LAW OFFICES OF

RACINE OLSON NYE BUDGE & BAILEY CHARTERED

201 EAST CENTER STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83204-1391

TELEPHONE (208) 232-6101
FACSIMILE (208) 232-6109

www.racinelaw.net

SENDER'S E-MAIL ADDRESS: RCB@racinelaw.net

W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
MITCHELL W. BROWN
ERIC L. OLSEN
CONRAD J. AIKEN
RICHARD A. HEARN, M.D.
DAVID E. ALEXANDER
LANE V. ERICKSON
PATRICK N. GEORGE
SCOTT J. SMITH
STEPHEN J. MUHONEN
BRENT L. WHITING
JUSTIN R. ELLIS
JOSHUA D. JOHNSON
JONATHON S. BYINGTON
DAVE BAGLEY
CAROL TIPPI VOLYN
THOMAS J. BUDGE
CANDICE M. MCHUGH

BOISE OFFICE
101 SOUTH CAPITOL
BOULEVARD, SUITE 208
BOISE, IDAHO 83702
TELEPHONE: (208) 395-0011
FACSIMILE: (208) 433-0167

IDAHO FALLS OFFICE
477 SHOUP AVENUE
SUITE 203A
IDAHO FALLS, ID 83402
TELEPHONE: (208) 528-6101
FACSIMILE: (208) 528-6109

COEUR D'ALENE OFFICE
250 NORTHWEST
BOULEVARD, SUITE 106A
COEUR D'ALENE, ID 83814
TELEPHONE: (208) 765-6888

ALL OFFICES TOLL FREE
(877) 232-6101

LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL

April 10, 2008

David R. Tuthill, Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Blue Lakes/Clear Springs/Snake River Farms Delivery Call Cases

Dear Director Tuthill:

We are submitting on behalf of North Snake Ground Water District, Magic Valley Ground Water District and the Idaho Ground Water Appropriators, Inc. (collectively "IGWA") IGWA's Memorandum of Exceptions to the Summary Judgment Order, Recommended Order and Response Order, together with attached exhibits which consist of IGWA's Supplemental Proposed Findings of Fact and Conclusions of Law, Petition for Reconsideration and Clarification of Recommended Order, and Response to Spring Users' Joint Petition for Clarification. These documents will also be filed and served electronically today on parties of record per the attached service list.

We understand this matter is now before you for final decision. Thank you for your consideration.

Respectfully,

RANDALL C. BUDGE

RCB:rr
cc: Parties Per Service List

Randall C. Budge, ISB No. 1949
Candice M. McHugh, ISB No. 5908
Scott J. Smith, ISB No. 6014
Thomas J. Budge, ISB No. 7465
RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED
P.O. Box 1391; 201 E. Center Street
Pocatello, Idaho 83204-1391
Telephone: 208-232-6101
Facsimile: 208-232-6109

Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

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)** IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B, and 36-07148 **(Clear Springs, Snake River Farm Delivery Call)**	**MEMORANDUM OF EXCEPTIONS TO THE SUMMARY JUDGMENT ORDER, RECOMMENDED ORDER, AND RESPONSE ORDER**

COME NOW Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively "IGWA"), through counsel, and hereby take exception, pursuant to Procedure Rule 720.02.b, to the Order Granting in Part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment filed November 14, 2007 ("Summary Judgment Order"), the Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation filed January 11, 2008 ("Recommended Order")

and the Responses to Petitions for Reconsideration and Clarification and Dairymens' Stipulated Agreement filed February 29, 2008 ("Response Order").

INTRODUCTION

The Department recently concluded a hearing held November 28, 2007 through December 13, 2007 to reconsider two curtailment orders issued in 2005 in response to delivery calls made by Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs"). Blue Lakes and Clear Springs (collectively the "Spring Users") both operate aquaculture facilities supplied by spring flows in the Thousand Springs area. Their delivery calls sought to curtail ground water use on the Eastern Snake Plain in an attempt to increase flows from certain springs that supply their water rights. In response, the former Director issued orders dated May 19, 2005 ("Blue Lakes Order") and July 8, 2005 ("Clear Springs Order") (collectively the "2005 Orders") for the curtailment of 57,220 and 52,470 irrigated acres respectively. (Blue Lakes Order at ¶ 77; Clear Springs Order at ¶71.) The 2005 Orders were issued on an emergency basis without the benefit and deliberation of a prior hearing.

Petitions for Reconsideration of the 2005 Orders were filed by IGWA, Blue Lakes, and Clear Springs, among others. Parties to the hearing included IGWA, Blue Lakes, Clear Springs, Idaho Dairymen's Association, Rangen, Inc., and the cities of Wendell, Shoshone, Paul, Jerome, Heyburn and Hazelton. The Honorable Gerald S. Schroeder acted as Hearing Officer.

The Hearing Officer issued the Summary Judgment Order prior to the hearing on November 14, 2007. The Recommended Order was filed after the hearing, on January 11, 2008. In response to Petitions for Reconsideration filed by Blue Lakes, Clear Springs, and IGWA, the Hearing Officer filed the Response Order on February 29, 2008. The Spring Users then filed a Joint Petition for Clarification which was denied by the Order Regarding Joint Petition for

Clarification filed March 26, 2008. This Memorandum of Exceptions is filed timely pursuant to Procedure Rule 720.02.b.

The Recommended Order and Response Order constitute recommended orders subject to review by the Director. Procedure Rule 720. In reviewing the Orders, the Director "shall exercise all the decision-making power that he would have if [he] had presided over the hearing." I.C. § 67-5277; IDAPA 37.01.01.70.01. The Director's final order must be based "exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding." Idaho Code § 67-5248.

The 2005 Orders, issued on an emergency basis without a prior hearing, are predicated on a deficient record. As such, the 2005 Orders warrant no deference in the Director's issuance of a final order. Rather, the Director must carefully consider whether the facts and record established at the hearing compel a different result than was reached in 2005. The Director must determine whether the completed record supports the Hearing Officer's recommendations in the Summary Judgment Order, Recommended Order and Response Order in accordance with Idaho law and sound water policy for the conjunctive administration of ground water and spring water rights.

IGWA agrees with and supports a majority of the Hearing Officer's recommendations, including the following:

A. Various factors have contributed to the decline in spring flows, including reductions in incidental recharge as a consequence of improved irrigation efficiencies, drought, and ground water pumping. (Recommended Order at 6.)

B. Ground water users are only responsible for spring flow reductions they have caused and not for reductions resulting from increased surface water irrigation efficiencies. (Recommended Order at 8.)

C. Blue Lakes and Clear Springs cannot require the continuance of inefficient flood irrigation practices, and to the extent that efficiencies have reduced spring flows, the Spring Users are without recourse. (Recommended Order at 8.)

D. The Spring Users' delivery calls failed to follow proper procedure or establish a basis for their claims of material injury. (Recommended Order at 9.)

E. Consideration of information predating Partial Decrees issued in the Snake River Basin Adjudication is proper in responding to a delivery call and does not constitute a re-adjudication of the water right. (Recommended Order at 10.)

F. There are limitations in the use of the East Snake Plain Aquifer Model ("ESPAM" or "Model") and an error factor should be implemented when curtailment is ordered based on Model predictions. (Recommended Order at 13-14.)

G. Multiple variables contribute uncertainty to curtailment predictions generated by the Model including non-uniform geology of the ESPA, variations within the Model cells, and the inability of the Model to predict the effect of curtailment on discrete spring flows. (Recommended Order at 13.)

H. The linear analysis used to predict the effects of curtailment on a particular spring is not technically defensible. (Recommended Order at 20.)

I. The use of a trim line is proper. (Recommended Order at 14 and 22.)

J. The doctrine that "first in time is first in right" is subject to consideration of the public interest and full economic development of the underground water resource. (Recommended Order at 17.)

K. Natural seasonal variations in spring flows must be considered in determining the quantity of water that the Spring Users may be entitled to make a delivery call for. (Recommended Order at 18.)

L. The Spring Users are not entitled to dry upon hundreds of thousands of acres when that action may contribute little or nothing in any reasonable time to their shortage. (Recommended Order at 23.)

M. Phased-in curtailment is permissible. (Recommended Order at 26.)

N. Providing replacement water to Spring Users in the amount they would receive under curtailment is permissible. (Recommended Order at 26-27.)

Notwithstanding IGWA's substantial agreement with the Hearing Officer's recommendations, IGWA takes exception to those recommendations that are inconsistent with the following conclusions which IGWA believes must be reached based on the record established at the hearing:

1. The laws of full economic development and reasonable use of water must be applied to the facts of this case to redefine and constrict the location of the trim line adopted in 2005.

2. Uncertainty inherent in the Model predictions and linear analysis is greater than 10% and, therefore, the location of the trim line must be constricted as necessary to provide reasonable certainty that curtailed ground water use will actually be put to beneficial use by the Spring Users. (*Cf.* Recommended Order at 12, 22.)

3. The trim line implemented in 2005, though a limitation on curtailment, still vests in Blue Lakes and Clear Springs an unreasonable monopoly over vast quantities of the ESPA. (*Cf.* Recommended Order at 23.)

4. The facts of this case condition curtailment upon the Spring Users' conversion to a ground water source pursuant to CM Rule 42.01.h, with the right of curtailment subject to the law of reasonable pumping levels set forth in I.C. § 42-226. (*Cf.* Summary Judgment Order at 7, 10.)

5. The doctrine of futile call as defined by the CM Rules is applicable to this case and at the very least compels constriction of the trim line to a point at which a significant portion of the curtailed water use will be put to beneficial use by the Spring Users within a reasonable time. (*Cf.* Recommended Order at 19 and 21.)

6. The economic impact of curtailment further demands constriction of the trim line pursuant to I.C. § 42-226. (*Cf.* Recommended Order at 19, 21.)

7. Blue Lakes' and Clear Springs' claims of material injury are not substantiated by the record, nor does the record support the Hearing Officer's conclusion that "depletion of the water supply ... is material injury when the business is the production of fish." (Response Order at 2.) Further, the record does not support the recommendation that the amount of water that would be deliverable is in fact "usable" and can be put to beneficial use. (Recommended Order at 21.)

8. The Swan Falls settlement precludes the curtailment of ground diversions from the East Snake Plain Aquifer so long as minimum stream flows at the Murphy Gauge are met. (*Cf.* Summary Judgment Order at 11.)

9. The Hearing Officer correctly found that water quality and temperature are not elements of a water right, but erroneously required those elements be part of any mitigation/replacement water plan. (Recommended Order at 22.)

In further support of these exceptions, IGWA refers the Director to its Supplemental Proposed Findings of Fact and Conclusions of Law, its Petition for Reconsideration and

Clarification of the Recommended Order, and IGWA's Response to Spring Users' Joint Petition for Clarification filed herein, copies of which are attached hereto.

DISCUSSION

I.

FULL ECONOMIC DEVELOPMENT AND REASONABLE USE OF WATER

The laws of full economic development and reasonable use of water must be applied to the facts of this case to redefine and constrict the location of the trim line adopted in 2005.

This monumental case presents no greater question than what the effect is of the legislative mandate that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." I.C. § 42-226. IGWA contends that the Recommended Order and Response Order give inadequate effect to that mandate.

The mandate for full economic development imposes a pragmatic limit on the right of an appropriator to curtail beneficial use of Idaho's ground water resources. Though a senior appropriator may be in priority, his right to curtail junior water uses ends where the curtailment would unreasonably interfere with full economic development of the resource. I.C. § 42-226; CM Rule 20.03. The legislature's authority to limit the right of priority is rooted in the Idaho Constitution: "priority of right shall be subject to such limitations as to the quantity of water used and times of use as the legislature, having due regard both to such superiority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe." Article 15, § 5. On that foundation the Legislature enacted I.C. § 42-226 in 1951.

The Department incorporated the law of full economic development into Conjunctive Management Rule ("CM Rule") 20.03:

> **Reasonable Use of Surface and Ground Water.** These rules integrate the administration and use of surface and ground water in a matter consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water sources to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

While the principal that "first in time is first in right" defines the starting point for water rights administration, that principle clearly "is not without limitation." (Recommended Order at 15.) Principles of full economic development, optimum beneficial use, and reasonable use of water (referred to collectively as the "public interest" by the Hearing Officer) impose practical limits on the right of an appropriator to curtail beneficial water use. (Response Order at 7.) In this case the limitations set forth in I.C. § 42-226 and CM Rule 20.03 give relevance to the economic effect of curtailment, the monopolistic exercise of an appropriation, the amount of waste resulting from curtailment, the futile call doctrine, and model uncertainty—each of which constrains the right of curtailment. (Recommended Order at 17.) IGWA supports the recommendation that these limitations be given effect via the implementation of a trim line, "a point of departure beyond which curtailment was not ordered." (Recommended Order at 17.)

Director Dreher testified that the trim line implemented in 2005 derives solely from 10% uncertainty in the USGS gauges used to calibrate the East Snake Plan Aquifer Model ("ESPAM" or "Model"). (Dreher, Tr. 1166:7-10, 1227:21-1228:4; Wylie, Tr. 817:12-818: 9.) Other relevant limitations had no bearing on its location. Yet while Model uncertainty defines the most distal possible location of the trim line, the public interest constraints set forth in I.C. § 42-226

and CM Rule 20.03 certainly warrant further constriction. The 2005 Orders acknowledge I.C. § 42-226 and CM Rule 20.03, but give them no meaningful consequence.

The Recommended Order affirms that the limitations set forth in I.C. § 42-226 and CM Rule 20.03 are relevant and "have significance in several issues in this case," yet goes no further than to cite such limitations generally as justification for the use of a trim line. (Recommended Order at 17.) IGWA petitioned for reconsideration of the Recommended Order on the basis that the 2005 trim line, which extends curtailment to water rights for which only a tiny fraction of the amount curtailed might be made available to the calling senior,[1] exceeds the limits imposed by I.C. § 42-226 and CM Rule 20.03. (IGWA's Petition for Reconsideration and Clarification at 17-23.) The Response Order again cites to Model uncertainty as a quantitative basis for the 10% trim line, refusing any further analysis of the affect of the public interest constraints on the location of the trim line. (Response Order at 6.)

The Hearing Officer's refusal to constrict the trim line pursuant to I.C. § 42-226 and CM Rule 20.03 appears to stem from the lack of an "empirical basis" for implementing the public interest constraints. (Response Order at 2.) Yet while such limitations may not be susceptible to scientific quantification, they are nonetheless relevant and meaningful limitations on the right of prior appropriation. Indeed, the limitations set forth in I.C. § 42-226 and CM Rule 20.03 aim to protect the public interest and inserting an element of reasonableness in the administration of water under Idaho law. It is these types of "reasonableness" decisions that require "some exercise of discretion by the Director." *American Falls Reservoir Dist. No. 2, et al., v. Idaho Dept. of Water Resources, et al.* (*AFRD#2*), 143 Idaho 862, 875, 154 P.3d 433, 446 (2007).

---

[1] Of the total quantity curtailed under the Blue Lakes Order, only 3.2% is expected to be made available to Blue Lakes. Of the total quantity curtailed under the Clear Springs Order, less than 1% is expected to be made available to Snake River Farm. (See Section II below.)

If ever a case warranted the Director's discretionary implementation of the public interest constraints set forth in I.C. § 42-226 and CM 20.03, this is it. The record established at the hearing powerfully compels constriction of the trim line implemented in 2005 for the reasons that it fails to adequately account for uncertainty in the Model predictions upon which the 2005 Orders are based (Section II), it creates in Blue Lakes and Clear Springs a monopoly over vast quantities of the ESPA (Section III), it results in drastic economic harm to the State of Idaho (Section IV), and it violates the futile call doctrine (Section V). Each of these considerations provides and independent basis for constriction of the trim line. In addition, achieving the goal of full economic development demands that the Spring Users be compelled to convert to a ground water source pursuant to CM Rule 42.01.h. (Section VI).

II.
ACCOUNTING FOR MODEL UNCERTAINTY

Uncertainty inherent in the Model predictions and linear analysis is greater than 10% and, therefore, the location of the trim line must be constricted as necessary to provide reasonable certainty that curtailed ground water use will actually be put to beneficial use by the Spring Users. (*Cf.* Recommended Order at 12, 22.)

The laws of full economic development and reasonable use of water inherently demand reasonable certainty that the curtailment of beneficial water use will actually benefit the calling senior. Curtailment of beneficial water use is unjustified where the intended benefit to the senior is mere speculation. Evidence admitted at the hearing established that the 2005 Orders extend curtailment to water rights for which there is no degree of certainty that the Spring Users will receive any benefit. IGWA takes exception to the Recommended Order and Response Order for failing to recommend constriction of the trim line as necessary to avoid speculative curtailment.

The 2005 Curtailment Orders are based on simulations generated by the ESPA Model which predict the effect of ground water curtailment on reach gains to the Snake River. The

Model's reach gain predictions are limited by the accuracy of the Model's inputs and assumptions. As a result, there is a degree of uncertainty inherent in Model simulations, which necessary limits curtailment based on such simulations. (Recommended Order at 13.)

Director Dreher assigned an uncertainty factor of 10% to Model simulations, which derived from the 10% margin of error in the USGS stream gauges used in the Model. (Tr. 1166:7-10, 1227:21-1228:4; Wylie, Tr. 817:12-818: 9.) Model uncertainty formed the basis of the trim line which limited curtailment to those junior-priority groundwater rights for which at least 10% of the quantity curtailed was predicted to return to the reaches of the Snake River in which Blue Lakes and Clear Springs are located. (Recommended Order at 14.) Director Dreher did not account for sources of uncertainty other than stream gauge error in defining the location of the trim line implemented in 2005.

At the hearing, all experts, including that of Dr. Brockway for Clear Springs and Dr. Wylie for the Department, agreed that Model uncertainty must be accounted for and does not result from stream gauge error alone. Expert testimony established multiple factors that contribute to Model uncertainty including non-uniform geology of the ESPA, variations within the Model cells, the assumption that well impacts are isotropic, the assumption that at all data was accurate and reliable, the use of complex mathematics, the unaccounted for impacts of surface water diversions, precipitation recharge and tributary underflow, and measuring gauge error. (Wylie, Tr. 842:25-843:3; 847:10-848:10; 888: 20-24; Dreher, Tr: 1166:1-1167:8; Land, Tr. 1561:22-1566:5; 1566:6-12; Brockway, Tr. 1647:18-1650:17.) Each of these variables contributes a degree of uncertainty to Model predictions. In fact, in hindsight Director Dreher agreed that 10 percent is the minimum possible degree of Model uncertainty, and that the actual margin of uncertainty is likely higher. (Tr. 1227:21-1228:4.)

Dr. Brendecke, who participated in developing the Model, testified that, in light of the additional sources of uncertainty, actual Model uncertainty is more accurately between 20-30 percent. (Tr. 1900:26-1901:25.) Dr. Brendecke's testimony went unchallenged by any other expert. No evidence was offered that 10% is the most accurate estimation of Model certainty. To the contrary, all evidence affirmed that true Model uncertainty is greater than 10%.

In addition to uncertainty in the Model predictions, a degree of error must be attributed to the linear analysis used to predict individual spring flows. The record unequivocally established that the Model is incapable of predicting the effect of curtailment on discrete spring flows; it can only predict reach gains. (Wylie, Tr. 857: 25-858:4; Brockway Direct at 11). As a result, Director Dreher utilized a linear analysis in an attempt to parse out reach gains between different springs. *Id.* But the linear analysis has not been tested. It does not consider spring elevations. And Mr. Wylie testified that he is not confident in its application to the specific spring source. (Tr. 856:2-7, 860:5-17, 867:2-16; Exhibit 6; Brockway, Tr. 1658:19-1659:3; Land, Tr. 1565:19-1566:5; 1566:17-1567:9; 1567:24-11.) Other experts similarly testified that uncertainty increases the more specific the application. (Brockway Direct at page 10, Brendecke Direct at 49-50; Land, Tr. 1567:24-1568:11.) This evidence established that the linear approach is not a defensible means to predict the effect of curtailment on discrete spring flows. Notwithstanding, the Hearing Officer accepted the Department's use of the linear analysis on the basis that "there was no credible evidence of a better result." (Response Order at 6.) But even if the linear analysis can properly be used to curtail water use, the curtailment must account for error in the analysis and cannot exceed the range of certainty provided by the analysis. The curtailment ordered in 2005, from which the Hearing Officer recommended no deviation, did not account for the significant source of uncertainty resulting from the linear analysis.

Given the unanimous expert testimony that uncertainty in the Model simulations is greater than 10%, combined with significant uncertainty attributable to the linear analysis, there can be no dispute that the actual degree of uncertainty in the curtailment predictions exceeds 10%. The unchallenged testimony of Dr. Brendecke that Model uncertainty is realistically 20%-30% provides the only conclusion substantially supported by the record. The Hearing Officer refrained from assigning more than 10% uncertainty for lack of an "empirical basis" to verify Dr. Brendecke's assertion. (Response Order at 2-3.) Yet it is fully within Dr. Brendecke's expertise to render an opinion that the predictive uncertainty is somewhere between 20 and 30%. It is confusing that the recommendation defers to the former Director's use of his "best judgment" in assigning 10% uncertainty based on a deficient record, yet refuses to recommend a more accurate level of uncertainty based on the full record because it would require the exercise of judgment (i.e. no empirical basis). The former Director's testimony that Model uncertainty is likely higher than 10% further justifies adjustment. If the former Director had discretion to use his best judgment in assigning a level of predictive uncertainty to curtailment scenarios, then the current Director certainly has discretion in his best judgment to adopt a more accurate estimation of predictive uncertainty based on the additional evidence presented at the hearing. Therefore, IGWA asks the Director review the record and exercise his discretion and judgment to assign a more accurate level of predictive uncertainty between 20 and 30%, and to constrict the trim line accordingly.

In addition, the Recommended Order suggests that the elevation contour map developed and presented by Clear Springs' expert witness Eric Harmon could be used as a further aid to define the reasonable limits of curtailment. (Tr. 906:7-15; 933:25-934:21, Figure 1.) Dr. Brockway testified that Mr. Harmon's analysis a good possible alternative to enhance

administration in this case. (Tr. 1659:4-13.) That map identifies a geographic area of the ESPA approximately 2-3 miles wide and 20 miles long, located generally north and east of Clear Springs' Snake River Farm facility, that particularly contributes to spring discharges. The geographic area identified in Dr. Harmon's contour map is considerably smaller than the 10% trim line implemented in the 2005 Curtailment Orders and should be used to further limit curtailment based on the geographic areas that are primary contributors to certain reaches of the Snake River. (Harmon, Tr. 931:21-931:24.) The record supports limiting curtailment based on a composite of Dr. Harmon's contour map and the general trim line derived from uncertainty inherent in the Model and linear analysis.

III.

LAW AGAINST THE MONOPOLISTIC EXERCISE OF A WATER RIGHT

The 2005 trim line, though a limitation on curtailment, still vests in Blue Lakes and Clear Springs an unreasonable monopoly over vast quantities of the ESPA.

While Model uncertainty defines the most distal possible location of the trim line, the public interest constraints set forth in I.C. § 42-226 and CM Rule 20.03 may warrant further constriction. Specifically, CM Rule 20.03 proscribes the monopolistic exercise of a water right: "An appropriator is not entitled to command the entirely of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water." The trim line implemented in 2005, while limiting the scope of curtailment, still creates in Blue Lakes and Clear Springs an unreasonable monopoly over vast quantities of the East Snake Plain Aquifer ("ESPA") via the permanent curtailment of 57,220 and 52,470 irrigated acres in an attempt to provide Blue Lakes and Clear Springs with only 3.2% and less than 1% of the curtailed water use, respectively. (Blue Lakes Order at ¶ 77; Clear Springs Order at ¶71.)

The trim lines implemented by the 2005 Orders extend curtailment to water rights for which no more than 10% of the amount curtailed is expected to return to the reach of the Snake River where the calling spring user is located. Only a fraction of the reach gain is expected to actually arise from springs that supply Blue Lakes' and Clear Springs' water rights. For instance, the Blue Lakes Order demands the permanent curtailment of 57,220 irrigated acres. (Blue Lakes Order at ¶ 77.) The Model predicts that 51cfs will return to the Devil's Washbowl to Buhl subreach of the Snake River where the Blue Lakes facility is located at steady state which will take more than 100 years to achieve. (Blue Lakes Order at ¶ 77) Of the 51 cfs reach gain, only 20% (10 cfs) is hoped to arise from the springs that supply Blue Lakes' water rights. (Blue Lakes Order at ¶ 15 and p. 28.) The10 cfs gain is equivalent to 7,239 acre-feet annually. In contrast, the curtailment of 57,220 acres amounts to an immediate and permanent lost water use of 228,880 acre-feet annually based on the IDWR field headgate requirement of 4 acre-feet per acre (57,220 x 4 = 228,880).[2] Thus, the 2005 trim line extends curtailment to the point at which no more than 3.2% of the curtailed water use is expected to arise from the springs that supply Blue Lakes' water rights under steady state conditions. (*See* IGWA's Supplemental Proposed Findings of Fact and Conclusions of Law at 11.) Even more startling is the Clear Springs Order, for which less than 1% of the quantity curtailed is expected to arise from the springs that supply Clear Springs' water rights. *Id.* at 12. The remaining 96.8% and 99% of the quantities curtailed are sacrificed in an attempt to supply the 3.2% and 1% to the calling senior. Exhibits 462 and 463, which were testified about extensively by Dr. Wiley, underscore the

[2] The IDWR field headgate requirement is consistent with the volumetric limitation on the curtailed ground water rights. When calculating the amount of lost ground water use compared to gained spring water use, it would be wrong to compare groundwater depletion to spring diversion because depletion and diversion are unequal (i.e. apples to oranges). The calculation must either compare depletion to depletion or diversion to diversion. Because aquaculture is deemed non-consumptive, the calculation cannot be based on comparative depletion. Therefore, the calculation must be based on comparative diversion to most accurately compare lost versus gained water use.

effect of implementing wholesale curtailment in an attempt to get water to one discrete spring outlet, and should be carefully reviewed. (Tr. 858:5-859:4.) It is unthinkable that the Idaho Legislature did not contemplate this very type of disparity when it declared: "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." I.C. § 42-226.

Aggravating the gross disparity between the water use curtailed and the water received is the fact that, even during the recent record drought, Blue Lakes' and Clear Springs' water rights are substantially filled without curtailment. The Blue Lakes Curtailment Order is based on a shortage of 35.25 cfs, which amounts to 19% of the total 197.06 cfs authorized at the Blue Lakes facility. (Blue Lakes Order at ¶ 61.) The Clear Springs Curtailment Order is based on a shortage of 24.5 cfs, which amounts to 20.8% of the total 117.67 cfs authorized at Clear Springs' Snake River Farm facility. (Clear Springs Order at ¶ 60.) The potential effect of the 2005 Curtailment Orders is the permanent elimination of 57,220 and 52,470 irrigated acres, sacrificing 96.8% and 99% of the quantities curtailed, in order to merely top off Blue Lakes' and Clear Springs' large aquaculture appropriations. If any effect is to be given to the rule that "[a]n appropriator is not entitled to command the entirely of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water," it must be given in this case. CM Rule 20.03.

Further, the 2005 Orders contravene the Idaho Constitution, which facilitates maximum beneficial use of water resources by ensuring that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Idaho Const., Art. 15, § 3. That provision prevents one appropriator from blocking others from the use of unappropriated water of this state. In circumstances where the exercise of appropriation

unreasonably bars maximum utility of the ground water resources, the Idaho Supreme Court heeds the limits set forth in the Constitution: "when private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interest must recognize that the ultimate goal is the promotion of the welfare of all our citizens." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). In applying Idaho law, the United States Supreme Court explained the legal limits on priority this way:

> Suppose from a stream of 1000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100, could it be said that he made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that when the entire 1000 inches are running, they so fill the channel that by a ditch he can draw off to his land 100 inches, can he then object to those above him and appropriating the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation.

Schodde v. Twin Fall Land and Water Co., 224 U.S. 107, 119. The Court's hypothetical could not be more fitting to the facts of this case. Vast amounts of the ESPA must go unused if the Spring Users are to draw off the tiny fraction necessary to top off their appropriations. As explained above, the trim line implemented in 2005 sacrifices 96.8% and 99% of the quantities curtailed so Blue Lakes and Clear Springs can draw off 3.2% and 1% respectively. Clearly this is such an unreasonable use of the 96.8% and the 99% as to not be tolerated under the law of appropriation.

The law set forth in *Schodde* demands constriction of the trim line to a point at which a reasonable portion of the quantity curtailed is expected to arise from the springs that supply the Spring Users' water rights. The Idaho Supreme Court affirmed that position less than one year ago in ruling:

> While 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. … The Idaho Constitution and statutes do not permit waste and require

> water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.

AFRD#2, 143 Idaho at 880, 154 P.3d at 451. The facts of this case at least demand constriction of the trim line to a point at which a significant portion of the curtailed water use will be put to beneficial use by the Spring Users within a reasonable time. To sacrifice more than 90% of the curtailed water use falls far short of what is required by the laws of full economic development and reasonable use of water. As evidence of what is reasonable, Clear Springs' CEO Larry Cope testified that a reasonable curtailment would provide 66% of the quantity curtailed to the senior water user within 10 years. (Tr. 159:7-16.)

IV.

CONVERSION TO A GROUND WATER SOURCE

The facts of this case condition curtailment upon the Spring Users' conversion to a ground water source pursuant to CM Rule 42.01.h, with the right of curtailment subject to the law of reasonable pumping levels set forth in I.C. § 42-226. (*Cf.* Summary Judgment Order at 7 and 10.)

Intertwined with the law against the monopolistic exercise of an appropriation is the rule that senior surface water appropriators may be compelled to convert to a ground water source as necessary to achieve the legislative mandate for full economic development. CM Rule 42.01.h. IGWA takes exception to the recommendation that the Spring Users not be compelled to make such conversion pursuant to CM Rule 42.01.h and I.C. § 42-226.

It has long been the law in Idaho that "[a] senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates 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. *Baker*, 95 Idaho at 584, 513 P.2d at 636. This means that "although a senior may have a prior right to ground water,

if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected." *Id.* The State Water Resource Board has specifically enunciated the effect of this law on the administration of spring-fed water rights in the Thousand Springs area which primarily are used for aquaculture purposes:

> Aquaculture can expand when and where water supplies are available and where such uses do not conflict with other beneficial uses. It is recognized, however, that future management and development of the Snake River Plain Aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities.

(Exhibit 440 Policy 5G (Emphasis added.)) The law that senior appropriators are not absolutely protected in their means of diversion is incorporated into CM Rule 42.01.h. In response to a delivery call, Rule 42.01.h requires the Director to consider

> [t]he extent to which the requirements of the senior-priority surface water right 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 divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

The Rule gives practical effect to the policy set forth in CM Rule 20.03 that "[a]n appropriator is not entitled to command the entirely of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water." The Supreme Court recently affirmed that the conjunctive administration of surface and ground water rights may include "compelling a surface user to convert his point of diversion to a ground water source." *AFRD#2*, 143 Idaho at 870, 154 P.3d at 441. Clearly the law facilitates full economic development of ground water resources by enabling the Director to condition a surface user's right of curtailment upon conversion to a ground water source. CM Rule 42.01.h.

The policy that surface users may have to convert to ground water is a corollary to the law of reasonable pumping levels, which also restricts the right of curtailment in order to ensure

full economic development of ground water resources. I.C. § 42-226; CM Rule 10.18. Idaho law is well-established 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... to hold that any land owner has a legal right to have such a water table remain at a given height would absolutely defeat drainage in any case, and is not required by either the letter or spirit of our constitutional or statutory provisions in regard to water rights.

Nampa & Meridian Irr. Dist. v. Petrie, 223 P.531, 532 (1923). The Idaho Supreme Court explained the law of reasonable pumping levels this way:

> The legislature attempted to protect historic water rights while at the same time promoting full development of ground water. Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected.

Baker, 95 Idaho at 584, 513 P.2d at 636. The rule is not unique to Idaho. Citing *Schodde*, the Colorado Supreme Court held that an appropriator

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

City of Colorado Springs v. Bender, 148 Colo. 458, 462, 366 P.2d 552, 555 (1961). The Utah Supreme Court has similarly held that "[a]ll users are required where necessary to employ reasonable and efficient means in taking their own waters in relation to others to the end that wastage of water is avoided and that the greatest amount of available water is put to beneficial use." *Wayman v. Murray City Corp.*, 23 Utah 2d 97, 105, 458 P.2d 861, 866 (1969).

Without the protection of CM Rule 42.01.h, the law of reasonable pumping levels could be annihilated by a single surface use whose appropriation demands that the water table be kept

at a certain level regardless the amount of water available for appropriation below. Therefore, Rule 42.01.h imposes pragmatic limits on the right of surface users to curtail ground water diversions by requiring the Director to consider the "amount of water available in the source," the "effort or expense of the holder of the water right to divert from the source," and whether the senior should be compelled to convert to a ground water source.

The Director's decision of whether to compel a surface user to convert to a ground water source must turn on whether administration of the senior surface right under his current means of diversion will unreasonably interfere with full economic development of ground water resources. No such analysis was made in the 2005 Curtailment Orders. Instead, the Orders excused the Spring Users from converting to a groundwater source merely because their individual surface water diversion structures were deemed to be reasonably efficient. (Clear Springs Order at 15 ¶ 64; Blue Lakes Order at 15 ¶ 66; Exhibits 130 and 15.) The Orders do not consider the global effect of the Spring Users' method of appropriation. Such limited application of CM Rule 42.01.h renders it utterly meaningless by enabling a surface user to avoid conversion to ground water simply by constructing an efficient surface water diversion structure, regardless of the degree to which administration of the surface right interferes with full economic development of ground water resources. In fact, by that interpretation of CM Rule 42.01.h it is inconceivable that a surface user could ever be compelled to convert to a ground water source.

Contrary to *Baker* and *Nampa & Meridian Irrigation Dist.*, the Spring Users' demand that the ESPA water table be kept at peak levels in order to support maximum discharges from the springs that supply their rights. To guarantee peak spring discharges requires maintaining a massive surplus of unused storage water in the ESPA that could never be appropriated. Evidence established at the hearing plainly demonstrate that the appropriations for which the Spring Users

are short are based on what essentially amounts to "flood flows" from the ESPA that resulted from decades of inefficient flood irrigation practices that are impossible to restore. (Brendecke, Tr. 1799:5-1800: 2; Brendecke Direct at 8 and 19; *See also*, Exhibits 467, 468 and 469.) The spring that supply the Spring Users' water rights are heavily influenced by surface water diversions through the North Side Canal Company system.[3] As early as 1910 the Company began diverting enormous amounts of water from Snake River into its leaky canal system. That year the Company diverted 1,020,000 acre-feet for the irrigation of roughly 25,000 irrigated acres—more than 40 acre-feet per acre. (Brockway, Tr. 1621: 4-22.) By 1918 the Company was still diverting in excess of 10 acre-feet per acre. (Brockway, Tr. 1620:1-1624:6.) Since crops only consume roughly 2 acre-feet per acre, the lion's share of water diverted through the system seeped into the ESPA, increasing the water table significantly, caused spring discharges in the Thousand Springs reach to increase dramatically, in some cases exponentially. (Brockway, Tr. 1627:7-1630:2, 1638:4-12; *see also* Exhibits 415 and 420.)[4]

It is upon the inflated water table and corresponding spring discharges that the Spring Users were enabled to make the appropriations for which there is now some shortage. And while spring flows have diminished slightly from peak levels, they still remain well above historic levels and the ESPA is at or near equilibrium. (Exhibits 154 and 429A; Wylie, Tr. 845:2-11; Brendecke Direct at 18, 28-29.) Further, current recharge of the ESPA (7.6 million acre-feet annually) far exceeds annual depletion from ground water diverted and consumptively used (roughly 2 million acre-feet annually). (Blue Lakes Order at ¶¶ 3-4.) These facts show that

---

[3] Exhibit 469 depicts the North Side Canal system as it relates to the Thousand Springs area.

[4] North Side Canal Company also attempted to store water in Jerome Reservoir which proved ineffective because "the water loss by seepage from the reservoir has failed to raise the general level of the underlying water table sufficiently to form a water seal for the reservoir bottom, and consequently, the losses at high stages in the reservoir are so excess that it is practically valueless for storage purposes." (Brockway, Tr. 1634:6-19.)

ground water users are not "mining" the ESPA.

There is plenty of water in the ESPA to satisfy the Spring Users' water rights without curtailing junior priority ground water diversions if the Spring Users are compelled to convert to a ground water source. But if the Spring Users are to be absolutely protected in their method of appropriation, then the water table in the ESPA must be maintained at artificially high levels to ensure maximum overflow from the ESPA, making the spring diversions akin to shallow wells. The curtailment ordered in 2005 is not necessary to provide sufficient water to satisfy the Spring Users' water rights; it is only necessary if the Spring Users are to be absolutely protected in their means of receiving overflow from the ESPA.[5]

If CM Rule 42.01.h is to have any meaningful effect in the conjunctive management of surface and ground water rights in Idaho, it must be given in this in this case. It is constitutionally impermissible to require that a massive surplus of water be stored in the ESPA which can never be appropriated. Art. 15, § 3, Idaho Const. Further, since spring flows remain well above historic levels and the ESPA is at or near equilibrium and is not being mined by junior diversions, the Spring Users have "no right to insist that the water table be kept at the existing level." *Nampa & Meridian Irr. Dist.*, 223 P. at 532 (1923). While Blue Lakes and Clear Springs may have earlier priority dates, they have no right "command the entirely of large volumes of water in a surface or ground water source to support [their] appropriation contrary to the public policy of reasonable use of water." CM Rule 20.03. Rather, the Spring Users must accept that their method of appropriation are not absolutely protected and that "some modification of their rights [is necessary] in order to achieve the goal of full economic

---

[5] Former Director A. Kenneth Dunn testified that spring-fed water rights in the Thousand Springs area "were viewed like ground water rights because both are supplied by the ESPA." (Dunn Direct at 5 and 9; *see also*, Carlson Direct at 14-15, 22.) While such rights were entitled to receive whatever water overflowed from the ESPA up to the authorized maximum, there was no protection against reduced flows from later development of the ESPA. (Dunn Direct at 7.)

development." Baker, 95 Idaho at 584.

The Spring Users' attempt to curtail ground water use in an effort to maintain a peak water table will positively *minimize* beneficial use of the ESPA and "result in such a monopoly as to work disastrous consequences to the people of the state." *Schodde*, 224 U.S. at 121. Administration of the ESPA must turn on "how best to utilize the annual supply without overdrafting the stock which maintains the aquifer's water level." *Baker*, 95 Idaho at 580. With spring flows well above natural levels and the ESPA at or near equilibrium, it makes no sense to dry up tens of thousands of irrigated acres in order to elevate the ESPA water table as necessary to top off the Spring Users' appropriations, especially with adequate water available via conversion to a ground water source. Certainly the Idaho Supreme Court did not act without forethought in specifically affirming the authority of the Director to "compel[] a surface user to convert his point of diversion to a ground water source." *AFRD#2*, 154 P.3d at 441. IGWA asks the Director to exercise such authority pursuant to CM 42.01.h and I.C. § 42-226 by conditioning the Spring Users' right of curtailment upon conversion to a ground water source and compliance with the law of reasonable pumping levels.

V.
FUTILE CALL

The doctrine of futile call as defined by the CM Rules is applicable to this case and at the very least demands substantial constriction of the trim line to a point at which a significant portion of the curtailed water use will be put to beneficial use by the Spring Users within a reasonable time. (*Cf.* Recommended Order at 19-21.)

Similar to the law against the monopolistic exercise of a water right, the well-established futile call doctrine likewise demands constriction of the trim line. In addressing the futile call doctrine, the Recommended Order states that in the context of conjunctive management of surface and ground water rights, "the fact that curtailment will not produce sufficient water

immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks." (Recommended Order at 20.) IGWA does not contest that recommendation. The Response Order, however, is troubling in that it appears to change course and recommend that no amount of delay can render a delivery call futile in the conjunctive management context:

> The staging set by the former Director provides a reasonable response time consistent with the Conjunctive Management Rules for curtailment or for achievement of the same results through replacement water. The amounts of water set forth in the targeted goals are usable by the Spring Users. If these targets are met the injuries that have developed over a period of years as the consequence of ground water pumping will be ameliorated. The delayed response time does not make the calls futile.

(Response Order at 5) (emphasis added). The Response Order appears to eliminate the Director's ability to deny a delivery call on the basis of unreasonable delay, leaving staged-in curtailment as the only option and essentially eliminating the application of futile call. The Hearing Officer's recommendation is not entirely clear on this point. Indeed, neither the Recommended Order nor the Response Order address the specifics of the extreme delay and the waste of water resulting from the trim line implemented in the 2005 Orders. IGWA maintains that the established facts of delay and waste of water resulting from the trim line implemented in 2005 goes beyond the tolerable limits of the futile call doctrine.

The futile call doctrine, tethered to the laws of full economic development and reasonable use of water, constrains the right of curtailment by limiting it to those junior priority water rights for which a significant portion of the quantity curtailed will be put to beneficial use by the senior water user within a reasonable time. CM Rule 10.08. Indeed, "The policy of the law of this state is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960); *Colthrop v. Mountain Home Irrigation*

District, 66 Idaho 173, 180 (1945) (citing *State v. Twin Falls Canal Co.*, 21 Idaho 410, 411 (1911). If a significant portion of the quantity curtailed will not reach the calling senior, or if it will take an unreasonable amount of time for such quantity to arrive, then the Director has a duty to declare the call futile. CM Rule 10.08.

As explained above, nearly all of the curtailed water use is sacrificed in order to provide a very small percentage of the curtailed water use to the Spring Users (3.2% to Blue Lakes and less than 1% to Clear Springs). Further, that small percentage will take more than 50 years to be substantially realized by the Spring Users, and more than 100 years to be fully realized. (*See* Exhibits 462 and 463.) It is very possible that the intended benefit of curtailment will be negated by a number of variables such as economic and market factors and technological improvements. One especially important factor is the ESPA's high level of responsiveness to precipitation and drought. (Wylie Testimony, Tr. 845:22-25; Brendecke Testimony, Tr. 1905:20-1906:24; Exhibit 154.) Just a few years of above-average precipitation will have a greater affect on improving aquifer levels and spring flows than wholesale curtailment. (Brendecke, Tr. 1905:20-1906:15.) Exhibit 154 shows that the amount of water discharging from the springs rebounds quickly in response to a few good water years is actually increasing (*see*, for example, years 1997-2001). It is contrary to the futile call doctrine and poor administrative policy to permanently curtail tens of thousands of irrigated acres when the intended benefit is likely to be intercepted and negated by the inevitability of good water years.[6]

The facts of this case beg for a finding of futile call. IGWA maintains that the fact that the Spring Users are predicted to receive only 3.2% and less than 1% of the water use curtailed

[6] Further, since August of 2006 there appears to be no shortage to Clear Springs' 1955 water right since they are diverting more than 89 cfs, the combined total of water right nos. 36-02703, 36-02048, 36-04013C, and 36-04013A. (*See* Exhibit 157 at page for calendar year 2006 and 2007.) See Section VII below.

after more than 100 years makes Blue Lakes' and Clear Springs' delivery calls futile in the entirety, especially since there is no evidence in the record to show that the amount of water that will actually arise is needed by the Spring Users or will be received in sufficient quantity or for a long enough period to actually be put to beneficial use by the Spring Users.[7] Further, the established record demonstrates a real risk that the intended benefit of curtailment under the 2005 Curtailment Orders may be nullified by future wet years, increased efficiencies by the senior, or numerous other factors affecting supply and demand.

If the extreme delay and waste of water that results from curtailment based on the 10% trim line adopted in 2005 does not present a factual basis for applying the futile call doctrine, none could ever be found under the definition contained in the CM Rules. Without eliminating the important role of priority, pragmatic administration of Idaho's finite water resources commands reasoned limits on the length of delay and the degree of waste allowable in response to a delivery call. What amount of delay and waste is deemed "reasonable" obviously requires "some exercise of discretion by the Director." *AFRD#2*, 154 P.3d at 446. Therefore, IGWA asks the Director to carefully consider the well established principle of futile call as defined at CM Rule 10.08, and apply this definition to the facts of this case. If the delivery calls are not denied entirely as futile, then at the very least the trim line should be redefined and constricted to ensure that a significant portion of the quantity curtailed will actually be put to beneficial use by the Spring Users within a reasonable time. As mentioned above, Clear Springs' CEO Larry Cope provided compelling testimony that a reasonable curtailment would provide 66% of the quantity curtailed to the senior water user within 10 years. (Tr. 159:7-16.) This is a clear admission and further evidence to support the conclusion that the curtailments areas under the

[7] There is serious doubt that the water will ever actually arise from the desired spring outlet, and if it does there is no evidence that it will actually result in greater fish production. (Wylie, Tr. 858:5-859:4.)

2005 Orders were excessive, failed to apply the futile call doctrine, and violated the principles of full economic development and reasonable use of the State's water resources.

VI.

ECONOMIC IMPACT OF CURTAILMENT

The economic impact of curtailment further demands constriction of the trim line pursuant to I.C. § 42-226. (*Cf.* Recommended Order at 19 and 21.)

The legislative mandate for "full economic development" inherently gives relevance to the economic effect of curtailment. I.C. § 42-226. As stated in the Recommended Order, "the Director has a responsibility to the State to consider the impact of the requested curtailment." (Recommended Order at 24.) While priority of right is the starting point for water rights administration, economic considerations may reasonably constrain the right of a senior appropriator to curtail beneficial uses of Idaho's ground water resources. The economic facts established at the hearing powerfully support constriction of the trim line accordingly.

The economic impact of the permanent curtailment required under the 2005 Orders, for which the Hearing Officer recommended no change, is drastically grim for the State of Idaho. The facts established at the hearing explain that the curtailment of ground water use "would result in an immediate and largely permanent net loss of nearly 3,500 jobs, at least $160 million near term decrease in the area's personal annual income, and a loss of between $4.4 to $7 million in annual local property tax revenues." (Church Direct at 6:24-26.) In contrast, the value gained from curtailment is less than 6% of the value lost. (Exhibit 442 at ¶¶34-47.) Given that the Spring Users will receive only a tiny fraction of the water use permanently curtailed, that such fraction merely tops off their appropriation which is substantially filled, and that such fraction will not fully accrue for more than 100 years and may very well be nullified by a few years of

above-average precipitation, the disastrous economic result of the 2005 Curtailment Orders is not surprising.

The residual impacts of curtailment would be extensive and severe. For example, dairies require water for their cows, for the irrigation of crops to provide feed to their cows, and also to manage their waste management plans which require irrigated crops to absorb nutrients from manure spread upon crop land. The lack of water for any of these functions could seriously affect entire dairy operation. (Brockway, Tr. 1598:16-1599:19.) Indeed, there can be no dispute that the curtailment ordered on an incomplete record in 2005 poses severe economic consequences. The question, then, is whether economic impacts impose a legitimate constraint on the right of curtailment—whether the Director is to have administrative discretion to give effect to the legislative mandate that "a reasonable exercise of [the prior appropriation doctrine] shall not block full economic development of underground water resources." I.C. § 42-226.

It seems that, if ever, the facts of this case compel constriction of the trim line and narrow the economic disparity resulting from lost ground water use compared to increased spring flows as necessary to achieve full economic development pursuant to I.C. § 42-226. While the Recommended Order acknowledges that the Director's responsibility to consider the economic impact of curtailment, IGWA takes exception to the lack of a recommendation that the economic impact of curtailment compels further constriction of the trim line pursuant to I.C. § 42-226 as necessary to ensure that a significant portion of the quantity curtailed will be put to beneficial use by the Spring Users within a reasonable time.

VII.

MATERIAL INJURY AND BENEFICIAL USE

Blue Lakes' and Clear Springs' claims of material injury are not substantiated by the record, nor does the record support the Hearing Officer's conclusion that "depletion of the water supply ... is material injury when the business is the production of fish." (Response Order at 2.) Further, the record does not support the conclusion that the amount of water that would be deliverable is in fact "usable" and can be put to beneficial use. (Recommended Order at 21.)

IGWA takes exception to the recommendation that the Spring Users have suffered material injury due to ground water pumping. The established record is inadequate to support the Spring Users' claims of material injury.

Beneficial use is the extent, measure and limit of a water right. I.C. §§ 42-104, 42-222; Idaho Const., Art. XV, § 3. To support a claim of material injury, it is not enough to merely demonstrate a capability to divert more water; one must show a material interference with the beneficial use for which the appropriation is authorized. Likewise, to the extent that the water resulting from curtailment of a junior-priority water user will not be put to beneficial use by the calling senior, curtailment is not justified. *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 442 319 P.2d 965, 968 (1957); *see also* I.C. § 42-607. In this case the Spring Users failed to prove by competent evidence that the additional water expected to result from curtailments is needed to accomplish the beneficial use for which their water rights are authorized. Such failure was by the Spring Users' own design.

Prior to the hearing the Spring Users' asked the Hearing Officer to block IGWA from discovering information relating to facility improvements and construction, water right diversion, use and measurement prior to the date when their partial decrees in the Snake River Basin Adjudication (i.e. prior to 2001). (Joint Motion for Protective Order at 2-3.) By having such information suppressed the Spring Users could prevent IGWA from proving that the Spring

Users had not in fact suffered material injury and did not in fact need the additional water that might result from curtailment to accomplish the beneficial use for which their water rights are authorized. Surprisingly, the Hearing Officer granted the Spring Users' request, but with one critical caveat—that if the Spring Users' refused to provide such information to IGWA, they could not use it to support a position that "more water allows for the production of more or larger healthy fish." (Order Re Discovery dated September 10, 2007, at 2.) The Hearing Officer recognized that by suppressing such information it would be impossible for IGWA to disprove the Spring Users' claim of material injury. Therefore, he gave the Spring Users the option to either disclose such evidence and defend their claims of material injury or otherwise be prohibited from offering such evidence to support their claims, stating:

> The ultimate question of whether production records must be produced remains open following the hearing. Prior authority from the SRBA District Court indicates that such information is not discoverable. That determination is binding in these proceedings. However, if that information is not produced in discovery Blue Lakes and Clear Springs may not introduce information from the records to support any position they assert, e.g. more water allows the production of more or larger healthy fish.

(Order Re Discovery at 2) (emphasis added.) In other words, the Spring Users were not permitted to use as a sword the very information they shielded IGWA from discovering. The Spring Users chose not to disclose the information requested by IGWA and thereby precluded themselves from presenting the evidence they needed to support their claims of material injury.

The Discovery Order's suppression of pre-adjudication information was premised on the assumption that IDWR performs a full factual investigation of the amount of water actually needed and used by each water right prior to issuing its recommendations to in the Director's Report to the SRBA Court. The established record shows that is not the case. Both Director Dreher and Tim Luke testified that the Department does not normally re-evaluate the amount of

water actually used or needed to accomplish the beneficial use of previously licensed or decreed water rights prior to making its recommendation to the SRBA Court, nor do the Department's recommendations contain all of the administrative conditions that are relevant in a delivery call. (Luke, Tr. 649: 13-20; Dreher, Tr. 1141:6-1147:4, 1348:9-1350:22.) Rather, there is a presumption given to the prior license or decree and no field examination is conducted unless there is obvious evidence of abandonment or forfeiture. (Dreher, Tr. 1455:18-1456:19.) In this case, the Discovery Order allowed some limited investigation of historical discharge records for the springs that supply the Spring Users' water rights. However, because IGWA could not discover the amount of water actually developed, used and needed to accomplish the designated beneficial use, or the patterns of the Spring Users' beneficial use of water, there was no way for IGWA to prove whether or not the amount of water actually put the beneficial use has changed materially over time and whether or not a small amount of additional water was actually needed and could be put to beneficial use. IGWA was deprived of any meaningful opportunity to defend against the Spring Users' claims of material injury because of the Discovery Order and the Spring Users' election to not disclose the information underlying their claims of material injury.

Since the Spring Users chose to prevent IGWA from discovering the information necessary to challenge their claims of material injury, they likewise were precluded from presenting any evidence that they could apply more water to beneficial use or were injured by any water shortfall. They offered the generic testimony of one lay witness that the Spring Users could grow more fish if they had more water, but no evidence to support that lone assertion, nor that the production of more fish could be marketed at a profit or at all. When Clear Springs attempted to introduce testimony in support of its claim of material injury, the Hearing Officer assured IGWA that that the weight given such evidence was reduced because it could not be

verified. (Tr. 177:5-24.)[8] Yet notwithstanding the utter dearth of facts supporting the Spring Users' claims of material injury, the Hearing Officer found it anyway, concluding that "fish propagate and grow in water. More water allows the production of more fish. Less water accommodates fewer fish. Depletion of the water supply in the ponds and raceways limits the production of fish. That is material injury when the business is the production of fish." (Response Order at 2.)

The claim that more water automatically equals more fish and that less water automatically equals material injury is entirely without foundation in the record. It assumes from non-existent evidence that there is no limit to the number of fish that can be grown in a facility, that the maximum rate of diversion authorized under the Spring Users' water rights is needed continuously year-round to accomplish the beneficial use for which their water rights are authorized, that there is a market for more fish and that they could be marketed at a profit rather than a loss. The Spring Users were permitted to "prove" their claims of material injury without offering an iota of supporting evidence concerning production of fish, operating income, operating expenses and product marketability. Further, it is incredible to think that their lay witness testimony that more water equals more fish was not substantially supported by their knowledge of production and the production records that were kept from IGWA. Their mere allegation of material injury was turned into an unrebuttable presumption of material injury. Their stratagem paid off.

---

[8] Q. If additional spring flows were made available to Clear Springs at the Snake River Farms facility, could that water be utilized in those dry raceways?
A. Yes. If we had additional water, we would introduce the water to the empty raceways.
Q. What would result if that additional water was put in the raceways?
A. Obviously, we would stock those raceways with fish, and there would be additional production.
MR. BUDGE: I'd object, Your Honor, and move to strike that question [sic] as being unresponsive. We got into the area where he said more water is more fish. The ruling was very specific that there couldn't be testimony that more water is more fish or bigger fish or healthier fish.
THE HEARING OFFICER: That's relying on production records. This goes to the weight and without the production records to substantiate that it has less weight.

There is no evidence in the record to support the conclusion that the amount of water that is projected to show up at the Spring Users' sources will actually "grow more fish" or is in fact needed and would be put to beneficial use. Logic may tell us that more water equals more fish, but how much more water and how many more fish in a given facility? Given the natural seasonal variability that has always existed in the spring sources, will the additional cfs shows up during a time that it would actually be applied to beneficial use? These questions remains unanswered, but the recommendation is that they need not be answered.

The Recommended Order and Response Order propose a standard of proof so low that proving material injury requires nothing more than showing a capability to divert more water, without any supporting evidence of beneficial use and without any reasonable sideboards as to amount and timing. The recommendation establishes that no matter how little water may result to the senior, no matter what time of the year it shows up or for how long, no matter how long it takes to ever show up, so long as a lay witness testifies that it will be "used," that is enough to establish material injury. This standard, at least in the conjunctive management context, renders superfluous the many material injury factors provided in CM Rule 42 and sets a dangerous precedent for the conjunctive management of the state's water resources.

The CM Rules define material injury as the "[h]inderance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho law, as set forth in Rule 42." CM Rule 010.14 (emphasis added). The focus is upon the exercise of the water right, not simply whether there is capability to divert more water. According to the recommendation, however, there is no need to consider the beneficial exercise of a water right; rather, only the ability to divert water is relevant. Under the recommendation there is no need to evaluate the amount of water available in the source as required under CM

Rule 42.01.a. Likewise, why look at the amount of water being diverted and used compared to the water rights per CM Rule 42.01.e if the all that is required is lay witness testimony that more water could be used? The recommendation creates a standard by which putting more water in raceways alone is a beneficial use for fish farmers, regardless of whether the water would actually be used to raise fish. By analogy, this reasoning would make the diversion of water onto an uncultivated field a beneficial use regardless of whether crops will actually be raised.

The injustice wrought by a finding of material injury after IGWA was barred from discovering the information necessary to rebut the Spring Users' unsupported claim of material injury, effectively creating an unrebuttable presumption of material injury, cannot be avoided, particularly as the result of the Spring Users' own device. Ultimately, there is no competent evidence in the record to support the Spring Users' claim of material injury. There is likewise no competent evidence to support the recommendation that less water automatically equals material injury which runs contrary to the CM Rules and is poor administrative policy. Therefore, IGWA takes exception to the recommendation and asks the Director to deny the Spring Users' delivery calls for failure to substantiate their claims of material injury.

Finally, IGWA takes further exception to the Hearing Officer's finding in the Response Order that water right nos. 36-07120 and 26-04013A were materially injured.[9] The Hearing Officer based this conclusion on evidence, that at best, only shows that the spring sources may have discharged that much historically during seasonal high flow or following good water years, not that the Spring Users actually needed, diverted or used their entire water rights year-round to raise fish.[10] IGWA refers the Director to its Response to Spring Users' Joint Petition for

---

9 This matter is more thoroughly discussed in *IGWA'S Response to Spring Users' Joint Petition for Clarification* attached hereto for reference.

10 Although the Spring Users' partial decrees give them a right to use water year-round and for a certain

Clarification for further explanation of the lack of proof of material injury to water right nos. 36-07120 and 26-04013A.

VIII.

SWAN FALLS SETTLEMENT

The Swan Falls settlement precludes the curtailment of ground diversions from the East Snake Plain Aquifer so long as minimum stream flows at the Murphy Gauge are met. (*See* Summary Judgment Order at 11.)

IGWA takes exception to the Hearing Officer's recommendation that the Swan Falls settlement has no bearing on the rights of Blue Lakes and Clear Springs to curtail groundwater development of the ESPA. The recommendation was made on the basis that the Spring Users are not individually named in a settlement document entitled "Agreement" and that the "nothing in this record indicates that they agreed to the understanding" implemented by the Swan Falls settlement. (Summary Judgment Order at 11.) IGWA takes exception because the Swan Falls settlement is not limited to the one document entitled "Agreement" but was incorporated into the State Water Plan and affects the Department's administration of all water rights above Swan Falls Dam.

The Swan Falls settlement must be viewed in light of Idaho water policy in place at the time of the settlement. Decades prior to the settlement the legislature facilitated development of the Eastern Snake Plain by enacting the Ground Water Act which provided that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall

---

quantity, it is important to not elevate the partial decrees to mean the maximum authorized quantity is needed year-round. Indeed, "water rights adjudications neither address, nor answers, the questions presented in delivery calls." *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho, 862, 876, 154 P.3d 433, 447 (2007). Director Dreher testified that the partial decrees in the SRBA did not confirm what amount was actually needed, but rather, the recommendations contained the maximum quantity, even if that maximum quantity was only available for a very short period of time during the year at seasonal highs. (Dreher Tr. 1144:13-1145:15.) Further, Director Dreher testified that the partial decrees simply confirmed prior licensed amounts and there was a presumption that the investigations underlying the licenses were correct, however, that was not always the case. (Dreher Tr. 1348: 9 – 1350: 22.)

not block full economic development of underground water resources." I.C. § 42-226. The Supreme Court furthered that goal and specifically upheld the Act in *Baker v. Ore-Ida Foods, Inc.*, ruling that "senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development." 95 Idaho at 584. The remarkable development of the ESPA over the last half century by IGWA's members caused southern Idaho to flourish and contributes billions of dollars to Idaho's economy annually in furtherance of that goal.

The first State Water Plan implemented in 1976 reinforced the State's commitment to full economic development of the ESPA by establishing clear policy that "[f]uture management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River," and that, as a result, "aquaculture interests may need to construct different water diversion facilities than presently exist." (Exhibit 438 at 118; *see also* Exhibit 439 at 44.) State water policy deemed ground water available for appropriation so long Snake River flows at the Murphy Gauge exceeded 3,300 cfs. (Carlson Direct at 13.) Because the State Water Plan provided for a zero flow at Milner Dam, the maintenance of minimum flows downstream at the Murphy Gauge effectively secured spring discharges necessary to maintain the minimum flows. While spring users were entitled to use available spring flows, they were not entitled to boost their supplies via the curtailment of ground water pumping if the minimum flows were met. It was unthinkable that surface water rights in the Thousand Springs region had any entitlement whatsoever to curtail ground water rights on the Eastern Snake Plain so long as minimum flows were met. (Carlson Direct at 20-21.) Significantly, IGWA's members developed the ESPA in reliance upon the State's protection of ground water rights from curtailment by spring water rights in the Thousand Springs region.

In 1984 the State of Idaho was forced to scale back its protection of ground water development as part of the so-called Swan Falls settlement.[11] The settlement resolved a lawsuit brought by Idaho Power against thousands of water users in which Idaho Power asserted an unsubordinated hydropower right at its Swan Falls hydropower facility. *Idaho Power Co. v. Idaho Dep't of Water Resources, et al.*, Case No. 81375 (4th Jud. Dist. 1984) (Exhibit 458.) A ruling by the Idaho Supreme Court that the right was unsubordinated threatened to reverse decades of ground water development and effectively place control of the Upper Snake River Basin in the hands of Idaho Power. *Idaho Power Co. v. Idaho Dept. of Water Resources, et al.*, 104 Idaho 575 (1983). In response, the State negotiate a settlement with Idaho Power.

Importantly, the Swans Falls settlement resolved a lawsuit against thousands of water users, not just against the Idaho Department of Water Resources. Both spring users and ground water users were named in the Ada County case that gave rise to the Swan Falls settlement, and were dismissed from that action in response to the settlement. Though it was the individual water rights were exposed to curtailment by Idaho Power, the individual defendants did not negotiate the settlement. Rather, the State of Idaho negotiated the settlement on behalf of all water users as the sovereign owner of Idaho's water resources. And all water right holders were made subject to the terms of the settlement by its incorporation into the 1986 State Water Plan.

Central to the settlement were changes to the State Water Plan that provide for management of the upper Snake River Basin based upon increased minimum Snake River flows at the Murphy Gauge.[12] The State agreed to curtail ground water rights as necessary to maintain

---

[11] The Swan Falls settlement means collectively the October 1, 1984, Swan Falls Agreement; the October 24, 1984, Swan Falls Contract; and the 1982 State Water Plan as amended in 1986.

[12] The Swan Falls Agreement actually increased the minimum average daily flows at the Murphy Gauge to 3,900 cfs. from April 1 through October 31 and to 5,600 cfs. from November 1 through March 31. (Swan Falls Agreement at Exhibit 6.)

the increased minimum flows, but only those with a priority date after October 1, 1984. (Carlson Direct at 18-22.) The State of Idaho still protected ground water rights against delivery calls by the spring water rights so long as minimum flows were met, but the increased minimum flows at the Murphy Gauge curbed that protection while securing additional water for spring users.

The Swan Falls settlement still allowed for some additional ground water development on the Eastern Snake Plain. As a result, the 1986 Idaho State Water Plan, which implemented the Swan Falls Agreement, affirmed that "minimum flows for the Murphy Gauging Station should provide an adequate supply of water for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist." (Exhibit 440: Policy 5G at 38.) At the public hearings held to explain the Swan Falls Agreement, representatives of the State of Idaho and the Idaho Water Resource Board affirmed the State's protection of groundwater development of the ESPA so long as minimum flows are maintained at the Murphy Gauge. The State's protection of ground water rights so long as minimum stream flows at the Murphy Gauge are met was beyond question until only recently.

Various beneficiaries of spring flows in the Thousand Springs region made vigorous tactical efforts through the SRBA and otherwise to obviate the State's protection of ground water development and reverse decades of economic development of the ESPA. Those efforts culminated with the Spring Users' contemporary assertions that they are now entitled to curtail ground water rights on the Eastern Snake Plain and effectively take control of the ESPA in order to increase spillover from the springs that supply the Spring Users' water rights. The former Director surprisingly acquiesced to the Spring Users' unlawful demands by issuing the 2005 Curtailment Orders. In so doing the Director obliterated the State's policy of "full economic

development of ground water resources" and undermined the Swan Falls settlement, leaving the State of Idaho and the defendants on whose behalf it negotiated the settlement without the benefit they bargained for.

The State Water Plan provides the management constraints for the Snake River Basin and all state agencies are required to "exercise their duties in a manner consistent with the comprehensive state water plan." I.C. § 42-1734B(4). The State's responsibility to manage the upper Snake River Basin based on the minimum stream flows is particularly weighty, as a refusal to do so would undo the monumental Swan Falls settlement and the state would be denied the benefit of the Swan Falls bargain. (Dunn Direct at 10.) Accordingly, so long as minimum Snake River flows at the Murphy Gauge are satisfied neither Blue Lakes nor Clear Springs has any right to curtail ground water diversions on the Eastern Snake Plain. It is certainly impermissible to allow the Spring Users to increase minimum Snake River flows by proxy.[13]

The Director has an obligation to determine the administrative effect of the Swan Falls settlement as incorporated into the 1986 State Water Plan and administer water in the Upper Snake River Basin accordingly. 2005 Curtailment Orders are unlawful and must be dismissed because they reverse decades of economic development of the ESPA and obliterate the effect of the settlement as set forth in the State Water Plan.

---

[13] If the Spring Users can command the entirety of the ESPA to support their diversions, then why not Idaho Power?

IX.

MITIGATION AND REPLACEMENT WATER PLANS

The Hearing Officer correctly found that water quality and temperature are not elements of a water right, but erroneously required those elements be part of any mitigation/replacement water plan. (*See* Recommended Order at 22.)

Idaho law authorizes junior-priority water users "to prevent or compensate for material injury to holders of senior water rights caused by the diversion and use of water by the holders of junior priority ground water rights." I.C. § 42-5201. This may be accomplished via an approved "mitigation plan" pursuant to CM Rule 42.02:

> **Delivery Call for Curtailment of Pumping.** The holder of a senior-priority surface water or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

IDAPA 37.03.11.042.02. The prior appropriation doctrine grants water users a right in the *quantity* and *timeliness* of their appropriation, but not the source: "The source of the water supply is immaterial ... so long as the landowners and waterusers receive the quantity of water as of the date of their priorities for beneficial use." *In the Matter of the Petition of the Board of Directors of Wilder Irrigation District*, 64 Idaho 538, 554 (1943). Idaho Courts have long-supported the authority of IDWR

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

Id. at 551.

Maximum beneficial use of the Idaho's water resources inherently precludes water users

from a vested right in the specific chemical make-up of appropriated waters.[14] This is also the law in other western states that likewise seek maximum beneficial use of scarce water resources. Colorado and Oregon have both adopted statutory provisions authorizing an appropriator "to use stored, surface or ground water from another source in exchange for supplying replacement water in an equal amount to satisfy the prior appropriations from the other source ...." Or. Rev. Stat. 540.5333(1); *see also* Colo. Rev. Stat. 37-83-101. In fact, the Colorado Supreme Court thoroughly considered a claim "that the delivery of clear water instead of silty water would result in substantial damage to the individual [appropriators]." *A-B Cattle Company v. United States*, 196 Colo. 539, 542, 589 P.2d 57, 59 (1978). In that case the appropriators claimed injury resulting from "substituting water of a quality which is not as useful to [the appropriator] as the natural stream water customarily diverted by [the appropriator]." *Id.* at 543, 59. The Court refused to recognize a compensable interest in the chemical make-up of the water source, stating "our constitution makes *water*—not silt and not silt and water—the *property* which is subject to appropriation." *Id.* (italics in original). The Court reasoned that to hold otherwise

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

Id. at 546. The New Mexico Supreme Court has likewise held that an appropriator "does not have a right to receive a particular silt content that has existed historically." Similarly, the Utah Supreme Court has refused to recognize a compensable interest in the particular salt content of

---

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

an appropriation. *Deseret Livestock Co. v. State*, 110 Utah 239, 171 P.2d 401 (1946).

Idaho policies favoring maximum beneficial use of its water resources militate against a constitutionally-protected property right in the precise mineral content that may be suspended or carried by Idaho's water resources. Therefore, the IGWA that the Director's final order provide that no Idaho law or CM Rule requires that replacement water offered pursuant to an approved mitigation plan be of the identical chemical makeup and temperature of the source being replaced.

CONCLUSION

The Director's final order should dismiss the delivery calls made by Blue Lakes and Clear Springs for any of the reasons that the Spring Users failed to prove their claims of material injury, the delivery calls are futile, the Spring Users must convert to a ground water source as necessary to achieve the goal of full economic development, and/or the Swan Falls settlement as incorporated into the State Water Plan bars the curtailment of ground water diversions from the ESPA so long as minimum stream flows are met at the Murphy Gauge.

If the Spring Users' delivery calls are not dismissed and curtailment is permitted, the record established at the hearing compels that trim line be redefined and constricted pursuant to the public interest limitations set forth in I.C. § 42-226 and CM Rule 20.03. First, the trim line must account for error in the Model and linear analysis and be constricted as necessary provide reasonable certainty that the curtailed water use will actually be put to beneficial use by the Spring Users. The record is undisputed that predictive uncertainty is between twenty and thirty percent. Therefore, the trim line must at least be constricted to a point at which 20-30% of the water use curtailed is predicted to arise from the specific springs that supply Blue Lakes' and Clear Springs' respective water rights. Beyond that point, the location of the trim line should be

further constricted as necessary to protect against vesting Blue Lakes and Clear Springs with a monopoly over vast quantities of the ESPA, minimize the net economic harm resulting from curtailment, and ensure that a significant portion of the water use curtailed will actually be put to use by the Spring Users within a reasonable time. In accordance with the testimony of Clear Springs' CEO Larry Cope, IGWA maintains that the trim line should be constricted so as to limit curtailment to those ground water rights for which 66% of the quantity curtailed will be put to beneficial use by the calling senior water user within 10 years.

The Spring Users' attempt to curtail ground water use in an effort to maintain a peak water table and peak spring discharges will positively *minimize* beneficial use of the ESPA. It is grossly contrary to the public interest in our limited ground water supplies to curtail 57,220 and 52,470 irrigated acres in order to provide Blue Lakes with a mere 3.2% and Clear Springs with less than 1% of the curtailed water use, respectively. With an aquifer as highly responsive to climatic conditions as the ESPA, the permanent loss of agricultural interests to supply a meager amount of water to two spring users with no evidence that it is actually needed or will be put to beneficial use is not tolerated by the law of reasonable water use. Sound administration of the ESPA must turn on "how best to utilize the annual supply without overdrafting the stock which maintains the aquifer's water level." *Baker*, 95 Idaho at 580. With spring flows well above natural levels and the ESPA at or near equilibrium, it makes no sense to dry up tens of thousands of irrigated acres in order to elevate the ESPA water table as necessary to top off the Spring Users' appropriations. Therefore, IGWA asks the Director to at the very least restrict the trim line to a more reasonable geographic area based on considerations of the public interest, optimum use of the resource, full economic development and the uncertainties in the use of the Model as applied to the facts of this case is warranted. IGWA does not call for the elimination of

the prior appropriation doctrine; only for its reasonable application in accordance with I.C. §§ 42-226 and CM Rule 20.03.

DATED this 10th day of April, 2008.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By Randall C. Budge
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of April 2008, the above and foregoing document was served in the following manner:

David R. Tuthill, Director Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 dave.tuthill@idwr.idaho.gov	[ ] [ ] [✓] [ ] [✓]	U.S. Mail, Postage Prepaid Facsimile Overnight Mail Hand Delivery E-Mail
Honorable Gerald F. Schroeder Home Address fcjschroeder@gmail.com	[ ] [ ] [ ] [ ] [✓]	U.S. Mail Facsimile Overnight Mail Hand Delivery E-Mail
Daniel V. Steenson Charles L. Honsinger Ringert Clark P.O. Box 2773 Boise, Idaho 83701-2773 dvs@ringertclark.com clh@ringertclark.com	[ ] [ ] [ ] [ ] [✓]	U.S. Mail, Postage Prepaid Facsimile Overnight Mail Hand Delivery E-Mail
Phillip J. Rassier Chris Bromley Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098 phil.rassier@idwr.idaho.gov chris.bromley@idwr.idaho.gov	[ ] [ ] [ ] [ ] [✓]	U.S. Mail, Postage Prepaid Facsimile Overnight Mail Hand Delivery E-Mail
Sheila Lee North Snake GWD 152 East Main Street Jerome, Idaho 83338 nsgwd@safelink.net	[ ] [ ] [ ] [ ] [✓]	U.S. Mail, Postage Prepaid Facsimile Overnight Mail Hand Delivery E-Mail

Emily Haines Magic Valley GWD 809 East 1000 North Rupert, Idaho 83350-9537 pkmiller@pmt.org	[ ] [ ] [ ] [ ] [✓]	U.S. Mail, Postage Prepaid Facsimile Overnight Mail Hand Delivery E-Mail
Michael S. Gilmore Attorney General's Office P.O. Box 83720 Boise, Idaho 83720-0010 mike.gilmore@ag.idaho.gov	[ ] [ ] [ ] [ ] [✓]	U.S. Mail, Postage Prepaid Facsimile Overnight Mail Hand Delivery E-Mail
Jeff Fereday Mike Creamer Givens Pursley P.O. Box 2720 Boise, Idaho 83701-2720 jcf@givenspursley.com mcc@givenspursley.com	[ ] [ ] [ ] [ ] [✓]	U.S. Mail, Postage Prepaid Facsimile Overnight Mail Hand Delivery E-Mail
Robert E. Williams Fredericksen Williams Meservy P.O. Box 168 Jerome, ID 83338-0168 rewilliams@cableone.net	[ ] [ ] [ ] [ ] [✓]	U.S. Mail, Postage Prepaid Facsimile Overnight Mail Hand Delivery E-Mail
J. Justin May May, Sudweeks & Browning P.O. Box 6091 Boise, ID 83707 jmay@may-law.com	[ ] [ ] [ ] [ ] [✓]	U.S. Mail, Postage Prepaid Facsimile Overnight Mail Hand Delivery E-Mail
John Simpson Travis L. Thompson Barker Rosholt P.O. Box 2139 Boise, Idaho 83701-2139 jrs@idahowaters.com tlt@idahowaters.com	[ ] [ ] [ ] [ ] [✓]	U.S. Mail, Postage Prepaid Facsimile Overnight Mail Hand Delivery E-Mail

Randall C. Budge