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DEPARTMENT OF WATER RESOURCES

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

IN THE MATTER OF DISTRIBUTION)
OF WATER TO WATER RIGHTS NOS.)
36-07210, 36-07427, AND 36-02356A)
)
Blue Lakes Delivery Call)
_____)

**SPRING USERS JOINT RESPONSE TO
IGWA'S PETITION FOR
RECONSIDERATION &
CLARIFICATION OF
RECOMMENDED ORDER**

IN THE MATTER OF DISTRIBUTION)
OF WATER TO WATER RIGHTS NOS.)
36-04013A, 36-04013B, AND 36-07148)
(SNAKE RIVER FARM))
)
Clear Springs, Snake River Farm)
Delivery Call)
_____)

COME NOW, Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs") (collectively referred to as the "Spring Users"), by and through counsel of record, and hereby respond to Idaho Ground Water Appropriators, Inc.'s ("IGWA") *Petition for Reconsideration & Clarification of Recommended Order* ("Petition"). For the following reasons, IGWA's *Petition* should be denied.

ORIGINAL

INTRODUCTION

IGWA's *Petition* asks the Hearing Officer "reconsider" and "clarify" the January 11, 2008, *Opinion Constituting Findings of Fact, Conclusions of Law & Recommendations* ("*Opinion*"). IGWA raises the same erroneous legal arguments that it has repeatedly briefed and argued throughout the pendency of this case. In addition, IGWA bases its argument on a misrepresented record of these proceedings. Accordingly, IGWA's *Petition* should be denied.

ARGUMENT

I. Hearing Officer's Decision

IGWA's *Petition* challenges the adequacy of the *Opinion*, without identifying errors in, or offering alternatives to, the Hearing Officer's findings or conclusions. IGWA asserts that the Hearing Officer must expressly accept, reject or modify "in full or in part" every provision of the 2005 Curtailment Orders "consistent with all of the evidence placed into the record." *Petition*, at 3. There is no such requirement in Idaho law. Idaho's APA requires the following with respect to "orders":

- (1) An order must be in writing and shall include:
 - (a) a reasoned statement in support of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.
 - (b) a statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief.
- (2) Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in the proceeding.
- (3) All parties to the contested case shall be provided with a copy of the order.

I.C. § 67-5248.

The *Opinion* complies with the statute by recommending that the findings and conclusions in the 2005 Curtailment Orders are supported by the record and that they should be accepted in a final agency order. The Hearing Officer provided supporting reasons for his recommendations and based those reasons upon the evidence in the record, which includes the 2005 Curtailment Orders and the testimony at the hearing. In seeking reconsideration, it is incumbent upon the petitioner to identify errors either in the Hearing Officer's findings of fact, with references to the record, or in the Hearing Officer's conclusions of law, with references to pertinent legal authority. The Spring Users' *Joint Petition for Reconsideration* identified specific errors of fact and law as required for reconsideration. IGWA's *Petition* fails in this respect.

Moreover, IGWA fails to cite to any law that supports its assertion that the Hearing Officer's *Opinion* is inadequate under the Idaho Administrative Procedure Act, I.C. § 67-5103 et seq. (as opposed to erroneous in its findings and conclusions of law). For example, IGWA cites to *Compton v. Gilmore*, 98 Idaho 190, 193, 560 P.2d 861, 864 (1977), to support the argument that "proper and adequate findings of fact are not only mandatory, but highly practical and salutary in the administration of justice." However, in that case, the Court addressed the duties of a *trial* judge, not a hearing officer making a recommendation to the head of a state agency with respect to a previously issued order. *Id.* Likewise, *Woodfield v. Bd. Of Prof. Discipline*, 127 Idaho 738, 905 P.2d 1047 (Ct. App. 1995), is not applicable here. In *Woodfield*, the Court recognized that courts "will scrutinize [an agency's] findings of fact more critically if they contradict the [hearing officer's] conclusions than if they accord with the [hearing officer's] findings." Once again, the Court did not address a situation, such as this, where the hearing

officer is providing recommendations to the Director of the Idaho Department of Water Resources for purposes of a final agency order.

In this case, the Hearing Officer issued an opinion and recommendation, after reviewing the record in this matter and hearing testimony during a 2½-week hearing. The Hearing Officer responded by addressing the specific points and specific challenges raised by the parties during the hearing. The Hearing Officer should not be required to rewrite the entire 2005 Curtailment Orders and address provisions that were not challenged or argued by the parties. IGWA's failure to understand the extent of that acceptance is not reason to justify a wholesale redrafting of the 2005 Curtailment Orders. As such, IGWA's *Petition* should be denied.

II. IGWA's Assertions Regarding the Facts Presented at Hearing

IGWA misrepresents several facts from the hearing to support its arguments. For example, at pages 22-23 of the *Petition*, IGWA mischaracterizes the testimony of Clear Springs' expert witness Eric Harmon and his use of Exhibit 314. Exhibit 314 was intended to depict general direction of flow and contributing areas, but not specific or isolated preferential pathways in the Aquifer; a fact not supported by the groundwater model. According to IGWA, this map intended to provide "a further aid to focus and define the curtailment area to one that would likely provide a reasonable response to the Spring Users' outlet sources." *Petition*, at 22. IGWA conveniently fails to address Mr. Harmon's actual testimony as to the intent of Exhibit 314. The Hearing Officer correctly recited Mr. Harmon's testimony and the import of Exhibit 314. Mr. Harmon proffered that existing groundwater level data utilized in traditional analyses of well relationship and interference in the proximity of the Clear Lakes' springs showed that there are definable relationships between aquifer levels and spring flows in the Thousand Springs reaches. He further quantified those relationships to certain springs in certain sub-reaches. His

analysis was referred to by Dr. Wylie to further refine the relationships indicated by the groundwater model.

IGWA exaggerates the testimony regarding competition for commercial trout to suggest that junior out-of-priority groundwater users should not be subject to administration. According to IGWA, increased competition for commercial trout renders the future water needs and even existence of the aquaculture industry speculative. *Petition*, at 12. There was no testimony suggesting that competition threatens the future water needs or existence of the aquaculture industry. To the contrary, Mr. Kaslo testified that markets for commercial trout are favorable. The Spring Users have been in business since the 1950s. The aquaculture industry in Idaho has grown because the cool, high quality water discharging from the Thousand Springs provides optimum water for rearing marketable fish. With the expansion in global population and the continuing demand, the better inference is that there will continue to be demand for the food products that the spring users are able to produce with their water rights.

Regardless of the changes that may occur in their business practices, the fish will still need water and the Spring Users' water rights will still be senior. Likewise, so long as junior ground water rights are permitted to injure the Spring Users' senior water rights, the junior groundwater users will still be required to curtail or provide mitigation.

Finally, IGWA creates facts relative to the diversion rate for groundwater users by indicating that it is "4 acre-feet per acre." *Petition*, at 15. IGWA fails to cite to any source for this assertion. This is undoubtedly due to the fact that no such evidence was ever provided. Rather, as was provided in the completed record, the ESPAM used an input of 2 acre-feet per acre net depletion. IGWA then attempts to use the results of the ESPAM (based on a 2 acre-feet

per acre diversion), along with its inflated diversion rate to somehow show that curtailment is unreasonable.

III. Material Injury.

Prior to the hearing, IGWA argued that only an expert can testify about the relationship between water flows and fish production in an attempt to prevent the owners/operators of the Clear Springs and Blue Lakes facilities from testifying that they will put the additional water they seek to beneficial use. The Hearing Officer advised the parties that, during the hearing, he would consider objections based on the questions posed.

During the hearing, the Hearing Officer overruled IGWA's repeated objections to the testimony of Clear Springs' and Blue Lakes' witnesses in which they explained that they will put additional water to beneficial use. This is not rocket science. Water in a raceway is the living and growing environment for fish. More water provides more space in which to raise more fish (as is the case with a bigger fish tank). Greater flows also increase oxygen content and enable the Spring Users to increase feeding. Just as no expert is required to establish that a farmer can grow more of a crop on additional acres, no expert is required to demonstrate that more fish can be raised in more raceways that have more flowing water in them. The shortage during recent years has been so severe that, at low flows, the Spring Users have run raceways at reduced flows, and have had to dry up some raceways entirely.

The Hearing Officer properly identified the respective burdens of proof spelled out in the Supreme Court's decision in *AFRD#2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007). *Opinion* at 9-10. These burdens recognize a "presumption that a senior water user is entitled to the amount of water set forth in the partial decree." *Id.* at 9. Thereafter, following allegations of material injury made under oath, the Director makes a material injury determination and the burden shifts

to the junior water users to “show a defense to a call for the amount of water in the partial decree.” *Id.* at 9-10. CMR 10.14 defines material injury as the “hindrance to or impact upon the exercise of a water right caused by the use of water by another person.”

The undisputed testimony at the hearing is that the Spring Users would beneficially use all the water under their senior water rights if it were available. Such testimony was based on the decreed water rights and the experience of Larry Cope, CEO of Clear Springs, Randy MacMillan, Vice-President of Clear Springs, and Gregory Kaslo, Blue Lakes’ Vice President. In addition, the former Director Karl Dreher and Cindy Yenter, the Watermaster for Water District 130, confirmed that additional water could be put to beneficial use by Clear Springs and Blue Lakes under their senior surface water rights. None of IGWA witnesses disputed this testimony. IGWA cannot now, after the hearing is over, attempt to challenge the record.

IV. Model Uncertainty and the 10% Trim Line

It is undisputed that, while not perfect, the ESPAM is the best available science to address the interactions between the ground and surface waters of the Eastern Snake Plain. *Opinion*, at 14 (“There is no better science available”). Indeed, during the hearing, a number of witnesses testified that these imperfections lead to uncertainties in the results of the ESPA. However, any such imperfections or uncertainties should not prevent the Department from using the ESPAM when faced with a call for conjunctive administration. Accordingly, the question for the Director is how such uncertainty should be applied.

In this case, the Director inappropriately applied the uncertainties to impose a 10% trim line, or “margin of error,” *Opinion* at 14, against the Spring Users. In essence, the Director’s application of the ESPAM uncertainties authorizes further depletions to the Spring Users’ senior water rights. What the Director, and IGWA, fail to realize is that, with a 10% uncertainty, or

even with a 20-30% uncertainty as proposed by Dr. Brendecke, the curtailment necessary to achieve the results indicated by the ESPAM could be 10% or even 30% **higher** than indicated. Accordingly, a groundwater user whose depletions were considered to be less than 10% of the consumptive rate could actually be depleting 10% more or, according to Dr. Brendecke, even 20-30% more, than the Director anticipated. The Hearing Officer recognized this undisputed fact:

The former Director recognized that there had to be a margin of error in the application of the model and assigned a 10% error factor. This conclusion was based on ***the fact that the gauges used in water measurement have a plus or minus error factor of 10%. Some will be high; some will be low.***

Opinion at 14 (emphasis added). That notwithstanding, the Director determined that a 10% reduction was in order and allowed junior groundwater users to continue depleting the water source.

While Dr. Brendecke attempted to offer a numeric value on his perceived margin of error for the ESPAM, his testimony was not “compelling.” *Petition*, at 7. In fact, when asked whether 20% uncertainty would be reasonable, Dr. Brendecke responded: “Yeah, I think that would be reasonable.” *Transcript of the Testimony of Dr. Brendecke (“Brendecke Trans.”)* at 140, ll.22-23 (portions of transcript attached to this brief as Attachment A). As to whether a 30% would be reasonable, Dr. Brendecke responded: “Possibly, in some scenarios.” *Id.* at 141, l.1. His testimony also did not go “unchallenged.” *Petition*, at 7. Other experts and Department personnel testified that the ESPAM’s uncertainty could not be specifically determined at this time. Indeed, “Development of the model has not proceeded to the point of establishing a margin of error.” *Opinion* at 13.

As to the trim line imposed by the Director in the 2005 Curtailment Orders, Dr. Brendecke indicated that he did not even consider what an adequate trim line would encompass:

MR. STEENSON: It's my further understanding that you have not done an analysis to precisely define the area of the Eastern Snake Plain aquifer in terms of some number of square miles or drawing a circle around an area that reflects this confidence that you have. How large the area is, how large the area has to be for ground water pumping for you to have the confidence that you just described?

DR. BRENDHECKE: If you're asking me whether I tried to translate my sense of model uncertainty into something like a trim line, I have not.

Brendecke Trans. p. 93, ll.7-17. IGWA's "trim line" arguments suffer the same fatality as its futile call arguments, see below. Namely, failure to introduce any evidence in the hearing to address what it believes would be a "reasonable" trim line. While the Spring Users do not agree that a 10% trim line should be imposed, the Hearing Officer was correct in recognizing that a 20-30% margin of error is unreasonable.

V. Futile Call

As the Hearing Officer correctly recognized, "once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile." *Opinion* at 10 (citing *AFDR#2, supra*). As the Supreme Court has long held, "where an appropriator seeks to divert water on the grounds that it does not ... prejudice a prior appropriator he should ... produce '*clear and convincing evidence*' showing that the prior appropriation would not be injured or affected by the diversion." *Cantlin v. Carter*, 88 Idaho 179, 186-87, 397 P.2d 761, 766 (1964) (citing *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904)).

Similarly, in its summary judgment decision in the Basin-Wide Issue 5 subcase (on the proposed conjunctive management general provision), the SRBA district court explained that once the connection between the sources for the senior and junior water rights has been established, (as in this case) "the burden would shift to the junior to show by clear and

convincing evidence that curtailment would be futile.” *Second Affidavit of Daniel V. Steenson Re. Motions for Partial Summary Judgment*, Ex. I, at 33, fn. 10.

IGWA incorrectly asserts that the futile call defense is based on the hortatory¹ policy statements in CMR 20.03 regarding reasonable use, optimum beneficial use, and full economic development. *Petition*, at 9-10, 12, 17. IGWA cites no legal authority to support this characterization of the futile call defense, and repetition does not make it so. Whether a call is futile is a factual question, not a policy issue. In the Basin-Wide Issue 5 subcase, the SRBA district court explained the futile call defense as follows:

[T]he concept of “futile call” prevents the curtailment of a junior right on the same source if curtailment would not provide water to the senior in sufficient quantity to apply to beneficial use. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P2d 1220, 1223 (1976); citing *Albion – Idaho Land Co v. NAF Irrigation Co.*, 97 F. 2d 439, 444 (10th cir. 1938); *Neil v. Hyde*, 32 Idaho 576, 586, 186 P. 710 (1920); *Jackson v. Cowan*, 33 Idaho 525, 528, 196 P. 216 (1921). ***The relative location of the points of diversion on a given source gives rise to this concept.***

Second Affidavit of Daniel V. Steenson Re. Motions for Partial Summary Judgment, Ex. I, at 30 (emphasis added).

The Idaho Supreme Court explained the futile call defense as follows in *Gilbert v. Smith*, cited by the SRBA court in the above quote:

We agree that if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water. *Albion-Idaho Land Co. v. NAF Irr. Co.*, 10 Cir., 97 F.2d 439, 444 (1938); *Neil v. Hyde*, 32 Idaho 576, 586, 186 P. 710 (1920); *Jackson v. Cowan*, 33 Idaho 525, 528, 196 P. 216 (1921). *See also, Washington v. Oregon*, 297 U.S. 517, 522-523, 56 S.Ct. 540, 80 L.Ed. 837 (1936). Nevertheless, it was appellants' burden here to show that neither the surface or underflow of Densmore or Birch Creeks, if uninterrupted, would reach the point of diversion of the respondents, as senior appropriators.

¹ See *Spring Users Joint Petition for Reconsideration* regarding IDWR’s explanation of the hortatory nature of the policy statements in Rule 20.03.

Jackson v. Cowan, supra, 33 Idaho at 528, 196 P. 216; *Neil v. Hyde, supra*. This, the district court found the appellants had failed to do, and we hold that the evidence sustains such a finding.

97 Idaho at 739, 552 P2d at 1223.

IGWA's attempt to change the futile call defense into a surrogate for the hortatory policy statements of CMR 20.03 reflects the fact that IGWA did not produce any futile call evidence or argument in pre-hearing briefing or during the hearing. Indeed, IGWA's own expert testified that he did not do any analysis regarding futile call:

MR. STEENSON: And you have not done any analysis to determine whether the Blue Lakes Trout Farm or Clear Springs calls may be futile as to any individual or groups of wells, correct?

DR. BRENDHECKE: That's correct.

Brendecke Trans. p. 95, ll.15-21. None of IGWA's all-or-nothing "no curtailment" arguments was based on a futile call defense. And contrary to IGWA's assertion at page 17 of its *Petition*, IGWA has never advocated nor produced any evidence to support "a significantly smaller curtailment area limited to those geographic areas that will provide a significant response within a short time."

IGWA argues that the Director, and now the Hearing Officer, were wrong. IGWA would have the Hearing Officer believe that the Spring Users' calls are futile due to the length of time required to realize the effects of curtailment and the alleged "waste"² that would result. *Petition*,

² In its *Petition*, IGWA has attempted to redefine the term "waste" as it relates to Idaho water law by asserting that "waste," as used in the *definition* of "futile call" refers to the quantities of water that, once curtailed, may not reach the senior appropriator. IGWA is wrong. The term "waste" is a term-of-art in Idaho water law addressing the *use* of water. See, *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) (quoting *Kuntz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990)) ("The policy of the law of this [s]tate is to secure the maximum use and benefit, **and least wasteful use**, of its water resources"); see also *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 535 (D.C. Cir. 1940) (same – applying Idaho law). Even the CMR recognize that "waste" deals with the *use* of water – not the scope of delivery following curtailment: "In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b., **the Director shall consider whether the petitioner making the delivery call is ... diverting and using water efficiently and without waste.**" CM Rule 40.03 (emphasis added).

at 8-17. IGWA bases its entire argument on the *definition* of futile call found in the CMR, as though that definition prescribed some action on the part of the Department or Hearing Officer. *See Id.* at 9. Such is not the case. Rather, the CMRs provide for administration through mitigation or phased curtailment even if a call is futile.

Although a call may be denied under the futile call doctrine, *these rules may require mitigation* or staged or phased *curtailment of a junior-priority use* if diversion and use of water by the holder of the junior-priority water right causes material injury, *even though not immediately measurable*, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection maybe remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

CMR 20.04 (emphasis added).

Rule 40 requires priority conjunctive administration, with a five-year phased-curtailment caveat where the impact of junior pumping is delayed:

Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where material injury is delayed or long range may, by order of the director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment.

Similarly, the material injury analysis under Rule 42 includes consideration of long-range, “multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.” Indeed, one of the statutory purposes of the ground water districts represented by IGWA is:

To develop, maintain, operate and implement mitigation plans designed to *mitigate any material injury caused by ground water use* within the district upon senior water users within and/or without the district.

I.C. §42-5224(11) (emphasis added).

All the evidence supports the Hearing Officer’s conclusion that the Spring Users’ calls are not futile. The ESPA is hydraulically connected to the Snake River and tributary surface

water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and springs tributary to the Snake River is in the Thousand Springs area. Spring discharges are dependent on aquifer levels. *See Direct Testimony of Charles M. Brendecke (“Brendecke Direct”)* at p.21, ll.5-8. As aquifer levels decline, the discharge from springs declines as well. *Brendecke Direct* at p.37, ll. 20-21. Factors affecting aquifer levels and spring discharges include ground water pumping, incidental recharge and precipitation levels. Groundwater diversions from the ESPA have reduced aquifer levels causing reductions in hydraulically connected spring discharges. *Brendecke Direct* at p. 38, lns.13-15; *BL Order* at 5, ¶ 18; *CS Order* at 6, ¶ 21. All groundwater depletions from the ESPA cause reductions in flows in the Snake River and spring discharges equal in quantity to the ground water depletions over time. *BL Order* at 3, ¶ 11; *CS Order* at 3, ¶ 11; IGWA Ex. 400A.

During the hearing, IGWA’s expert acknowledged the impact of groundwater depletions on spring flows:

MR. STEENSON: As you've testified previously, changes in aquifer levels directly affect spring flows?

DR. BRENDECKE: I would agree with that statement on a general basis.

MR. STEENSON: As aquifer levels decline, spring discharges decline, correct?

DR. BRENDECKE: Some aquifer levels' decline have more impact on spring flow declines than others.

MR. STEENSON: Ground water diversions have reduced ground water levels and spring discharges, to some extent?

DR. BRENDECKE: Ground water pumping withdraws water from the aquifer which would have the tendency to reduce water levels in the aquifer.

Brendecke Trans. p. 81, ll. 8-21. In fact, Dr. Brendecke testified that groundwater diversions are “certainly responsible” for a portion of the Spring Users’ injuries:

MR. STEENSON: Do you believe that the ground water users bear some responsibility for the shortages being experienced by Blue Lakes, Clear Springs, and other springs below Milner?

DR. BRENDHECKE: Well, *they're certainly responsible for some portion of their depletion or injury to those water rights* that are placing this call.

Brendecke Trans. p. 128, ll. 4-11 (emphasis added).

During the hearing, Dr. Wylie, IDWR's ESPA model expert, also confirmed that ground water pumping depletes spring flows:

MRS. McHUGH: But curtailment on the Eastern Snake Plain would increase the amount of water flowing out of the springs; is that correct?

DR. WYLIE: That's correct.

Wylie Trans. p. 120, ll. 17-20.

MR. SIMPSON: Mr. Wylie, I'd like to just confirm that -- that -- is it your testimony that the model describes that all consumptive use pumping contributes to a reduction in the river -- in the river and reaches of the river over time?

DR. WYLIE: All consumptive use impacts the river somehow, somewhere, at some point in time.

Id., p. 157, ll. 3-9.

MR. STEENSON: A model is not required to know that spring discharges are dependent upon ESPA aquifer levels; is that correct?

DR. WYLIE: That's correct.

MR. STEENSON: It's also -- a model is not either necessary to know that as aquifer levels decline spring discharges decline; correct?

DR. WYLIE: Correct.

MR. STEENSON: Is the model required to know that ground water diversions have reduced ground water levels and hence spring discharges, or is that known without employing the models that you've worked on?

DR. WYLIE: Is the model necessary to know that ground water depletions cause a decline in springs; that your question?

MR. STEENSON: Yes. Without quantifying the amount or the extent, just to know that that is a true fact?

DR. WYLIE: That is a true fact.

Id., p. 203, l. 20 – p. 204, l. 12.

IGWA supports its new “futile call” argument with inflated and misrepresented numbers. For example, and as stated above, IGWA uses a diversion rate of 4 acre-feet per acre, *Petition*, at 15, even though no such evidence was ever presented during the hearing and even though the ESPAM used a diversion rate of 2 acre-feet per acre for groundwater diversions across the ESPA. Such arguments are clearly intended to inflate the numbers and make IGWA’s arguments seem stronger. The Hearing Officer should not be distracted by these arguments. Indeed, as recognized by the Hearing Officer, junior groundwater diversions are depleting the flows of the springs that feed the Spring Users’ senior water rights. As such, the junior ground water users causing the injury must be curtailed or must mitigate that injury. Since IGWA failed to provide any evidence as to what a reasonable delay or “waste” would be, its *Petition* should be denied.

VI. Reasonable Use.

IGWA argues that curtailment under the 2005 Curtailment Orders would be an unreasonable “monopolization of Idaho’s water resources.” *Petition*, at 17-21. As before, this argument is based on an incorrect interpretation of the law. IGWA would have the Hearing Officer believe that, based on hand-picked statements from Idaho Code § 42-101 and the Ground Water Act, which does not apply here, the Spring Users’ call should be rejected. IGWA cites to Idaho Code section 42-101 for the contention that “[a]ll waters of the state ... are declared to be the property of the state” and that the State is responsible for controlling the allocation of water and “in providing for its use shall equally guard all the various interests involved.” Such statements cannot be interpreted to eviscerate a senior’s statutory right to seek administration and

prevent juniors from injuring the senior's right merely because the senior water user has a large water right. Yet, that is exactly IGWA's interpretation. *See Petition*, at 18-19. Citations to Idaho Code section 42-226 have no weight in this matter as the Ground Water Act does not apply.

Once again, IGWA cites to the Supreme Court's decision in *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), to support its contention that curtailment in response to the Spring Users' calls is unreasonable. However, once again, IGWA misrepresents the holding of that case. In that case, a senior water user, who had constructed a series of water wheels to lift water from the Snake River to his properties, brought suit after a downstream dam caused "the waters of [the] Snake River [to be] backed up from said dam and to and beyond plaintiff's premises, and have destroyed the current in the river." *Id.* at 116. While there was no question that the plaintiff was entitled to his water right, *id.* at 117, the plaintiff sued to prevent the defendants from impeding the current of the Snake River so that the plaintiff's water wheels would continue to work. *Id.* at 116-17. While the Supreme Court rejected the plaintiff's right to appropriate the entire **current** of the Snake River, the Supreme Court did not diminish the water right held by the plaintiff and did not limit the senior water user's right to call for water when a junior appropriator injures his water right.

If the plaintiff were permitted to own the current of the stream as appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he would control and own ... ***but if an appropriator above should divert a sufficient quantity to lower the current under plaintiff's water wheels so that they would not revolve, the plaintiff would have a cause of action to prevent such an appropriation.***

Id. at 120 (emphasis added). In other words, even though the plaintiff could not prevent further development of the waters of the Snake River, he was not prevented from challenging appropriations that injured his water right. Likewise, while the Spring Users could not prevent

the development of the ESPA, junior groundwater users are not immune from administration when they deplete the water supply and injure the Spring Users' senior surface water rights.

IGWA even goes so far as to argue that since the Spring Users' water rights are larger than many of the junior groundwater users' water rights, they should simply allow the injurious depletions caused by junior groundwater users. According to IGWA, since the Spring Users have "enormous appropriations for aquaculture purposes," they should allow a certain level of depletion and injury to their senior water rights. *Petition* at 19 (arguing that the Spring Users "control huge amounts of water, nearly all of which (95.1% for Blue Lakes and 99.1% for Clear Springs) is still available for their use"); *Id.* at 20 ("Neither a 4.3% [sic] nor a 1% shortage to the Spring Users' aquaculture facilities warrants the permanent curtailment of tens of thousands of irrigated acres"). IGWA would apparently have the Hearing Officer believe that Blue Lakes and Clear Springs are receiving the entire allotment of water for their various facilities.

In addition to a lack of any legal foundation for these arguments, such arguments misrepresent the facts that IGWA sought to exclude throughout this proceeding. IGWA has continually objected to any discussion regarding water shortages at any of the other individual facilities. This is likely due to the fact that these other facilities are experiencing shortages in their supplies due to the depletions of the aquifer caused by junior groundwater depletions. IGWA did not want to discuss these facilities in conjunction with the Spring Users' call. IGWA cannot have it both ways.

First, there is no evidence in the record that these individual facilities are operated in such a manner that the water rights for one facility can be interchanged with other facilities, or that shortages to one facility can be compensated by using water rights from another facility. Mr. Kaslo testified that Blue Lakes is owned and operated by a private corporation, as an

independent business, with its own employees. It owns and “controls” only the water rights in its name, identified in the Orders and exhibits to this proceeding. The other facilities about which Mr. Kaslo testified (Clear Lakes, Rim View, White Springs, Fisheries Development) are also each independently owned and operated.

In addition, the evidence that is in the record refutes IGWA’s arguments. In the *Spring Users’ Pre-Hearing Memorandum*, at 12-13 ¶ 10, the Spring Users pointed out that the other facilities owned by Clear Springs are experiencing shortages in the decreed water rights for their various facilities. This evidence was not refuted. In addition, attached to the *Spring Users’ Pre-Hearing Memorandum* is the *Affidavit of Linda Lemmon*, indicating that the “total aggregate water shortage” among members of the Thousand Springs Water Users’ Association is 47.7% of the decreed amounts. Included in that amount, are facilities about which Mr. Kaslo testified, whose water rights have experienced shortages ranging from 23.7% to 100% (eight water rights in total). Likewise, the water rights listed in the Lemmon Affidavit for Clear Springs have experienced shortages ranging from 31.6% to 100%.

IGWA’s arguments are not supported by the law or facts and, as such, are without merit. Since the groundwater users are injuring the Spring Users by taking water that would otherwise be put to beneficial use under the Spring Users’ senior water rights, Idaho law demands that those junior water users curtail or mitigate for that injury to the senior rights.

CONCLUSION

IGWA’s *Petition* is an after-the-fact attempt to create a record based on evidence and arguments that it failed to provide during the hearing. IGWA cannot be permitted to back-fill the record with arguments and evidence that it failed to produce when it had the opportunity. As such, the Hearing Officer should deny IGWA’s *Petition*.

Dated this 11th day of February, 2008.

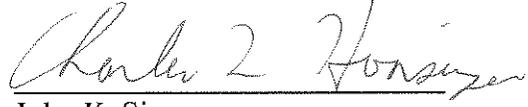
RINGERT CLARK, CHTD.



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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2008, I served a true and correct copy of the foregoing **SPRING USERS' JOINT RESPONSE TO IGWA'S PETITION FOR RECONSIDERATION & CLARIFICATION OF RECOMMENDED ORDER** by delivering it to the following individuals by the method indicated below, addressed as stated.

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c/o Victoria Wigle
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Boise, ID 83720-0098

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ATTACHMENT A

DAY 10 - TUESDAY, DECEMBER 11, 2007 PART 2

THE HEARING OFFICER: Evidence in the spring users cases. Do you wish to proceed?

MR. WILLIAMS: Your Honor, Rob Williams on behalf of the City of (inaudible). At the outset, with the graciousness of counsel, there's been a stipulation reached that would allow the admission of the city's pre-filed testimony in Exhibit 700 through 711. We're prepared to stipulate to that, Your Honor, at this time. The only reason that I wouldn't do that is if Your Honor would prefer to hear from these witnesses live. However, if they were to appear, they would just confirm their testimony that's already been pre-filed.

THE HEARING OFFICER: Is that proposed stipulation agreeable to all the parties?

MR. BUDGE: Yes, we would so stipulate.

UNIDENTIFIED SPEAKER: Yes.

UNIDENTIFIED SPEAKER: Yes.

THE HEARING OFFICER: Very well. Then we'll consider the pre-filed testimony and exhibits of the cities of Hazelton, Hagerman, Jerome, Paul, Shoshone, and Wendell.

MR. WILLIAMS: One other matter, Your Honor, again with the cooperation of counsel, they've agreed to

1 think the people on the modeling committee agree that
2 they should be accounted for. The folks on the
3 committee have urged the Department to do a (inaudible)
4 uncertainty analysis. But as I said, it's a
5 computationally intensive process.

6 MR. BUDGE: Is the 10 percent trim line adequate
7 in your opinion to account for these other
8 uncertainties?

9 DR. BRENDCKE: Uh, I would say probably not.

10 MR. BUDGE: Mr. Steenson asked you a question a
11 moment ago whether you calculated a specific number to
12 represent what you believe would be the appropriate
13 uncertainty, and I think you said no.

14 DR. BRENDCKE: No, I've not done that. As I said
15 several times (inaudible).

16 MR. BUDGE: Would it be reasonable, in your
17 professional opinion, to use 20 percent to account for
18 these other uncertainties?

19 DR. BRENDCKE: As sort of a total across the
20 model?

21 MR. BUDGE: Yes.

22 DR. BRENDCKE: Yeah, I think that would be
23 reasonable.

24 MR. BUDGE: Would it be reasonable to use 30
25 percent?

1 DR. BRENDECKE: Possibly in some scenarios. As I
2 said uncertainty is scenario-dependent, and the more
3 precise and narrowly focused the question the grayer
4 the uncertainty will be because there will be more
5 dependence on knowing hydrogeologic conditions at a
6 very fine scale. As we heard, the model is uniform
7 within each of those cells.

8 MR. BUDGE: It would be reasonable to use 50
9 percent?

10 DR. BRENDECKE: I don't know. That's a high
11 number. I don't know exactly what the number ought to
12 be. There are certainly a lot of sources of
13 uncertainty besides the gauge.

14 MR. BUDGE: The director chose to use a trim line.
15 Following that approach, what would you recommend?

16 DR. BRENDECKE: Well, if the purpose of the trim
17 line is to reflect model uncertainty, then the trim
18 line should be smaller the higher the uncertainty. I
19 think it makes more sense, though, to focus on -- I
20 mean I think that that's important information, but I
21 think there are other things to consider as well to try
22 to focus management.

23 Because of the uncertainty, I really believe that
24 it's speculative to say how much water is going to
25 show up at a particular spring. We're not going to

1 associating, predicting the effect of pumping within
2 large areas on reach gains, correct?

3 DR. BRENDCKE: I'm reasonably comfortable with
4 that. It's always been characterized in the modeling
5 committee as a regional model. When it's used as a
6 regional model, I'm comfortable with it.

7 MR. STEENSON: It's my further understanding that
8 you have not done an analysis to precisely define the
9 area of the Eastern Snake Plain aquifer in terms of
10 some number of square miles or drawing a circle around
11 an area that reflects this confidence that you have.
12 How large the area is, how large the area has to be for
13 ground water pumping for you to have the confidence
14 that you just described?

15 DR. BRENDCKE: If you're asking me whether I
16 tried to translate my sense of model uncertainty into
17 something like a trim line, I have not.

18 MR. STEENSON: Okay. And you do believe that the
19 director has the ability to determine what sub-reach
20 gains might accrue from curtailing groups of wells;
21 it's just a question of how big the group needs to be
22 for you to have confidence, correct?

23 DR. BRENDCKE: Well, you can certainly calculate
24 that with the model, and the larger area he's looking
25 at the more confidence you would have in the result.

1 not performed an analysis to determine whether or not
2 Blue Lakes Trout Farm or Clear Springs means of
3 diversion are reasonable?

4 DR. BRENDECKE: I haven't examined those means of
5 diversion from that standpoint, no.

6 MR. STEENSON: And you haven't performed any
7 analysis to determine what might be a reasonable
8 pumping level within the aquifer?

9 DR. BRENDECKE: No, I have not.

10 MR. STEENSON: And you have not done any analysis
11 to determine whether the Blue Lakes Trout Farm or Clear
12 Springs calls may be futile as to any individual or
13 groups of wells, correct?

14 DR. BRENDECKE: That's correct.

15 MR. STEENSON: Similarly, as you responded to
16 Mr. Simpson's question with respect to Clear Springs,
17 you have not done any analysis or formed any opinion
18 that Blue Lakes Trout Farm won't beneficially use
19 additional water within its facility if additional
20 water becomes available?

21 DR. BRENDECKE: That's correct.

22 MR. STEENSON: Your Honor, it's 4:41, 4:45. This
23 is a good place for me to stop, I won't be long in the
24 morning, but I'll go past five o'clock if I continue.

25 THE HEARING OFFICER: Whichever is preferable

1 MR. STEENSON: I take it you've observed the same
2 declining trend in aquifer levels since the 1950s
3 that's depicted in Attachment A and has been discussed
4 by other witnesses?

5 DR. BRENDECKE: Their Attachment A is a graph of
6 spring discharges, not aquifer levels, but they're
7 related.

8 MR. STEENSON: As you've testified previously,
9 changes in aquifer levels directly affect spring flows?

10 DR. BRENDECKE: I would agree with that statement
11 on a general basis.

12 MR. STEENSON: As aquifer levels decline, spring
13 discharges decline, correct?

14 DR. BRENDECKE: Some aquifer levels' decline have
15 more impact on spring flow declines than others.

16 MR. STEENSON: Ground water diversions have
17 reduced ground water levels and spring discharges, to
18 some extent?

19 DR. BRENDECKE: Ground water pumping withdraws
20 water from the aquifer which would have the tendency to
21 reduce water levels in the aquifer.

22 MR. STEENSON: With respect to well pumping, it
23 creates an area of depression, not a cone as far as
24 you're concerned, but has some radio effect that
25 may not be conical because of the conditions of the

1 do you have any basis to dispute that shortfall?

2 DR. BRENDECKE: I haven't tried to verify these
3 numbers with the model.

4 MR. STEENSON: Do you believe that the ground
5 water users bear some responsibility for the shortages
6 being experienced by Blue Lakes, Clear Springs, and
7 other springs below Milner?

8 DR. BRENDECKE: Well, they're certainly
9 responsible for some portion of their depletion or
10 injury to those water rights that are placing this
11 call.

12 MR. STEENSON: Now I am at the end. I have a
13 couple questions just to verify. At your direct
14 testimony, page 51 in lines 14 through 18, there are a
15 couple sentences where you mention (inaudible)
16 appropriation doctrine, principles of optimum
17 beneficial use for economic development. My
18 understanding is that you're not intending to offer
19 your opinion as to what legal definition or meaning
20 those phrases might have?

21 DR. BRENDECKE: No, I'm not trying to offer any
22 legal opinion.

23 MR. STEENSON: Thank you, Your Honor; thank you,
24 Dr. Brendecke. That's all I have.

25 MR. BUDGE: Thank you. For the record, Randy

DAY 5, TUESDAY, DECEMBER 4, 2007, PART 2:

HEARING OFFICER: Presume the proceedings in the spring users cases.

I received a description of a document in the 200 series with indications that a number have been stipulated for admission. Those marked from S, and then the A's, I think, have been admitted -- are admitted.

Anything else we need to take up before we start -- resume testimony?

Dr. Wylie.

UNIDENTIFIED PERSON: Should be identified as exhibits.

HEARING OFFICER: We have the listing. If for clarity of the record you want me to, I can. On those admitted or stipulated to admission: 227, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 258, 259, 260, 261, 262, and 263. And the list is in the possession of the Hearing Officer.

MS. McHUGH: Thank you.

BY MS. McHUGH:

Q. Dr. Wylie, this is Candace McHugh again representing the Ground Water Appropriators.

I wanted to just clarify a point that I'm

1 Q. As a result of curtailment.

2 A. That would.

3 Q. Okay. So those minimum flows provide a level
4 of protection to those spring users; is that not true?

5 UNIDENTIFIED SPEAKER: I'll object again.
6 There's still no foundation for protection.

7 HEARING OFFICER: Well, I'll allow him to
8 answer. I understand the concept there but I'll allow him
9 to answer.

10 THE WITNESS: In a manner of speaking, I
11 suppose there is some protection because of the minimum
12 flow given the scenario you outlined.

13 HEARING OFFICER: Using that in a lay term,
14 not in a legal conclusion that that follows from the Swan
15 Falls agreement and that water plan.

16 BY MS. MCHUGH:

17 Q. But curtailment on the Eastern Snake Plain
18 would increase the amount of water flowing out of the
19 springs; is that correct?

20 A. That's correct.

21 Q. Which that water would then flow into the
22 Snake River; correct?

23 A. Correct.

24 Q. Which makes the minimum -- which provides
25 water to the Idaho Power facility at Swan Falls.

DAY 6, WEDNESDAY, DECEMBER 5, 2007, PART 4:

HEARING OFFICER: Resume the evidence in the springs users cases. Dr. Wylie is again on the stand.

Did you wish to proceed?

MR. SIMPSON: Thank you, Your Honor.

HEARING OFFICER: I'd forgotten who was --

MR. SIMPSON: I'll proceed first --

HEARING OFFICER: Okay.

MR. SIMPSON: -- on the continuation of cross-examination.

EXAMINATION

BY MR. SIMPSON:

Q. Dr. Wylie, my name is John Simpson representing Clear Springs Foods in this matter. And I'll try to -- I'll try to keep my questions together in terms of the subject matter on cross given -- given that there was your direct testimony and then cross examination by IGWA's counsel and I may bounce back and forth between those two, so bear with me and I'll try to be as quick as I can.

On your -- on direct testimony you provided testimony regarding the new calibrated model, the version 1.0 and 1.1. And also some testimony regarding the old

1 those calls?

2 A. That's correct.

3 Q. Mr. Wylie, I'd like to just confirm that --
4 that -- is it your testimony that the model describes that
5 all consumptive use pumping contributes to a reduction in
6 the river -- in the river and reaches of the river over
7 time?

8 A. All consumptive use impacts the river somehow,
9 somewhere, at some point in time.

10 Q. Now with respect to the 10 percent clip, the
11 gauge uncertainties as you've described them with always
12 exist independent of the model, will it not?

13 A. There will always be uncertainty with the
14 gauge measurements, yes.

15 Q. Okay. How would you reconcile the gauge
16 uncertainties? How would you correct or address the gauge
17 uncertainties if you could?

18 A. There's -- we've had some talk about that and
19 the surface water people tell me that to reduce the gauge
20 uncertainty would be rather expensive.

21 Q. Would it mean getting the gauges calibrated?

22 A. No. The gauges are calibrated. I think my --
23 my -- the most intelligent thing for me to do is to say
24 that I'm not a surface water modeler so to go any further
25 down that road we ought to . . .

DAY 8, DECEMBER 7, 2008, PART 2:

HEARING OFFICER: Resume proceedings in the spring users cases.

It's been noted there is potentially one objection. One of the objections -- or one of the exhibits that's be stipulated. Mr. Budge.

MR. BUDGE: Yes. It's Exhibit No. 214, and which is identified as the affidavit of David Tuthill dated I think it's in '97. I'm not sure of the date.

I was, when I stipulated it's admission I was doing that under the misimpression that it was part of the agency record that the director relied on in making his order. I think we've since found out that that's not the case. It may have got attached to some pleading on summary judgment, but it's clearing -- on an irrelevant proceeding in a prior time frame and we don't have Ms. Tuthill here to tell us about it.

HEARING OFFICER: As I recollect that was the affidavit related to including the volume amount in the decrees. That was, I think in your affidavit on the motion for summary judgment. That isn't part of the agency record as such that was included.

Now what I do have a question on, there was a district court ruling on that, after, as I understand it,

1 in the springs. Have you seen that data?

2 A. I've seen that, yes.

3 Q. Okay. And at the high in the mid 50's
4 somewhere around 6800 CFS went across the spring; correct?

5 A. Widely accepted numbers.

6 Q. Okay. So the increase was in the 60 percent
7 range across the springs?

8 A. Correct.

9 Q. Then at Blue Lakes springs, if this is a
10 number that I got out of Dr. Brendecke's direct
11 examination, 1980 CFS and if it increased to a high of 229
12 CFS in 1951 or there's a USGS figure of 300 CFS, that's a
13 substantially greater rate of increase of spring flow over
14 the same time frame; is it not?

15 A. It is.

16 Q. And would this be indicative of preferential
17 flow?

18 A. It's bigger than quite a few, yes;
19 preferential.

20 Q. A model is not required to know that spring
21 discharges are dependent upon ESPA aquifer levels; is that
22 correct?

23 A. That's correct.

24 Q. It's also -- a model is not either necessary
25 to know that as aquifer levels decline spring discharges

1 decline; correct?

2 A. Correct.

3 Q. Is the model required to know that ground
4 water diversions have reduced ground water levels and hence
5 spring discharges, or is that known without employing the
6 models that you've worked on?

7 A. Is the model necessary to know that ground
8 water depletions cause a decline in springs; that your
9 question?

10 Q. Yes. Without quantifying the amount or the
11 extent, just to know that that is a true fact?

12 A. That is a true fact.

13 Q. When we talked about the May 19, 2005, order
14 during the deposition, you represented that you were
15 involved in certain parts or certain aspects of the order
16 but not all aspects; correct? Is that correct?

17 A. That's correct, yes.

18 Q. And what information did you gather for the --
19 in any report or information summary you may have given to
20 the director that related to the May 19, 2005, order?

21 A. I helped the director with the water budget.
22 Can I cheat and look at the order?

23 Q. Sure you can. It's Exhibit No. 30.

24 HEARING OFFICER: Here, this will be faster.

25 BY MR. STEENSON: