjudication ("SRBA") decrees. (Clear Springs' Opening Br. at 23-29; Blue Lakes' Opening Br.

at 18-21.) In support of this argument, they claim that allowing the Director to consider so-called "pre-decree information" constitutes a "re-adjudication" of their water rights. (Clear Springs' Opening Br. at 29; Blue Lakes' Opening Br. at 18[2].) Not only is this "re-adjudication" argument mistaken, it is *res judicata*.

As explained below, the Idaho Supreme Court has already considered and rejected the argument that all pre-decree information is off-limits in the conjunctive management context. Since an SRBA decree does not define all information that may be relevant to the Director's material injury determination under the Department's *Rules for Conjunctive Management of Surface and Ground Water Sources*[3] ("Conjunctive Management Rules" or "CM Rules"), the Director cannot be blinded from relevant information that is not contained in an SRBA decree in making that determination. Accordingly, the Director acted properly within his discretion in considering the historic reliability of the Spring Users' water supplies, which is not defined by the SRBA but is nonetheless relevant to the issue of material injury under CM Rule 42.

A. This Court should reject the Spring Users' "re-adjudication" argument for the same reasons that the Idaho Supreme Court rejected the argument in its *AFRD2* decision.

The Spring Users' "re-adjudication" argument takes issue specifically with the Director's consideration of the historic reliability of their water supplies (facts that obviously pre-date the issuance of their SRBA decrees), claiming that such action imposed a "condition" on their water rights. (Clear Springs' Opening Br. at 28-29; Blue Lakes' Opening Br. at 18.) In the Spring Users' view, consideration of any pre-decree information is off-limits because "the nature and

[2] Blue Lakes makes the same argument but uses the word "reevaluation" instead of "re-adjudication."
[3] The CM Rules are all found at IDAPA 37.03.11.

extent of the water rights are 'conclusive' and binding on the Department …." (Clear Springs' Opening Br. at 23; Blue Lakes' Opening Br. at 19.) They claim that the Directors' consideration of historic water conditions "violates the Constitution's required priority administration and the watermaster's 'clear legal duty' to distribute water according to decrees," resulting in a "re-adjudication" of their water rights. (Clear Springs' Opening Br at 28-29.)

These very same arguments were made to the Idaho Supreme Court in the *AFRD2* case—almost word for word. In that case, Clear Springs likewise argued that the Director cannot look beyond a decree in water rights administration because "a water right decree is 'conclusive' to the 'nature and extent' of that right and the Director is bound to honor that decree in administration." *Pl.'s Br. in Response to D.'s & IGWA's Brs*. at 21, *AFRD2*, 143 Idaho 862.[4] Clear Springs also similarly argued that "honoring a court water right adjudication forbids the Director from conditioning a decreed water right on the basis of 'historic conditions' when the appropriation was first made." *Id*. at 24 (emphasis added). And the conclusion that the Idaho Supreme Court was asked to reach in *AFRD2*—the same conclusion the Spring Users ask this Court to reach—is that the material injury considerations authorized by CM Rule 42 "effect an unlawful 're-adjudication' of senior water rights." *Id*. at 25.

This Court must reject the Spring Users' "re-adjudication" argument for the same reasons that the Idaho Supreme Court rejected the argument less than two years ago. The problem with

[4] Clear Springs was an Intervenor-Respondent in the *AFRD2* case, but the *Plaintiffs' Brief in Response to Defendants' and IGWA's Briefs* was signed by counsel as "Attorneys for Twin Falls Canal Company and Clear Springs Foods, Inc." (p. 41.) Since Clear Springs did not file a separate brief of its own, it is assumed here that Clear Springs' position is represented in the Plaintiffs' Brief. A copy of the *Plaintiffs' Brief in Response to Defendants' and IGWA's Briefs* is attached hereto as Exhibit A for the Court's convenience.

the argument is that it is presumes that an SRBA decree is conclusive on all matters relevant to conjunctive water rights administration, which it is not.

Although the SRBA Court may impose administrative conditions on a water right, a decree is not conclusive on all matters that are relevant in conjunctive administration. The Idaho Supreme Court recognized this in its *AFRD2* decision, pointing out, for example, that "reasonableness is not an element of a water right," that "a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source," and that "determining whether waste is taking place is not a re-adjudication because clearly that too, is not a decreed element of a water right." 143 Idaho at 877. The reality, the Court explained, is that "water rights adjudications neither address, nor answer, the questions presented in delivery calls." *Id*. at 876. Accordingly, the Court concluded that "responding to delivery calls, as conducted pursuant to the CM Rules, do[es] not constitute a re-adjudication." *Id*. at 786-77.

In asking this Court to declare all pre-decree information off-limits, the Spring Users conflate authorized water use with actual water use. They are not one and the same. By definition, "material injury" is the "[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person …." CM Rule 10.14 (emphasis added). The focus is not upon the decreed parameters of authorized water use, but upon the calling senior's actual water use within those parameters. This is reflected in the material injury factors that are listed in CM Rule 42, which include such matters as the "amount of water available from the source," the "quantity and timing of when water is available," the "amount of water being diverted and

used compared to the water rights," and whether "the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion." CM Rule 42.01.

These and other material injury considerations transcend the defined elements of a water right license or decree. They focus on water use, and they incorporate "the traditional policy of reasonable use of both surface and ground water," including "concepts of priority in time and superiority in right being subject to conditions of reasonable use, … optimum development of water resources in the public interest, … and full economic development as defined by Idaho law." CM Rule 20. Neither the defined elements of an SRBA decree nor the date of the decree answers any of these questions. Therefore, it would be artifice to preclude the Director from considering pre-decree information in making these determinations.

Not surprisingly, the Spring Users say very little of the Idaho Supreme Court's *AFRD2* decision in their opening briefs, though that decision unquestionably provides the most recent, relevant and definitive interpretation of the CM Rules. They do, however, cite to the statement that "there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." (Blue Lakes' Opening Br. at 20; *see also*, Clear Springs' Opening Br. at 24.) Apparently, the Spring Users read this to mean that the Director is forbidden from considering pre-decree information in making a material injury determination under CM Rule 42. This is not what *AFRD2* stands for, as is clear when the aforementioned statement is read in context with the rest of the decision.

The reference to "post-adjudication factors" reflects the reality that even the defined elements of a water right license or decree may change as a result of post-decree water use practices. For example, non-use of water may result in forfeiture of all or part of the water right, thereby reducing the maximum authorized rate of diversion under the water right. Consequently, in responding to a delivery call the Director may consider post-decree information to determine whether there has been some change to the parameters of authorized water use. That does not mean, however, that the Director cannot consider information that is not defined in an SRBA decree (including pre-decree information) in making a material injury determination under CM Rule 42. As explained above, the Idaho Supreme Court already ruled that the Director's consideration of pre-decree information in making a material injury determination does not constitute a re-adjudication of senior water rights. *AFRD2,* 143 Idaho at 875. While the Court's reference to post-adjudication factors limits the Director's ability to question the defined elements of a water right license or decree, it does not limit the Director's ability to use pre-decree information to make a material injury determination under CM Rule 42.

In truth, the Spring Users' proposed pre-decree restriction aims to undermine the Director's ability to exercise discretion in response to a delivery call. The Spring Users have long sought to eliminate the Director's discretion in administering ground water, instead forcing the Director into a rote approach to water administration by strict priority. In this case, they have taken care to not call for strict priority directly, since in *AFRD2* the Idaho Supreme Court undertook to "point out those issues … from which no appeal was taken," including the argument "that water rights in Idaho should be administered strictly on a priority in time basis." *Id*. at 441.

Instead, the Spring Users seek to indirectly force the same result by blinding the Director from all pre-decree information, which would leave little for the Director to consider but priority dates alone. The Spring Users' approach would also enable the senior to thwart all discovery into any pre-decree facts necessary for the junior right to establish defenses or limitations to the senior's delivery call.

The practical reality is that administration by strict priority may work between competing surface water rights, where the water supply is confined to a channel and the results of curtailment are immediate and can be readily observed and measured. However, when dealing with interconnected ground and surface water rights "[t]he issues presented are simply not the same." *AFRD2*, 143 Idaho at 877. Therefore, the Idaho Supreme Court affirmed that "[c]learly, even as acknowledged by the district court, the Director may consider factors such as those listed [in CM Rule 42] in water rights administration." *Id*. at 876. By rejecting the strict priority argument, the Court was rejecting Clear Springs' position that the CM Rules do not allow the Director to consider the "'historic conditions' when the appropriation was first made." Pl.'s Br. in Response to D.'s & IGWA's Brs. at 21, *AFRD2*, 143 Idaho 862. Accordingly, in this case the Director correctly affirmed the Hearing Officer's conclusion that "[i]t is proper to consider intra-year and inter-year variations in the spring flows in determining curtailment." (R. Vol. 16 at 3707; R. Vol. 16 at 3957, ¶ 1.)

In sum, the Spring Users' "re-adjudication" argument is simply a repackaging of arguments that were rejected by the Idaho Supreme Court in its *AFRD2* decision. The argument attempts to eliminate the questions of whether a water user is being materially injured and

whether water is being diverted and used in a manner that does not unreasonably interfere with full economic development of the ESPA, with the aim to effectively force the Director to administer ground water rights by strict priority. The argument has been rejected by the Hearing Officer, the Director, and the Idaho Supreme Court, and it should again be rejected by this Court.

B. The reliability of the Spring Users' water supplies, which is not defined by the SRBA, is relevant to the issue of material injury.

While the SRBA defines the source, quantity, and period of use of each water right, it does not investigate or define how often the source provides sufficient water to allow the maximum authorized rate of diversion under the right (i.e. the reliability of the source). Accordingly, the quantity element of a water right license or decree defines the maximum authorized rate of diversion; it is not a guarantee that water has been or at all times will be available to divert the maximum authorized quantity during the authorized period of use. Indeed, there are many irrigation water rights for which the maximum rate of diversion has historically been available only for a short period of time during high spring runoff, even though the defined period of use for these water rights includes the entire irrigation season (typically April to October). As explained by the Hearing Officer, since an SRBA decree does not guarantee that the water supply has been or always will be available to fill the right, the Spring Users "cannot call for the curtailment of junior priority ground water rights simply because seasonally the discharge from springs is less than the authorized rates of diversion." (Recommended Order, R. Vol. 16, p. 3707.) Thus, the Director's accounting for seasonal fluctuations in Clear Springs'

water supply is not a re-adjudication of its water rights since the reliability of the water supply is not adjudicated in the first place.

At the hearing, Director Dreher clearly explained why historic water conditions are relevant in the conjunctive management context. With the aid of Exhibit 464, which depicts a hypothetical spring supply with seasonal fluctuations, the Director confirmed that the quantity element of a water right license or decree defines a maximum authorized use and not a guaranteed entitlement:

> Q. And so does this illustrate, then, that the quantity of water under a water right at the time it's licensed or decreed, is simply an authorized amount that I can take up to the 100 CFS if it's available?
>
> A. That's correct.
>
> Q. And it doesn't guarantee, for example, the hatch marks here would indicate a potential hypothetical irrigation season from April 1 through October. That quantity of 100 CFS would not necessarily guarantee that that amount would be available for me for the entire irrigation season if it were not available?
>
> A. That's correct.
>
> Q. And so if a call were being made under this type of situation and you were trying to administer that delivery call, is that why you say it is relevant to go back and look at the water supply that was available at the time the water right was established?
>
> A. That's correct.
>
> Q. And that's why historical information is of some significance?
>
> A. That's correct.
>
> Q. And does this also indicate why seasonal and intrayear variation is also relevant for administration purposes?

A. It's one illustration of that, yes.

…

Q. So the issuance of a quantity for a maximum amount doesn't necessarily indicate that that amount is available at all times during the year?

A. That's correct.

(Tr. p. 1202, L. 1-p. 1206, L. 4.) In fact, the Spring Users' expert hydrologist, Dr. Brockway, agreed with the Director on this point:

Q. Okay. Both orders contain the identical finding of fact 49. And if you follow along with me it says both interyear and intrayear variations in the discharge from the springs of the source for the water are something that have to be looked at.

Do you agree, Dr. Brockway, that it's relevant to look at intrayear and interyear variations that existed at the time the water right was established?

A. I think so, yes.

(Tr. P. 1662, L 18-P. 1663, L. 1.)

It is thus clear that the Director, in making a material injury determination under CM Rule 42, can and should account for the reliability of the Spring Users' historic water supplies. In contrast, if the Director has no authority to consider the reliability of the Spring Users' water supplies, as they ask this Court to declare, then the Spring Users can demand that junior-priority ground water users provide replacement water or other mitigation in an amount that provides the maximum authorized rate of diversion at all times, even though their water supplies did not naturally provided the maximum rate of diversion year-round.[5]

[5] Blue Lakes' argument that its water supply cannot be enhanced through curtailment of junior-priority ground water rights ignores the reality that ground water users have little choice but to mitigate the effect of their diversions. (*see* Blue Lakes Opening Br. at 11-12.)

Put another way, if this Court blinds the Director to pre-decree information in responding to a water delivery call, the Spring Users decreed quantity would become a guaranteed amount, enhancing their rights over what existed at the time they were originally licensed. Not only would that be unjust, but an affront to the constitutional principle that a water right is only as good as the amount of water actually put to beneficial use. Accordingly, a delivery call should not be an avenue to secure a more reliable water supply than has historically existed.

C. The Director acted properly within his discretion in analyzing the reliability of the Spring Users' water supply in response to its delivery call.

The Spring Users ultimately argue that even if the Director can rightly consider the reliability of its historic water supply in making a material injury determination, the Director "had no information or data to support that assumption." (Clear Springs' Opening Br. at 25.) This argument blatantly ignores the record in this case.

The Watermaster, Cindy Yenter, testified that spring flows in the Thousand Springs area do fluctuate seasonally and between years. (Tr. p. 491, L. 4-14; p. 577, L. 18-p. 578, L. 1.; p. 590, L. 12-25.) In addition, Exhibits 19, 414 and 420 clearly show that spring flows fluctuate seasonally. The fact that spring flows in the Thousand Springs area normally experience seasonal fluctuations, together with the undisputed fact that Clear Springs' water supplies have seasonally fluctuated every year since 1988 (every year for which records have been provided), persuasively support the Director's inference that spring flows similarly fluctuated prior to 1988.[6]

[6] The Department persuasively argues that the Director properly exercised his judgment regarding the facts and determined that neither Clear Springs water right no. 36-4013 nor Blue Lakes water right no. 36-7210 are materially injured. (Respondents' Br. at 44-57.) The court should not substitute its judgment for that of the Department on issues of fact. I.C. § 67-5279(1).

In contrast, the Spring Users would have the Director assume, with no supporting facts, that the springs that supply its water rights behave differently now than they did at that time of appropriation. In their view, it is somehow unreasonable to assume that the hydrologic conditions that have existed for the last two decades likewise existed during the two preceding two decades. Remarkably, the Spring Users are the ones with access to the information that would support its argument on this point, yet they offered nothing—no data and no testimony—that its spring flows did not experience seasonal variations at the time of appropriation. The absence of such evidence in the record is telling.

Understanding the reliability of the Spring Users' water supplies, which is not defined in their SRBA decrees, is relevant to the Director's material injury determination in accordance with the CM Rules. In this record, there is substantial and undisputed evidence to support the Director's finding that spring flows have always fluctuated considerably, both inter- and intra-year. In contrast, there is no evidence to indicate that the spring flows that supply the Spring Users' water rights were not subject to fluctuations at the time of appropriation or that decreed quantities were available at all times in all years.

Therefore, this Court must follow the Idaho Supreme Court's *AFRD2* decision which allows the Director to consider pre-decree information in making a material injury determination under CM Rule 42, and confirm that there is substantial evidence in the record to support the Director's finding that Clear Springs' spring flows have historically fluctuated, the recognition of which does not constitute a re-adjudication of Clear Spring's water rights.

II. THE SPRING USERS DEFY A CENTURY OF JURISPRUDENCE BY ASKING THIS COURT TO DISABLE THE LAWS OF REASONABLE WATER USE AND FULL ECONOMIC DEVELOPMENT OF GROUND WATER RESOURCES.

Blue Lakes puts forth great effort to dismiss the laws of reasonable water use and full economic development of ground water resources, arguing that these principles "do not support out-of-priority diversions." (Blue Lakes' Opening Br. at 21.) Clear Springs similarly argues that these laws "[do] not preclude or condition administration of water rights in Idaho." (Clear Springs' Opening Br. at 47.) In other words, it is the Spring Users' position that the laws of reasonable use and full economic development have no meaningful effect in the conjunctive administration of ground and surface water. This is another variation of the Spring Users' erroneous strict priority argument.

Blue Lakes relies on briefing filed by the Department in the *AFRD2* case to support this argument, claiming that "the CMRs are constitutional because they 'emphasize the importance of priority more than any other principle or policy.'" (Blue Lakes' Opening Br. at 22.) This one statement, however, falls far short of binding law. Moreover, when read in context it does not support Blue Lake's inference that reasonable water use and full economic development are absolutely inferior to the prior appropriation doctrine. While the Department's briefing affirmed that the CM Rules embody the fundamental administrative concept that first in time is first in right, the Department also cited to CM Rule 20.03 to equally affirm that "concepts of priority in time and superiority of right [are] subject to conditions of reasonable use, … optimum development in the public interest, … and full economic development." Lest there be any doubt, the Department confirms this position in its briefing in this case: "The Department fully agrees

that each of the above-mentioned principles are part of Idaho's prior appropriation doctrine." (Respondent's Brief at 14.)

Moreover, one need only look to the Idaho Supreme Court's actual decision in *AFRD2* to see that the principle of priority, at least when applied to ground water administration, is indeed tempered by principles of reasonable water use and full economic development. As the Court explained, "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." *AFRD2*, 143 Idaho at 876. The Court certainly would not have affirmed the Director's duty to make such determinations if, as Blue Lakes suggests, they have no effect on administration. Indeed, the Court took the effort to quote the district court's conclusion that "there is a lot more to Idaho's version of the prior appropriation doctrine than just 'first in time.'" *AFRD2*, 143 Idaho at 872, quoting *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, Gooding County Case No. CV-2005-600, n.21 at 90 (June 2, 2006).

Clear Springs takes a different approach at dismissing reasonable water use and full economic development, arguing that the Director may consider these laws in reviewing new water right appropriations, transfers and mitigation plans, and in forming the state water plan, but not in administering water rights. (Clear Springs' Opening Br. at 46-48.) This argument fails for two reasons. First, the Hearing Officer's reference to laws of reasonable water use and full economic development as "public interest" considerations was not a declaration that the laws do not apply to water rights administration. Second, the plain language of the Ground Water Act provides for the "administrative determination of adverse claims," which occurs "[w]henever 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 users of ground water rights of later priority." I.C. 42-237b.

In addition, Clear Springs improperly attempts to mount a new constitutional attack on the CM Rules, arguing that their inclusion of the laws of full economic development of ground water resources "is misplaced and out of context" because, Clear Springs claims, these laws apply only within "water delivery organizations" and not in the conjunctive management context. (Clear Springs' Opening Br. at 51.) In Clear Springs' view, the Director's authority to consider reasonableness and full economic development derives solely from Article XV, Section 5 of the Idaho Constitution, and applies only to water delivery organizations. (Clear Springs' Opening Br. at 48.) This argument, however, is also flawed.

This Court need not undertake an analysis of the scope of Article XV, Section 5 of the Idaho Constitution. Contrary to Clear Springs' argument, laws of reasonable water use and full economic development do not rest solely on Section 5, but are grounded in a century of jurisprudence and affirming statutes that have interpreted and defined the prior appropriation as it applies to all water rights under Article XV, Section 3 of the Constitution. Idaho's version of the prior appropriation doctrine unmistakably requires the Director to consider reasonable use and full economic development in responding to the Spring Users' delivery calls.

As the Idaho Supreme Court has stated, the appropriation, diversion and use of Idaho's water resources are "under such rules and regulations as may be prescribed from time to time by the law making power of this state." *Walbridge v. Robinson*, 22 Idaho 236, 242 (1912); *see also*,

Speer v. Stephenson, 16 Idaho 707, 712 (1909) (Article XV, §§ 1 and 3 demonstrate that "the people in adopting the constitution recognized that the public waters of the state should be committed to legislative control"). And as early as 1901, the Idaho Legislature codified the law that both juniors and seniors have rights in water administration:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose ….

1901 Idaho Sess. Laws 191, 200-201, codified at I.C. § 42-101 (emphasis added).[7] This was subsequently confirmed by the Idaho Supreme Court who explained that Idaho's water resources are owned by the State in its sovereign capacity "for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity." *Poole v. Olaveson*, 82 Idaho 496, 502 (1960), quoting *Walbridge*, 22 Idaho at 242.

Accordingly, the United States Supreme Court, in applying Idaho's prior appropriation doctrine, confirmed that "the right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right." *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 120 (1912). The Court continued:

[7] The Hearing Officer cited to the importance of I.C. § 42-101 in his Recommended Order. (R. Vol. 16, p. 3690.)

> the right of first appropriation, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water … must be exercised with reference to the general condition of the country and the necessities of the people, and not so to deprive the whole neighborhood or community of its use and vest an absolute monopoly in a single individual.

Id. at 121, quoting *Basey v. Gallagher*, 870 U.S. 670, 683 (1875). The Court rejected the idea that appropriators become "the absolute owners of the waters without restriction," because, the Court explained, "unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state." *Id*.

In 1936, the Idaho Supreme Court confirmed the law of reasonable water use with respect ground water supplies, stating that an appropriator has "no right to insist the water-table be kept at the existing level in order to permit him to use the underground waters." *Nampa & Meridian Irrigation District v. Petrie*, 37 Idaho 45, 51, 223 P. 531, 532 (1923). "To hold that any land owner has a legal right to have such a water-table remain at a given height," the Court explained, "would absolutely defeat drainage in any case, and is not required either by the letter or spirit of our constitutional or statutory provision in regard to water rights." *Id*.

Thus, when the Idaho legislature amended the Ground Water Act in 1953 to provide for full economic development in the administration of ground water rights, I.C. § 42-226, the Legislature was not deviating from the prior appropriation doctrine. In fact, the first sentence of the Act states that it incorporates the "traditional policy of the state of Idaho" which is that "water resources of this state [are] to be devoted to beneficial use in reasonable amounts through appropriation …." *Id*.

The Ground Water Act is acutely relevant in this case because it is the only place in state code where the Legislature addresses the situation where a surface water user asks the Director to curtail junior-priority ground water rights. It was the Ground Water Act that first authorized the Director to administer ground water rights in priority for the benefit of surface water rights. I.C. § 42-237b. In other words, prior to the 1953 amendment of the Act, surface water rights had neither a recognized right nor an administrative mechanism to seek priority administration against ground water rights.[8] The Act gives the Director the "duty … to control the appropriation and use of the ground water of this state as in this act provided." I.C. § 42-231.

Importantly, the right to seek administration against ground water rights under the Act is conditional. The Legislature did not provide that junior-priority ground water users would be shut off whenever senior surface rights are not receiving their full decreed quantities. Rather, the Legislature brought ground water rights into the priority system—making them subject to curtailment by senior surface water users for the first time—on the express condition that "full economic development" would not be unreasonably compromised, along with other established prior appropriation doctrine principles. The Legislature obviously recognized that the development of aquifers would cause a decline in the water table. It was in anticipation of that result that the Legislature limited the exercise of priority against ground water rights.

The unavoidable consequence of Idaho Code § 42-226 is that, under some circumstances, junior-priority water rights may continue even though their depletions impact a more senior

[8] The Idaho Constitution expressly addresses water in "natural streams," but contains not a single reference to ground water. Idaho Const., Art. XV, § 3. It was not until 1931 that the Idaho Supreme Court determined, "by analogy," that ground water rights could be administered, at least between themselves, under the prior appropriation doctrine. *Silkey v. Tiegs*, 51 Idaho 344, 353 (1931).

water right. The Idaho Supreme Court specifically considered this limitation on the exercise of priority, and found it to be "consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest," reasoning that "[f]ull economic development of Idaho's ground water resources can and will benefit all of our citizens." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584 (1973).[9] The Court explained that "when private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is promotion of the welfare of all our citizens." *Id.* Consequently, the effect of the law of full economic development is that "in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development." *Id.*

This does not mean, however, that Idaho Code §42-226 does away with administration by priority, nor have the Ground Water Users ever taken the position that priority has no place in the conjunctive management context. As explained previously, administration by priority can and should operate subject to the bounds of reasonableness. There is, however, a point at which the exercise of priority will unreasonably interfere with full economic development of the ESPA. At that point, the Director's duty to administer by strict priority ceases.

The CM Rules expressly incorporate the laws of reasonable use and full economic development. CM Rule 20.02 provides that "[t]hese rules acknowledge all elements of the prior appropriation doctrine." Even more specific, CM Rule 20.03 confirms that "[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water

[9] Notably, the administration of water in *Baker* was not confined to a water delivery organization.

source to support his appropriation contrary to the public policy of reasonable use…." The Idaho Supreme Court's recent confirmation that these CM Rules are facially constitutional, together with the Court's declaration that the Director does have authority to "make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development," *AFRD2*, 143 Idaho at 876, leaves no doubt that laws of reasonable use and full economic development impose practical limitation on the exercise of priority in the conjunctive management. Contrary to the Spring Users' argument, Idaho law requires the Director to deny administration by strict priority where doing so will unreasonably interfere with full economic development of the ESPA.

III. THE RESPONDENT'S BRIEF REINFORCES THE DIRECTOR'S FAILURE TO INDEPENDENTLY CONSIDER WHETHER THE DOCTRINE OF FULL ECONOMIC DEVELOPMENT WARRANTS A NARROWING OF THE SCOPE OF CURTAILMENT.

The Department acknowledges the Director's duty to consider the public interest in water administration, including consideration of full economic development. (Respondents' Br. at 60, quoting I.C. 42-226.) Notwithstanding, the record in this case shows that the Director failed to meet that duty by not independently considering whether the scope of curtailment should be narrowed to assure that the Spring Users' delivery calls do not unreasonably interfere with full economic development of the ESPA. The Director's failure in this regard constitutes an abuse of discretion that substantially prejudices the rights of junior-priority ground water users and the public generally.

In 2005, the Director ordered the curtailment of junior-priority ground water rights for which at least ten percent of the quantity curtailed is expected to accrue to the reaches of the

Snake River where Blue Lakes' and Clear Springs' are located. (Blue Lakes Order, R. Vol. 1, p. 61, ¶78; Clear Springs Order, R. Vol. 3, p. 501, ¶66.). This was accomplished via implementation of a "trim line," a point beyond which junior-priority diversions would not be curtailed. (Blue Lakes Order, R. Vol. 1, p. 49, ¶16, p. 59, ¶67; Clear Springs Order, R. Vol. 3, p. 491, ¶17, pp. 508-09, ¶96.). The location of the trim line was decided solely as the product of the Director's attribution of ten percent uncertainty in the ESPA Model. (Blue Lakes Order, R. Vol. 1, p. 63, ¶6; Clear Lakes Order, Vol. 3, p. 513, ¶12.) There are no findings of fact or conclusions of law to indicate that the Director directly considered whether the scope of curtailment should be further narrowed consistent with doctrine of full economic development as set forth in Idaho Code § 42-226.

The Director's failure to directly and thoroughly consider whether to limit the scope of curtailment consistent with the doctrine of full economic development appears to stem from a mistaken belief that he has little if any authority to deny the exercise of priority. The Hearing Officer explained his refusal to narrow the scope of curtailment this way: "It is, however, inescapable that spring flows have declined over time and that a portion of that decline is attributable to ground water pumping. … Curtailment is proper." (Respondent's Br. at 14, quoting R. Vol. 16 at 3714.) This explanation reflects the Director's belief that his discretion under Idaho Code § 42-226 is limited to the acceptance of mitigation in lieu of curtailment and the allowance of phased-in curtailment. This is most clearly stated in the Director's latest curtailment notice, wherein the Director concludes that "[a] senior may not block the full economic development of the State's water resources <u>if junior ground water users can mitigate</u>

their depletions in-time and in-place." (Final Order Accepting Ground Water Districts' Withdrawal of Amended Mitigation Plan, Denying Motion to Strike, Denying Second Mitigation Plan and Amended Second Mitigation Plan in Part; and Notice of Curtailment at 9, ¶ 11.)[10] Stated conversely, the Director believes that a senior can block full economic development of the ESPA if junior ground water users cannot mitigate their depletions in-time and in-place. This is not the administrative paradigm that the Legislature adopted in the Ground Water Act.

The Legislature limited the exercise of priority under the Ground Water Act precisely because it anticipated declining aquifer levels. The Act does not provide for the maintenance of peak aquifer levels for the benefit of a few, but instead required the maintenance of sustainable aquifer levels for the benefit of many, while still preserving the right of priority as necessary to maintain sustainable aquifer levels. In contrast, the Director's requirement that ground water users provide mitigation to avoid curtailment demonstrates management of the ESPA to sustain historic (rather than reasonable) aquifer levels in direct contradiction of the purpose of the Act.

Indeed, the Act's protection of reasonable pumping levels would be meaningless if a senior ground water user could demand that junior users be curtailed unless they provide mitigation to maintain historic aquifer levels. The Idaho Supreme Court rejected that idea in *Baker*, holding that "[a] senior appropriator is not absolutely protected in either his historic water levels or his historic means of diversion," but is "only entitled to be protected to the extent of 'reasonable pumping levels'…." 95 Idaho at 584. Nevertheless, the Director is now, by

[10] This order is essentially an extension of the Final Order in this case. As stated in the order, "Conclusions of Law set forth in the July 2005 Order, the Recommended Order, and the Final Order, as well as subsequent orders related thereto, as applicable, are incorporated into this order by reference." A copy of this order is attached hereto as Exhibit B.

absolutely refusing to allow junior diversions without mitigation, applying the Act in a way that requires the maintenance of historic spring flows (i.e. historic aquifer levels), thereby entitling the Spring Users to do what no other senior-priority ground water users could do.

Contrary to the plain language of the Ground Water Act and its application by the Idaho Supreme Court in *Baker*, the Director has now undertaken management of the ESPA for historic levels. This is the very thing that the Legislature attempted to avert by limiting the exercise of priority in the event it unreasonably interferes with full economic development of the ESPA. In fact, the Legislature created a special administrative body called a "local ground water board" to assure that its provision for reasonable limitations on the exercise of priority was given proper effect. I.C. § 42-237d. The involvement of local residents in ground water administration underscores the Legislature's intent that meaningful consideration be given the effect of curtailment on the community of ground water users.

The Legislature's intention that the Director not manage the ESPA for peak levels, but rather for sustainable levels, is not only clear in the language of the Act and subsequent Idaho Supreme Court decisions, but also in Idaho State Water Plans that state specifically the effect of the Act on aquaculture water users in the Thousand Springs area. The 1976, 1982, and 1986 State Water Plans consistently explain that

> [a]quaculture is encouraged to continue to expand when and where supplies are available and <u>where such uses do not conflict with other public benefits</u>. 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, <u>aquaculture interests may need to construct different water diversion facilities than presently exist</u>.

Ex. 438 at 118, Ex. 439 at 44, Ex. 440 at 38 (emphasis facilities).[11] These Plans reflect the practical effect of the policy of full economic development as provided in Idaho Code § 42-226.

Thousands of ground water appropriators have invested and developed the ESPA in reliance on the State of Idaho's assurance that they would not be held hostage by the few water users in the Thousand Springs area who might get the idea of curtailing ground water pumping in an effort to increase spring flows. In keeping with that policy, the Department encouraged and issued thousands of ground water rights which, coupled with cheap electricity incentives by Idaho Power Company, enabled Idaho farmers to make the desert bloom. Spring flows declined as expected, though they remain well-above natural levels. (Ex. 406.) Rather than continue these policies, however, the Final Order initiates a reversal of state ground water policy that is destined to return thousands of irrigated acres back into sagebrush.

In voluntarily restricting his authority under the Ground Water Act, it seems the Director has inadvertently conflated the separate doctrines of futile call and full economic development. The purpose of providing mitigation is to render a delivery call satisfied, since mitigation eliminates the injury being complained of. In contrast, the purpose of full economic development is to protect the public's interest in maximizing beneficial use of finite resources, even if the senior's right is not fully satisfied. Whereas the focus of the mitigation analysis is personal to the calling senior, the focus of the full economic development analysis is communal. In short, the Ground Water Act does not condition the exercise of priority upon whether the

[11] The reference to "adequate water" reflects the Plans' incorporation of "a zero Minimum flow at the Milner gauging station" which "means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low water years," and that "[t]he Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system." Ex. 440 at 35.

junior can fully mitigate its depletion, but upon whether the curtailment will interfere with full economic development of the resource. In factual circumstances where mitigation is impossible, unfeasible or would not provide any meaningful benefit within a reasonable time to the calling senior, the Director has a reasonable basis to refuse priority administration under the doctrine of full economic development.

The Director's incomplete analysis of the doctrine of full economic development is further manifest by his failure to consider or apply CM Rule 42.01.h, which specifically identifies certain mechanisms available to the Director to assure that the reasonable exercise of priority does not interfere with full economic development of the ESPA. CM Rule 42.01.h advises the Director to consider

> [t]he extent to which the requirements of the senior surface water rights could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to use and divert water from the area having a common ground water supply under the petitioner's surface water right priority.

The Hearing Officer refused to consider this factor because he believed that "treating the decreed water rights as ground water rights would be contrary to statute and would constitute a collateral attack on the partial decrees." (R. Vol. 14 at 3236-3237.) The Department similarly justifies the Director's failure to consider this material injury factor, claiming that "[i]f the Director were required to compel Blue Lakes and Clear Springs to change the source listed on its partial

decrees from surface water to ground water, that would constitute a readjudication." (Respondents' Br. at 62.)[12]

The Director's belief that he has no authority to apply CM Rule 42.01.h runs contrary to the Idaho Supreme Court's affirmative conclusion that the Director can apply the factors of CM Rule 42 without causing a re-adjudication of the senior water right. In addition, it defies the general provision in the SRBA that all water sources are deemed inter-connected unless proven otherwise. The very fact that the Spring Users are allowed to curtail water rights whose SRBA decrees list the source as "ground water" gives credence to the Director's authority to require a conversion from one hydraulically connected source to another as necessary to assure that the exercise of priority does not unreasonably interfere with full economic development of the ESPA. It also contradicts and reverses the historic policy outlined in State Water Plans that the Spring Users' water supplies and means of diversion are not absolutely protected, as explained above.

On reconsideration, the Director acknowledged that Idaho Code § 42-226 may in fact justify a narrowing of the scope of curtailment in the public interest, but still failed to independently consider the extent to which it does. Instead, full economic development was nebulously cited to support of the Director's decision to limit curtailment based on Model

[12] What the Department is really saying is that the Director has no authority under any circumstance to compel a surface water right to convert to a ground water source. Since every water right license and decree defines a source, the application of CM Rule 42.01.h would require a change from the defined surface source to a ground water source in every instance. The rule becomes entirely useless under the Director's claim that its application constitutes a re-adjudication. Surely, however, the Director must be afforded the opportunity to apply CM Rule 42.01.h and administer the water right based on the extent of interconnection between its source and that of junior water users, which is not defined in the Spring Users' SRBA decrees. And in this case it is undisputed in this case that the Spring Users' spring flows consist entirely of ground water emanating from the ESPA. (Dreher, Tr. p. 1113, L. 18-p. 1114, L. 2; Wylie, Tr. p. 889, L. 11-17, P. 891, L. 23-P. 892, L. 5.)

uncertainty. (R. Vol. 16, p. 3703-04, 3706, 3711-13.) The Director's accounting for Model uncertainty, however, is not and should not be the same analysis undertaken to consider full economic development.

Moreover, the lack of a fresh and independent reconsideration of whether the trim line should be constricted in accordance with Idaho Code § 42-226 underscores the problem with ordering large-scale, permanent curtailment without a prior hearing. It is no secret that the Ground Water Users are soured by the curtailment of their water rights on an emergency basis without a full evidentiary record and without hearing argument on important legal defenses to the Spring Users' delivery calls. Compounding this injustice is the defensive, appellate-type review that was given to the 2005 Curtailment Orders. Had the facts and legal defenses raised by the Ground Water Users been heard and thoroughly considered before ordering curtailment, the law of full economic development would have been given thorough and independent consideration, which the Ground Water Users believe would have resulted in a much narrower scope of curtailment from the beginning.

In this case, it is extraordinarily difficult to mitigate for the small quantity demanded for Clear Springs' Snake River Farm facility due to its location, as was explained by Lynn Carlquist and Dean Stevenson. (Carlquist, R. Supp. Vol. 7, p. 4837, L. 10-19, p. 4840, L. 6-11; Stevenson R. 2nd Supp. Vol. 1, p. 5549, L. 14-23, p. 5552, L. 1015.) Dr. Wylie of the Department also agreed that efforts to mitigate with water to Snake River Farms would be difficult given its location:

A. The Buhl to Thousand Springs reach is much shorter. This is over 20 miles

> long, and the Buhl to Thousand Springs reach is 10 miles long. So you get - you don't get as much impact as that impact spreads out radially from a well on this much shorter reach.

(Tr., p. 825, L. 9-13.) The result is that it is not practically possible to fully mitigate for impacts to Clear Springs, which the Director views as leaving himself no option but curtailment by strict priority.

In conclusion, the law of full economic development as set forth in the Ground Water Act expressly requires the Director to directly consider and make specific findings of fact about whether the exercise of priority must be limited to assure that it does not unreasonably interfere with full economic development of the ESPA. This is an independent analysis and just a backup to support Director's accounting for uncertainty in the ESPA Model. However, the Director's testimony that the trim line is solely the product of model uncertainty, the lack of any analysis of full economic development within the orders, and the lack of any findings of fact addressing the economic effects of the ordered curtailment collectively demonstrates that the Director did not independently consider, at least not in a meaningful or adequate way, whether the location of the trim line should be constricted in accordance with the legislative mandate for full economic development of the ESPA. The Director's failure in this regard was arbitrary and capricious and constitutes an abuse of discretion that violates substantial rights of the Ground Water Users.

If the law of full economic development is going to have any meaning in ground water administration, it must be addressed by making specific findings, yet the Director was entirely silent on this issue. As explained above and in the Ground Water Users' Opening Brief, the scope of curtailment in this case is so broad that 52,470 acres (more than 145 square miles) of

productive irrigated farmland are being retired to provide just 481 acres worth of water to Clear Springs—an anticipated return to Clear Springs of less than one percent at steady state, meaning this small benefit will only inure gradually and only be fully realized after decades. As acknowledged by the Hearing Officer, "[t]he vast majority of the water curtailed will not go to the Blue Lakes or Snake River Farms facilities. Perhaps it will go to beneficial use in Idaho, perhaps not." (R. Vol. 16, p.3711.)

Thus, the ultimate question before this Court is whether or not the Director's curtailment unreasonably interfere with full economic development of the ESPA when it retires 52,470 acres of productive irrigated farmland to provide just 2.66 c.f.s. to Clear Springs over the next several decades, retires 57,220 irrigated acres to provide 10.05 c.f.s. to Blue Lakes. One can hardly imagine a scenario that more persuasively demands some limitation on the exercise of priority. Accordingly, the Ground Water Users ask this Court to narrow the scope of curtailment so that priority is reasonably exercised as against only those ground water rights for which curtailment will provide a significant return within a reasonable time to the springs that supply Clear Springs' and Blue Lakes' water rights. This is the condition upon which the Legislature subjected ground water rights to delivery calls by surface water rights under Idaho Code § 42-226. Alternatively, the Ground Water Users ask this Court to remand this case to the Director to make that determination.

IV. THE CONJUNCTIVE MANAGEMENT RULES CLEARLY ALLOW A JUNIOR-PRIORITY WATER USER TO AVOID CURTAILMENT BY PROVIDING REPLACEMENT WATER TO MITIGATE THE EFFECT OF THE JUNIOR'S DIVERSION.

Clear Springs argues that the Director is without authority to approve "replacement water plans" on the basis that "no regulations or statutes authorize a 'replacement water plan.'" (Clear Springs' Opening Br. at 37.) This is an interesting argument, since the CM Rules expressly authorize junior-priority water users to avoid curtailment by providing "replacement water supplies or other appropriate compensation." CM Rule 43.03.c (emphasis added). Obviously, replacement water is an acceptable form of mitigation, as would be other compensation such as money or fish. And it is hard to imagine how replacement water will be provided without a plan for delivery, approved by the Director. There is simply no substance to Clear Springs' claim that the Director exceeded his authority by allowing junior-priority water users to mitigate by providing replacement water.

Instead, the Spring Users propose an administrative approach of immediate curtailment without a hearing to the curtailed ground water users, resulting in dire and potentially irreversible economic consequences as well as minimizing beneficial use of the ESPA, until a permanent mitigation plan is finalized. Yet, as explained above and in the Respondent's Brief, the Director must guard all interests equally and consider principles of reasonable use and full economic development in water rights administration. The Director's consideration and approval of replacement plans in this case falls within the realm of discretion afforded by the CM Rules.

Ironically, the Spring Users' procedural complaints with replacement water plans are not much different than the Ground Water Users' complaint with the Director's decision to order

broad-scale curtailment without a prior hearing to consider valid factual and legal defenses. (*See* Ground Water Users' Opening Br. at 69-72.) In this case it is the Ground Water Users, not the Spring Users, who have been denied due process. In response to the delivery calls, the Director considered information provided by the Spring Users but did not consider information from the Ground Water Users that would support defenses related to material injury, reasonableness of use, and full economic development. If curtailment without a hearing is to be tolerated, then certainly the approval of replacement water plans to avoid curtailment by mitigating injury to the calling party pending a hearing must also be tolerated.

Further, the Director's decision to order broad-scale curtailment without providing junior-priority users with a hearing or even time to do reasonable discovery and investigation undermines the Spring Users' assertion that the Ground Water Users have been given a "free pass." (Clear Springs' Opening Br. at 43.) The history of the Ground Water Users' replacement water plans will not be recited here, as it is already detailed in the Respondent's Brief. (pp. 33-41.) Suffice it to say, however, that the Ground Water Users have filed replacement water plans with the Director every year since curtailment was first ordered in 2005, even though there is solid ground to dispute the validity of the orders and their improper issuance on an emergency basis.[13] And when the 2007 plan was deemed insufficient to meet the Director's reach gain targets and curtailment was still ordered, the junior ground water users responded with even more replacement water options which led to the Director's approval of the plan.

[13] In 2006 the Gooding County District Court rendered the CM Rules facially unconstitutional and hence, administration under the rules was essentially stopped until resolution of that case was made by the Supreme Court in *AFRD2* which found the CM Rules facially valid.

The expense to the Ground Water Users to provide replacement water has been astronomical, amounting to nearly fourteen million dollars to date to revert irrigated lands from ground water back to surface water, dry up irrigated acres, perform managed recharge of the ESPA, and purchase spring flows.[14] (R. Vol. 1, p. 111, 154; Vol. 3, p. 427, 543, 570, 574; Vol. 4, p. 680; Vol. 5, p. 881; Vol. 7, p. 1375; Vol. 9, p. 1853.) Not only have the Ground Water Users spent millions to mitigate the Spring Users' delivery calls, they have also spent millions to mitigate in response to the Surface Water Coalition's delivery call. The cost of providing replacement water to the Spring Users has imposed an enormous and unreasonable burden on the Ground Water Users, who have had no choice but to bear the cost to forestall the ruination of their businesses and livelihoods while awaiting their due process. (Carlquist, R. Supp. Vol. 7, p. 4837, L. 20-p. 4840, L.2; Stevenson, R. Supp. Vol. 6, p. 4823, L. 1-p. 4825, L. 6.) They have done so in anticipation that the burden will be temporary until the orders are reversed for violating the State's obligation to manage the ESPA based on the minimum flows established in the Swan Falls Agreement and State Water Plan, or alternatively, until the scope of curtailment is narrowed to bring it within the bounds of reasonableness. They certainly received no "free pass."

In sum, there should have been no curtailment in the first place without an adequate opportunity to weigh in and provide information that bears on the required determinations of material injury, reasonable use, and full economic development. The issues involved in this case

[14] The Ground Water Districts purchased in 2008 Pristine Springs along with the State of Idaho and the City of Twin Falls. The Ground Water Districts' portion of the sale was $11 million, plus rent. Although not part of this record, the Pristine Springs purchase is a matter of public record and is currently part of a Replacement Water Plan to provide Blue Lakes with 10 c.f.s. of direct replacement water to satisfy the Blue Lakes delivery call. The cost for the replacement water plans from 2005-2007 was $2.7 million. (Carlquist, R. Supp. Vol. 7, p. 4837, L. 20-p. 4840, L.2; Stevenson, R. Supp. Vol. 6, p. 4823, L. 1-p. 4825, L. 6.)

are complex—factually, technically and legally. And, unlike surface-to-surface water right administration, the results of ground water curtailment take years or even decades to be realized. While the Spring Users would have continued to receive nearly their full rates of diversion without curtailment, the curtailment of ground water pumping is complete and causes severe and to a large extent irreversible. In light of the foregoing, it is not imperative that curtailment be immediate in response to a delivery call in the conjunctive management context. Rather, as the Idaho Supreme Court explained in *AFRD2*,

> While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframe on this process. 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 water right will indeed provide water to the senior, it is difficult to imagine how such a time frame might be imposed across the board. <u>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</u>.

143 Idaho at 875 (emphasis added).

That the Director immediately ordered curtailment without the necessary information and time to make a sound reasoned decision based on the relevant facts and legal defenses was a mistake that violated the Director's emergency authority under Idaho Code § 67-5247. Indeed, to curtail first and hold a hearing second, especially in response to the first delivery call in the conjunctive management "in Idaho's history," (Repondent's Br. at 63), was a mistake. That the Director accepted the Ground Water Users' replacement water plans to mitigate the effect of the Spring Users alleged injury was not.

V. THE RECORD LACKS SUBSTANTIAL EVIDENCE THAT A "USABLE QUANTITY" OF WATER WILL ACCRUE TO BLUE LAKES AND CLEAR SPRINGS FROM THE CURTAILMENT.

In response to the Ground Water Users' complaint that Blue Lakes and Clear Springs will not be able to raise more, larger, or healthier fish as a result of the curtailment of 57,220 and 54,270 acres, respectively, the Department cites to nothing more than the Hearing Officer's bare conclusion that "[t]he percentage of water that will go to the particular Spring Users is a usable quantity." The problem is that this conclusion is not supported by substantial evidence in the record.

Clear Springs claims that it "has been forced to suffer continued injury to its water rights and reduce operations—even shutting down raceways…." (Clear Springs' Opening Br. at 1.) However, while there is evidence in the record that Clear Springs has reduced operations as a result of market conditions, the record does not show that ground water pumping has prevented Clear Springs from meeting its market demands. (Cope, Tr. p. 136, L. 2-p. 139, L. 17.) And there no evidence in the record of how much water is required to fill a raceway, or whether more water will enable increased production. In short, there is no substantial evidence in the record that the additional 2.66 and 10.05 c.f.s. is needed and will be put to beneficial use.

Clear Springs has now admitted that it "knows the maximum amount of oxygen that a unit of water (e.g. cfs) can contain and knows the maximum amount of fish that can be produced from that unit of water" (Clear Springs' Opening Br. at 7, n.3.), which begs the question: why is there no evidence of this in the record? The answer, of course, is that Clear Springs went to great lengths to avoid substantiating its claim of material injury, arguing vigorously that it should

be protected from having to disclose its production records, facility operations, etc., and by refusing to produce them in response to discovery. Although in making a material injury determination, the CM Rules specifically authorize the Director to consider "the rate of diversion compared to the acreage of land served" (or, by analogy, the rate of diversion compared to the number of raceways served) and "the method of irrigation water application" (or, by analogy, the method of aquaculture water application), CM Rule 42.01.d, the Hearing Officer nevertheless allowed the Spring Users protection from these pre-hearing discovery attempts by the Ground Water Districts on that condition that if this information was not provided they would not be able to present evidence at the hearing that to prove that more water would allow the production of more, larger, or healthier fish). The Spring Users elected to not produce any production or financial records and consequently produced no evidence to demonstrate that they needed or would be able to put to beneficial use the additional water that is expected to accrue from curtailment. As a result, ground water users were relieved of any obligation to prove that the Spring Users suffered no material injury from the small loss of water. Despite the fact that the Spring Users presented no evidence whatsoever of injury resulting from the reduced water supply, they now ask the Court to infer material injury from bare assertions of injury that are based on evidence that was never disclosed nor presented at the hearing.

As a result, this record is without evidence of any material injury to the Spring Users, i.e. there is no evidence in the record that Clear Springs or Blue Lakes will need or be able to produce more, larger, or healthier fish with the additional water that comes available at some future date as a result of the curtailment. Thus, a curtailment order was issued without any

evidence of material injury to the Spring Users. Absent any evidence in the record of injury it is clearly not reasonable to immediately and fully curtail 52,470 acres of productive irrigated farmland in response to Clear Spring's loss of 2.6 c.f.s. or to curtail 57,220 acres in response to Blue Lakes loss of 10 c.f.s.

CONCLUSION

In the event the Spring Users' delivery calls are not denied for the reasons set forth in the Ground Water Users' Opening Brief, this Court must decide and render specific findings whether: (1) the Director erred by failing to address or make any findings or conclusions whether the curtailment will unreasonably interfere with full economic development of the ESPA; (2) whether the immediate curtailment of irrigated acres can be sustained by inferring and assuming material injury to the Spring Users given their refusal to disclose and present any evidence demonstrating that modeled small amounts of water derived from wide-spread curtailments would be beneficially used to produce more, larger or healthier fish; and (3) how the principle of futile call as defined in CM Rule 10.08 is applied to the facts of the Spring Users delivery calls.

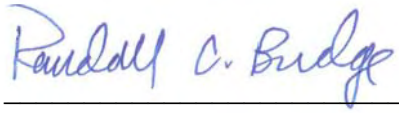
In responding to the Spring Users' delivery calls, the Director failed to directly confront and fully analyze and answer these essential and fundatmental questions, resulting in an inferential conclusion that the vast curtailments do not unreasonably interfere with full economic development of the ESPA and that the delivery calls are not futile. This failure constitutes an abuse of discretion and resulted in a curtailment so overbroad as to be arbitrary, capricious, and in violation of Idaho Code § 42-226.

If the Spring Users' delivery calls are not denied, the Ground Water Users ask this Court to apply the principle of full economic development as prescribed in the CM Rules to narrow the scope of curtailment in order to include only those ground water rights for which a significant portion of the water curtailed will accrue to Blue Lakes and Clear Springs within a reasonable time, or to remand this case to the Director with instructions to make that determination. It is not a matter of eliminating the exercise of priority, but of requiring that priority be reasonably exercised as against only those ground water rights for which curtailment will within a reasonable time provide a significant return to Clear Springs and Blue Lakes.

RESPECTFULLY SUBMITTED.

DATED this 9th day of March, 2009.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED



Randall C. Budge
Candice M. McHugh
Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2009, the above and foregoing document was served in the following manner:

Deputy Clerk Gooding County District Court 624 Main Street Gooding, Idaho 83333	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
Daniel V. Steenson Charles L. Honsinger Ringert Clark P.O. Box 2773 Boise, Idaho 83701-2773 dvs@ringertclark.com clh@ringertclark.com	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
Phillip J. Rassier Chris Bromley Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 phil.rassier@idwr.idaho.gov chris.bromley@idwr.idaho.gov	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
Michael S. Gilmore Attorney General's Office P.O. Box 83720 Boise, Idaho 83720-0010 mike.gilmore@ag.idaho.gov	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
Jeff Fereday Mike Creamer Givens, Pursley P.O. Box 2720 Boise, Idaho 83701-2720 jcf@givenspursley.com mcc@givenspursley.com	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail

J. Justin May May, Sudweeks & Browning P.O. Box 6091 Boise, Idaho 83707 jmay@may-law.com	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
John Simpson Travis L. Thompson Barker Rosholt P.O. Box 2139 Boise, Idaho 83701-2139 jks@idahowaters.com tlt@idahowaters.com	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
Josephine P. Beeman Beeman & Associates 409 W. Jefferson Boise, Idaho 83702 jo.beeman@beemanlaw.com	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
Robert E. Williams Fredricksen Williams Meservy P.O. Box 168 153 E. Main Street Jerome, Idaho 83338-0168 rewilliams@cableone.net	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-mail

Randall C. Budge

RANDALL C. BUDGE