

John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
Paul L. Arrington, ISB #7198  
**BARKER ROSHOLT & SIMPSON LLP**  
1010 W. Jefferson, Suite 102  
P.O. Box 2139  
Boise, Idaho 83701-21239  
Telephone (208) 336-0700  
Facsimile (208) 344-6034

*Attorneys for Clear Springs Foods, Inc*

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

|                                   |   |                                    |
|-----------------------------------|---|------------------------------------|
|                                   | ) |                                    |
|                                   | ) |                                    |
| IN THE MATTER OF THE SECOND       | ) |                                    |
| MITIGATION PLAN OF THE NORTH      | ) | <b>AFFIDAVIT OF PAUL L.</b>        |
| SNAKE AND MAGIC VALLEY GROUND     | ) | <b>ARRINGTON IN SUPPORT OF</b>     |
| WATER DISTRICTS TO COMPENSATE     | ) | <b>CLEAR SPRINGS FOODS, INC.'S</b> |
| SNAKE RIVER FARMS                 | ) | <b>BRIEFING ON THE DIRECTOR'S</b>  |
|                                   | ) | <b>AUTHORITY TO APPROVE A</b>      |
| (Water District Nos. 130 and 140) | ) | <b>MITIGATION PLAN FOR</b>         |
|                                   | ) | <b>MONETARY COMPENSATION</b>       |
| _____                             | ) |                                    |

I, PAUL L. ARRINGTON, being first duly sworn upon oath, depose and hereby state as follows:

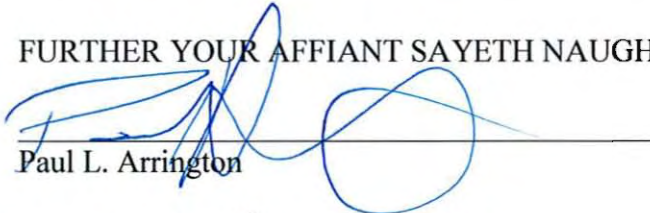
1. I reside in Twin Falls County and I am over the age of 18. I am an attorney representing Clear Springs Foods, Inc. in this matter.
2. Attached hereto, as Exhibit A, is a true and correct copy of excerpts from the *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, issued on December 29, 1999, by the SRBA Court.
3. Attached hereto, as Exhibit B, is a true and correct copy of excerpts from the *Deposition of David R. Tuthill, Jr.*, dated January 30, 1998.

4. Attached hereto, as Exhibit C, is a true and correct copy of excerpts from the *Findings of Fact & Conclusions of Law (Facility Volume)*, dated February 24, 1998.

5. Attached hereto, as Exhibit D, is a true and correct copy of the *Order Granting State of Idaho's Motion for Order of Interim Administration*, dated January 8, 2002.

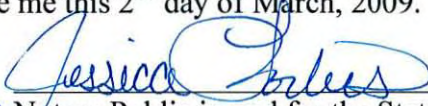
6. Attached hereto, as Exhibit E, is a true and correct copy of excerpts from the *Final Order Creating Water District No. 130*, dated February 19, 2002.

FURTHER YOUR AFFIANT SAYETH NAUGHT

  
Paul L. Arrington

SUBSCRIBED & SWORN to before me this 2<sup>nd</sup> day of March, 2009.



  
Notary Public in and for the State of Idaho  
My Commission Expires: 4/3/12

## CERTIFICATE OF SERVICE

I hereby certify that on this 2<sup>nd</sup> day of March, 2009, I served a true and correct copy of the foregoing **AFFIDAVIT OF PAUL L. ARRINGTON IN SUPPORT OF CLEAR SPRINGS FOODS, INC.'S BRIEFING ON THE DIRECTOR'S AUTHORITY TO APPROVE A MITIGATION PLAN FOR MONETARY COMPENSATION**, by depositing same in the United States mail, postage prepaid, addressed to the following:

Randall C. Budge  
Candice M. McHugh  
**RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHTD.**  
201 E. Center Street  
P.O. Box 1391  
Pocatello, ID 83201  
Email: [rbc@racinelaw.net](mailto:rbc@racinelaw.net)  
[cmm@racinelaw.net](mailto:cmm@racinelaw.net)

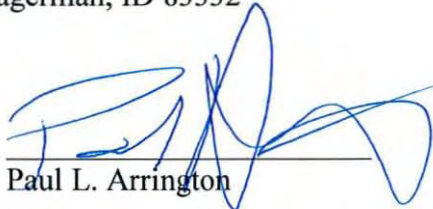
Tom Arkoosh  
**ARKOOSH LAW OFFICES, CHTD.**  
PO Box 248  
Gooding, ID 83330  
Email: [tarkoosh@cableone.net](mailto:tarkoosh@cableone.net)

Daniel Steenson  
**RINGERT CLARK, CHTD.**  
PO Box 2773  
Boise, ID 83702  
Email: [dvs@ringertclark.com](mailto:dvs@ringertclark.com)

Justin May  
**MAY SUDWEEKS & BROWNING**  
PO Box 6091  
Boise, ID 83707  
Email: [jmay@may-law.com](mailto:jmay@may-law.com)

Kent Fletcher  
**FLETCHER LAW OFFICE**  
PO Box 248  
Burley, ID 83318  
Email: [wkf@pmt.org](mailto:wkf@pmt.org)

Mark Daily  
**Idaho Aquaculture Association, Inc.**  
PO Box 767  
Hagerman, ID 83332



Paul L. Arrington



## EXHIBIT "A"

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

|                       |   |   |
|-----------------------|---|---|
| <b>In Re SRBA</b>     | ) | Subcase Nos. 36-02708, 36-07201, 36-07218, 36-02048,  |
|                       | ) | 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040,  |
|                       | ) | 36-07148, 36-07568, 36-07071, 36-02356, 36-07210, 36- |
|                       | ) | 07427, 36-07720, 36-02659, 36-07004, 36-07080 and 36- |
| <b>Case No. 39576</b> | ) | 07731   |
|                       | ) |   |
|                       | ) | <b>ORDER ON CHALLENGE (Consolidated Issues) OF</b>    |
|                       | ) | <b>"FACILITY VOLUME" ISSUE AND "ADDITIONAL</b>        |
|                       | ) | <b>EVIDENCE" ISSUE</b>                                |

---

**I.  
APPEARANCES**

Professor D. Craig Lewis, Esq., Moscow, Idaho, and Ms. Dana Hofstetter, Esq., Beeman & Hofstetter, Boise, Idaho, for North Snake Ground Water District, May Farms Ltd., and Faulkner Land & Livestock Company

Mr. Daniel Steenson, Esq., Ringert Clark, Boise, Idaho, for Clear Lakes Trout Company

Mr. Norman Semanko, Esq., Rosholt Robertson & Tucker, Twin Falls, Idaho, for Clear Springs Foods Inc. and Blue Lakes Trout Farm Inc.

Mr. Patrick Brown, Esq., Jerome, Idaho, for John W. Jones Jr.

**II.  
ORAL ARGUMENT AND  
MATTER DEEMD FULLY SUBMITTED FOR DECISION**

Oral argument on this Consolidated Challenge was held in open court on November 1, 1999. At the conclusion of argument, no party sought to present additional briefing or authorities

"The right to the use of a stream for depositing debris from mines is discussed in section 840, volume 2, of Lindly on Mines. Many cases from the various states of the Union are cited and discussed by the author. He closes his text as follows: '**No positive rule of law can be laid down to define and regulate such use with entire precision. As to this, all courts agree. It is a question of fact to be determined by the jury.**' This conclusion certainly seems reasonable and logical.

*Id.* at 311, 312 and 313 (bold emphasis added).

The same reasoning applies to the fish propagator's use of water which is returned to the stream. Questions of excessive pollution in a water source are questions of fact to be made on a case-by-case basis, at least for the use of water for fish propagation. As such, a "one size fits all" rule in the form of a facility volume remark is wholly inapplicable. All of the evidence is to the effect that the size of the facility has no demonstrable effect on water quality. How an individual facility is managed or mismanaged clearly does impact water quality and a facility volume remark adds nothing.

## **B. Local Public Interest**

In *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 911 P.2d 748 (1995), the Idaho Supreme Court held that the public trust is not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants. Thus, the SRBA lacks jurisdiction to consider the public trust in the adjudication of these claims.

Pursuant to *Matter of Hidden Springs Trout Ranch, Inc.*, 102 Idaho 623, 636 P.2d 745 (1981), specifically dealing with statutory local public interest, the Supreme Court held that the public interest could not be considered with respect to rights which had vested. All of the claims here have vested into licenses and/or are beneficial use claims. They are not applications to appropriate water or a permit, and this is not a transfer proceeding under I.C. § 42-222. As such, facility volume remarks cannot be considered under the local public interest.

## **C. Mitigation**

It is essentially undisputed that until 1997, IDWR's stated purpose for including a facility volume remark was to regulate water quality. However, since 1997 IDWR has asserted that a

facility volume remark helps to “define the extent of beneficial use” for purposes of mitigation<sup>4</sup> in time of water shortage. In other words, if a senior fish propagator made a water delivery call on junior water users, the junior users could offer mitigation in the form of money instead of ceasing their use of the called water. However, while mitigation may be voluntarily exercised between private parties, IDWR freely admits it cannot compel a senior user to accept mitigation in the event of a water delivery call. The right of senior water right holders to have water delivered “first in time, first in right” is constitutionally protected. Idaho Constitution, Art. VX. § 3. Therefore, since IDWR has no authority to compel mitigation, this cannot serve as a legal basis for the inclusion of a facility volume remark.

### **Licenses Issued With and Licenses Issued Without the Facility Volume Remark**

As stated earlier in this Decision, some of the water rights licenses were issued with a facility volume remark which was not challenged by the license holder at the time. Other licenses were issued without the facility volume remark and the remark appeared for the very first time in the Director’s Report for the respective claimed right.

In his July 31, 1998, *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)*, then Special Master Haemmerle ruled as follows:

#### **F. THE LICENSES**

As indicated, some of the water rights based on licenses had facility volume inserted when the licenses were issued. Most of the water rights based on licenses, however, had facility volume inserted in the Director’s Report long after the licenses were issued. The inquiry is what relevance or finality previously issued licenses have between Claimants and IDWR in the context of the SRBA. Stated differently, the inquiry is whether the purpose of the SRBA is to inventory licenses or to recondition and reallocate licenses.

The Director has the authority to insert such remarks as are necessary to define, clarify, or administer a particular water right. I.C. § 42-1411(2)(k). On the other hand, a license once issued by IDWR “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right.” I.C. § 42-220 [footnote 2 cited]. As applied, IDWR is part of the “state” as the word is used in I.C. § 42-220 [footnote 3 cited]. As between the two statutes, there is a conflict only when a remark redefines the use

---

<sup>4</sup> See generally, *Rules For Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11, *et seq.*



## EXHIBIT "B"



1 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
2 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS  
3  
4  
5 In Re SRBA ) Subcase Nos. 36-02048, 36-02703,  
6 ) 36-02708, 36-04013A, 36-04013B  
7 ) 36-04013C, 36-07040, 36-07083  
8 ) 36-07148, 36-07218 and 36-07568  
9 Case No. 39576 )  
10  
11  
12  
13 DEPOSITION OF DAVID R. TUTHILL, JR.  
14  
15 Boise, Idaho  
16  
17 January 30, 1998  
18  
19  
20  
21  
22 **COMPLIMENTARY**  
23  
24  
25

Page 1

1 I N D E X  
2  
3 WITNESS EXAMINATION BY PAGE  
4 DAVID R. TUTHILL, JR. Mr. Brown 4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14 E X H I B I T S  
15  
16 DESCRIPTION PAGE  
17 (None marked.)  
18  
19  
20  
21  
22  
23  
24  
25

Page 3

1 DEPOSITION OF DAVID R. TUTHILL, JR.,  
2 taken at the instance of Clear Springs Foods, Inc. at  
3 the law offices of Hepworth, Lezamiz & Hohnhorst, 537  
4 West Bannock, in the City of Boise, State of Idaho,  
5 commencing at 1:30 p.m., on Friday, January 30, 1998,  
6 before CONSTANCE S. BUCY, CSR, a Notary Public in and  
7 for the State of Idaho, pursuant to Notice, and in  
8 accordance with the Idaho Rules of Civil Procedure.  
9  
10  
11  
12  
13  
14  
15  
16

17 A P P E A R A N C E S

18 For Clear Springs HEPWORTH, LEZAMIZ & HOHNHORST  
19 Foods, Inc.: by PATRICK D. BROWN, Esq.  
20 Post Office Box 389  
21 Twin Falls, Idaho 83303-0389  
22 For Idaho Department CHARLES L. HONSINGER, Esq.  
23 of Water Resources: Deputy Attorney General  
24 Natural Resources Division  
25 Water Resources Unit  
Post Office Box 83720  
Boise, Idaho 83720-0098

Page 2

1 BOISE, IDAHO, FRIDAY, JANUARY 30, 1998, 1:30 P. M.  
2  
3  
4 DAVID R. TUTHILL, JR.,  
5 produced as a witness at the instance of Clear Springs  
6 Foods, Inc., having been first duly sworn, was  
7 examined and testified as follows:  
8  
9  
10

11 EXAMINATION

12 BY MR. BROWN:

13 Q Can you state your name for the record,  
14 please?

15 A David R. Tuthill, Jr.

16 Q And, Mr. Tuthill, you've been designated  
17 by the Department as the 30(b)(6) deponent?

18 A Yes.

19 Q Do you have any personal knowledge of  
20 the facts relating to the facility volume of any of  
21 the cases we're here today to discuss?

22 A No.

23 Q Okay, do you know if anybody in the  
24 Department does have personal knowledge concerning the  
25 facility volume?

A Our standard procedure is for the agent

Page 4

1 the dollar amount of impact resulting from the loss of  
2 water. The dollar amount of impact would be much  
3 different as between 500 acres and 1,000 acres of  
4 irrigation loss.

5 Q So you're going to go from 500 acres to  
6 dollars?

7 A Yes.

8 Q So he gets compensated for what on 500  
9 acres? How do you get from 500 acres to dollars?

10 A It would be the production loss on those  
11 500 acres quantified by a process that is acceptable  
12 to the mitigating reviewer, the reviewer of the  
13 mitigation plan.

14 Q Has the Department ever done anything to  
15 analyze whether or not mitigation is Constitutional?

16 A Mitigation is relatively new in Idaho  
17 and the Constitutionality I don't know about.

18 Q Do you know if there's ever been an  
19 analysis made of it?

20 A Mitigation certainly does play a part in  
21 the rules. I would anticipate that the negotiated  
22 rulemaking right now, for example, will result in  
23 mitigation provisions and I don't know whether they  
24 will be challenged Constitutionally or not.

25 Q Isn't it true that the Department has

Page 37

1 not made a rule yet that says you could impose  
2 mitigation involuntarily?

3 A Mitigation is one alternative solution  
4 to a water dispute. As far as it being a mandatory  
5 solution, I'm not aware that it is that, but it is an  
6 alternative that exists as a solution.

7 Q So the Department has -- there are no  
8 rules in this state which allow the Department or  
9 purport to allow the Department to impose mitigation  
10 as opposed to delivery of water?

11 A In position of mitigation, perhaps not,  
12 but mitigation as an alternative for problem solving  
13 is considered to be an acceptable alternative.

14 Q I'm not sure what the answer was.  
15 There's no rule in Idaho, there's no law in Idaho, to  
16 your knowledge, that says the Department can impose  
17 mitigation on a fish propagator who is not receiving  
18 his water?

19 A I'm not aware of a rule about imposing  
20 mitigation; however, in response to a call, mitigation  
21 is one of the alternative solutions, perhaps not the  
22 imposed solution, but it is a solution.

23 Q Again, you don't know if it's a  
24 Constitutional solution?

25 A Solutions that are acceptable to the two

Page 38

1 parties may not go through a Constitutional challenge.

2 Q But the Constitution says you can't deny  
3 the fish propagator his right to water that has been  
4 diverted and put to beneficial use; right?

5 A The Constitution provides for first in  
6 time is first in right, so there are Constitutional  
7 protections to senior water users.

8 Q The Constitution says that you can never  
9 deny someone beneficial use of water which they've  
10 diverted and continue to divert; correct?

11 A I would have to review the  
12 Constitution. I know it does says first in time is  
13 first in right.

14 Q What is your experience with regard to  
15 whether changes in facility volumes have ever impacted  
16 other water users? Have you ever been involved in an  
17 experience where you believe that occurred?

18 A In 1979 in Billingsly Creek we were  
19 advised of concerns about impacts of expansions of  
20 fish propagation systems. In response to that  
21 concern, the Department developed the administrator's  
22 memorandum that we've spoken of. This memorandum was  
23 prepared in response to an existing problem and from  
24 my perspective serves to provide the basis for  
25 measurement of rights in the future. I'm not aware of

Page 39

1 a situation where facility volume has been applied to  
2 a situation; however, it provides the basis for that  
3 application in the future.

4 Q Again going back to that memorandum and  
5 that experience, to your knowledge, has there ever  
6 been any scientific peer review of those memoranda or  
7 the documents that speak of the relationship between  
8 water quantities and fish production?

9 A When the memorandum was first created,  
10 the Department biologist was involved with that  
11 creation, so we did have expert advice at the time.

12 Q My question, do you know whether he ever  
13 had it reviewed by any of his peers?

14 A I don't know.

15 Q Do you know whether these figures have  
16 ever been compared to actual practice to see if  
17 they're valid?

18 A We've used the figures as guidelines for  
19 a number of years and, to my knowledge, I'm not aware  
20 of any objection to using facility volume until in the  
21 SRBA, so they've been used for some time as far as  
22 comparison to practice. I don't know if a formal  
23 review has been made.

24 Q Okay. In these cases we've talked about  
25 the fact that there are three licenses which mention

Page 40

## EXHIBIT “C”



Hepworth Nungesser  
FEB 25 1998

1998 FEB 24 PM 3:12

FEB 25 1998

DISTRICT COURT - SRBA  
TWIN FALLS CO., IDAHO  
FILED

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

In Re SRBA

Subcases: See Exhibit A

Case No. 39576

**FINDINGS OF FACT  
AND CONCLUSIONS  
OF LAW (FACILITY VOLUME)**

**I. PROCEDURAL BACKGROUND**

All water rights listed in Exhibit A are claimed by Clear Springs Foods, Inc. (Claimant) and are used for fish propagation. Numerous objections were filed. This matter relates to objections filed by Claimant to the remarks addressing facility volume. IDWR gave four reasons for including facility volume as a remark. Those four reasons were to administer water quality, define consumptive use, benefit the local public interest, and establish the extent of beneficial use. Claimant alleges that facility volume is not necessary to define or administer these water rights. The objections were tried before the court on February 8, 1998.

**II. STANDARD FOR INCLUSION OF REMARK**

The Director of the Idaho Department of Water Resources (IDWR) may include "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(k). The claimant bears the "burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in the director's report." I.C. § 42-1411(5).

... [The filing of an application] ... is not therefore a right arising to any vested level which would preclude application of the [the local public interest].

*Id.* at 624-625 (emphasis added).

In this case, water rights 36-07201, 36-07218, and 36-07568 had facility volume remarks inserted at the time the licenses were issued. The legality of the remarks for these rights is addressed *infra* § IV(F). The remaining water rights including 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148, 36-04013A, 36-04013B, and 36-04013C are either licenses which did not have facility volume inserted at the time the licenses were issued, or the rights are claimed through beneficial use. Because these rights vested prior to insertion of the facility volume remarks, Claimant is entitled to use these rights under the conditions which existed when the water rights vested. Any attempt to condition vested water rights under the public trust would be analogous to newly enacted zoning ordinances applying retroactively to preexisting land uses.

For these reasons, the facility volume remarks cannot be considered under the local public interest.

#### **D. Beneficial Use - Mitigation**

The stated purpose of including facility volume was to define the extent of beneficial use in terms of fish production. IDWR believed this to be important for purposes of mitigation. In other words, if the Claimant made a call on junior water users, the junior users could offer money for lost fish production instead of delivering water. There is no question that water users may engage in mitigation between themselves in lieu of a formal call on water being made. However, IDWR admits that it cannot force mitigation in lieu of performing its duty to deliver water should a senior user make a call. The right of water users to have water delivered "first in time, first in right" is constitutionally guaranteed. IDAHO CONS., art. VX, § 3; *In Re SRBA Case No. 39576*, 125 Idaho 392, 871 P.2d 809 (1994). Since IDWR has no authority to force mitigation, it is not necessary to include facility volume for purpose of water administration. Even if IDWR could force mitigation, as previously indicated, there is no rational relationship between facility volume and fish production. *See infra*, § III(B).

For these reasons, facility volume is not necessary for purposes of mitigation.

## **EXHIBIT “D”**



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

|                |   |  |
|----------------|---|--|
| In Re SRBA     | ) | <b>Subcase 92-00021</b>                |
|                | ) | <b>(Interim Administration)</b>        |
| Case No. 39576 | ) |  |
|                | ) | <b>ORDER GRANTING STATE OF IDAHO'S</b> |
|                | ) | <b>MOTION FOR ORDER OF INTERIM</b>     |
|                | ) | <b>ADMINISTRATION</b>                  |

---

On November 19, 2001, the State of Idaho filed a *Motion for Order of Interim Administration and Motion for Order Expediting Hearing*, pursuant to I.C. § 42-1417, seeking administration of water rights located in all or portions of Administrative Basins 35, 36, 41, and 43, in accordance with the Director's Reports for those water rights or in accordance with partial decrees that have superseded the Director's Reports.

On November 19, 2001, the Court issued its *Order Setting Hearings on State of Idaho's Motion for Order of Interim Administration and Motion for Order Expediting Hearing; I.C. § 42-1417, AO1 6f(2)* (Subcase 92-00021), which established the service procedures and hearing schedule for the State of Idaho's *Motion*.

On November 23, 2001, the State of Idaho served copies of the *Motion* and supporting briefing and affidavits and the *Order Setting Hearings on State of Idaho's Motion for Order of Interim Administration and Motion for Order Expediting Hearing; I.C. § 42-1417, AO1 6f(2)* (Subcase 92-00021) on all affected parties by U.S. Mail.<sup>1</sup> The State of Idaho filed the Certificate of Service with the Court on November 26, 2001.

---

<sup>1</sup> The "affected parties" are claimants in Basins 35, 36, 41, and 43 with water rights within the area shown on Attachment 1, other than small domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

On January 8, 2002, the Court held a hearing on the State of Idaho's *Motion*.

This Court, having heard the *Motion* and reviewed the pleadings, makes the following findings of fact and conclusion of law and enters its *Order* as follows:

#### **A. FINDINGS OF FACT**

1. The State of Idaho has complied with the service requirements of I.C. § 42-1417(2)(b) and this Court's *Order Setting Hearings on State of Idaho's Motion for Order of Interim Administration and Motion for Order Expediting Hearing; I.C. § 42-1417, AO1 6f(2)* (Subcase 92-00021) (Issued November 19, 2001).
2. The available water supply in all or portions of Administrative Basins 35, 36, 41, and 43 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.

#### **B. CONCLUSION OF LAW**

1. Interim administration in those portions of Administrative Basins 35, 36, 41, and 43 shown on Attachment 1 in accordance with the Director's Reports and the partial decrees for water rights is reasonably necessary to protect senior water rights in accordance with the prior appropriation doctrine as established by Idaho law.

#### **C. ORDER**

The State of Idaho's *Motion for Interim Administration* is hereby GRANTED. Pursuant to Idaho Code § 42-1417, the Court authorizes distribution of water pursuant to chapter 6, title 42, Idaho Code in accordance with the Director's Reports and the partial decrees that have superseded the Director's Reports, in those portions of Administrative Basins 35, 36, 41, and 43 shown on Attachment 1.

This ***Order*** shall continue in force and effect until modified or dissolved by this Court.

DATED this 8<sup>th</sup> day of January, 2002.

/s/Roger Burdick  
ROGER S. BURDICK  
Presiding Judge  
Snake River Basin Adjudication



## **EXHIBIT "E"**

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

IN THE MATTER OF CREATING THE THOUSAND )  
SPRINGS AREA WATER DISTRICT, DESIGNATED )  
AS WATER DISTRICT NO. 130, FOR THE )  
ADMINISTRATION OF RIGHTS TO THE USE OF )  
GROUND WATER AND SPRINGS DISCHARGING )  
FROM THE EASTERN SNAKE PLAIN AQUIFER )  
IN ADMINISTRATIVE BASINS 36 AND 43. )

**FINAL ORDER  
CREATING WATER  
DISTRICT NO. 130**

The Director of the Idaho Department of Water Resources ("Director") is authorized by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. The authority to create water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree. During the pendency of a water rights adjudication, the district court is authorized by statute to approve interim administration of the water rights by the Director if reasonably necessary to protect senior water rights. The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with partial decrees entered by the court or in accordance with a Director's Report as modified by the court's order.

**FINDINGS OF FACT**

1. On August 3, 2001, the Director established the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA") pursuant to Idaho Code § 42-233b. The Director designated the Thousand Springs GWMA due to concerns about the depletionary effects of ground water withdrawals under junior priority water rights and the availability of water supplies for senior priority water rights from connected surface and ground water sources during the severe drought conditions experienced across the Snake River Basin. The Director issued the order in response to his recognition that he has a responsibility, subject to the confines of existing knowledge and technology, to exercise his statutory authorities to administer water rights for the use of ground water in a manner that recognizes and protects senior priority surface water and ground water rights in accordance with the provisions of Idaho law. In establishing the Thousand Springs GWMA, the Director stated his intent to curtail diversions under certain junior ground water rights that caused significant depletions to hydraulically connected surface water sources thereby causing injury to senior priority water rights.

2. On August 31, 2001, the Director was advised by representatives of holders of

with the court, with or without modification by the court, or in accordance with partial decrees that have superseded the director's reports. See Idaho Code § 42-1417.

#### District Creation

6. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should create a water district to administer water rights within those portions of Administrative Basins 36 and 43 overlying the ESPA, as shown on the map appended hereto as Attachment A, to protect senior priority water rights.

7. The Director concludes that the water district should be formed on a permanent basis and be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

#### Administration of Affected Water Rights

8. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), pursuant to chapter 6, title 42, Idaho Code, is necessary for the protection of prior surface and ground water rights.

9. The Director concludes that compliance with the provisions of the interim stipulated Agreements will provide adequate replacement water to satisfy the need for any mitigation or curtailment of the rights to the use of ground water held by persons who are party to the Agreements or are represented by a party to the Agreements during the term of the stipulated Agreements.

10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

- a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);
- b. Measure and report the diversions under water rights;
- c. Enforce the provisions of stipulated agreements approved by the Director; and
- d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director.

11. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, models, and