IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

A & B IRRIGATION DISTRICT, Petitioner, vs. DAVID R. TUTHILL, JR., in his official capacity as director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondents.	)	Case No. CV-2007-665

MEMORANDUM DECISION RE: RESPONDENT'S MOTION TO DISMISS

On October 23, 2007 the Respondents' Motion to Dismiss came on regularly for hearing. Counsel Travis Thompson and Roger Ling appeared on behalf of the Petitioner and Counsel Phillip Rassier and Chris Bromley appeared on behalf of the Respondents.

PROCEDURAL AND FACTUAL BACKGROUND

Petitioner A & B owns the right to water right no. 36-2080 which allows it to divert 1100cfs through 177 wells from the Eastern Snake Plain Aquifer ("ESPA") to irrigate 62,604 acres. This right has a priority of 9/9/1948.

A & B asserts that in 1994 it was not receiving the water it was entitled to and on July 27, 1994 it filed a Petition for Delivery Call claiming that junior ground water pumpers were causing material injury and claiming a loss of 126 cfs (claiming that there were reduced diversions of 40 of its wells that impacted 21,000 acres). The petitioner sought to have the Idaho Department of Water Resources ("IDWR") administer the water in such a manner so that A & B could get the water it was entitled to and to designate the ESPA as a Ground Water Management Area in accordance with I.C. §42-233b.

On May 1, 1995 A & B, IDWR, and other participants entered into a stipulation. Pursuant to the stipulation, an Order was entered that in effect stayed further proceedings on A & B's Delivery Call with the understanding that (1) IDWR would develop a plan for management of the ESPA; (2) that no drought related emergency permits to divert water would be issued; (3) IDWR would propose rules for supplemental water rights; (4) that IDWR would seek to fully implement provisions of section 42-701 for the measurement and reporting of diversions of water in ESPA; (5) that the moratorium of water appropriations would remain in effect; (6) that IDWR would retain jurisdiction of the petition to review information of water supply; and (7) IDWR would study the impact of ground water use and the determination and designation of the ESPA as a ground water management area. It was further provided that "any party may file a Motion to Proceed" and request the stay be lifted.

On March 16, 2007 A & B filed with IDWR a Motion to Proceed and sought to have the Director lift the stay that was entered on May 1, 1995 and further requesting the Director to administer the water in the ESPA so as to provide A & B the ground water that it was entitled to under its ground water right.

When no formal action was taken by the Director on the Motion to Proceed, the Petitioner filed its Petition for Preemptory Writ of Mandate with the court on August 23, 2007. Based on the verified petition and the affidavit of Dan Temple this court issued its Alternative Writ of Mandate on August 28, 2007.

The Respondents filed their Motion to Dismiss and Brief in Support together with the Affidavit of David R. Tuthill, Jr. the Director of IDWR.

On September 25, 2007 a hearing was conducted on the Order to Show Cause and the Alternative Writ. The parties at that time were not prepared to address the Respondents' Motion to Dismiss due to its late filing; therefore, issues pertaining to the Alternative Writ that formed the basis of the motion to dismiss were not addressed at that time. The court did modify the Alternative Writ to compel the Director to respond to the Motion to Proceed filed by the Petitioner and to direct the Director to notify all of the parties or their representatives who had previously appeared that the stay on the A & B's Petition for Delivery Call had been lifted.

Further, a hearing has been scheduled and former Justice Gerald F. Schroeder has accepted the appointment as the independent hearing officer for purposes of the hearing scheduled for March 18, 2008. On October 19, 2007 the Director served on the parties to the A & B Delivery Call a "NOTICE OF MOTION TO PROCEED FILED BY A & B IRRIGATION DISTRICT; AND ORDER LIFTING STAY, SETTING HEARING SCHEDULE, AND ORDER APPOINTING HEARING OFFICER."

After oral argument on the Respondent's Motion to Dismiss, the respondent submitted another Affidavit from the Director which attached an Order from the appointed hearing officer dated October 26, 2007. The hearing officer former Chief Justice, Gerald F.Schroeder entered an order requesting, among other things, that the Department submit a report containing its

preliminary findings of fact by January 15, 2008. According to Mr. Schroeder's order, "the preliminary findings of fact are intended to provide the parties and the hearing officer with the Department's current understanding of the facts relevant to A & B's delivery call."

STANDARD

A. I.R.C.P. Rule 12(b)(6)-Motion to Dismiss.

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398, 987 P.2d 300, 310 (1999); *Rim View Trout Co. v. Dep't. of Water Resources*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a Rule 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. *Coghlan*, 133 Idaho at 398, 987 P.2d at 310; *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct. App. 1996). When reviewing an order of the district court dismissing a case pursuant to Rule 12(b)(6), the nonmoving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *Coghlan*, 133 Idaho at 398, 987 P.2d at 310. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims. *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995). "...If it appears beyond doubt that (the plaintiff) could prove no set of facts upon which relief could be granted." *Bissett v. State*, 111 Idaho 865, 868, 727 P.2d 1293, 1296 (Ct. App. 1986). It is clear that the court may not consider evidence or facts outside the scope of the pleadings when determining if the petition states a claim upon which relief may be granted. However, when the motion is presented under Rule 12(b)(6) and it is supported by evidence, such as affidavits, outside of the pleadings, the

motion may properly be treated as one for summary judgment to which the summary judgment standard would apply. *Storm v. Spaulding,* 137 Idaho 145, 44 P.3d 1200 (Ct. App. 2002). Lastly, "where one party moves for summary judgment and the other party is entitled to it, the court may grant summary judgment in favor of the non-moving party." *Juker v. American Livestock Ins. Co.*, 102 Idaho 644, 645, 637 P.2d 792, 793 (1981).

B. Mandamus Standard.

In *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) the Idaho Supreme Court again stated the standard for the issuance of a Writ of Mandate as follows:

> In *Idaho Falls Redev. Agency v. Countryman*, 118 Idaho 43, 794 P.2d 632 (1990), the Court recapitulated the requirements for the issuance of a writ of mandate:
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> 'In Utah Power & Light Co. v. Campbell, 108 Idaho 950, 953, 703 P.2d 714, 717 (1985), this Court stated that "[m]andamus will lie if the officer against whom the writ is brought has a 'clear legal duty' to perform the desired act, and if the act sought to be compelled is ministerial or executive in nature." Existence of an adequate remedy in the ordinary course of law, either legal or equitable in nature, will prevent issuance of a writ, and the party seeking the writ must prove that no such remedy exists. This Court has repeatedly held that mandamus is not a writ of right and the allowance or refusal to issue a writ of mandate is discretionary. Likewise, Idaho law requires that a writ must be issued in those cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.Id. at 44, 794 P.2d at 633 (citations omitted).'

The Court in *Musser* stated that the Director of IDWR pursuant to I.C.§ 42-602 has a clear legal duty to distribute water in accordance with the prior appropriation doctrine, "[A]lthough the details of the performance of the duty are left to the director's discretion,..." 125 Idaho at 395, 871 P.2d at 812.

In *Musser* the Director denied the senior water right holder's demand for delivery of water on the basis that it was not authorized to direct the watermaster to conjunctively administer ground and surface water within water district 36A without a formal hydrologic determination

that conjunctive management was appropriate. The trial court determined that the Director's failure to adopt rules to enable him to respond to the delivery call was a breach of his "mandatory, ministerial duty."

ANALYSIS

The respondents seek dismissal on the basis that the petitioner has failed to state a claim upon which relief may be granted. I.R.C.P. 12(b)(6). The motion to dismiss is supported by two affidavits of the Director and the affidavit of Allen Wylie, a hydrologist employed by the Department. The Director asserts that the Department has at all times been in compliance with the requirements of the May 1995 Order that stayed the proceedings on the Delivery Call of the petitioner and that the Director has set a timely hearing on the Delivery Call of the petitioner given its complexity.

The petitioner asserts that they have no adequate remedy at law and that the Director has breached his "mandatory, ministerial duty." The petitioner's opposition to the motion to dismiss is supported by the affidavit of Charles E. Brockway, a licensed engineer.

This court would note parenthetically that there are presently pending before the Director surface water calls made by the Surface Water Coalition, Blue Lakes Trout Farm, and Clear Springs. On March 22, 2005 Blue Lakes filed a Petition for Delivery Call and Clear Springs filed a similar Petition on May 2, 2005. The Director issued without a hearing a response to the Blue Lakes Delivery Call on May 19, 2005 and a response to the Clear Springs Delivery Call on July 8, 2005. In each of the delivery calls the senior surface rights seek to curtail junior ground water rights.

A. Administration of Ground Water Rights.

Idaho Code § 42-602 authorizes and compels the Director to control and distribute water in a water district in accordance with the prior appropriation doctrine, and § 42-603 authorizes the Director to adopt rules and regulations for the distribution of water, including ground water, "as shall be necessary to carry out the laws in accordance with the priorities of the rights of users thereof."

The Director and IDWR have promulgated administrative rules which govern the administration of surface and ground water rights. These are known as the Conjunctive Management Rules (CMR) which are set forth in IDAPA 37.03.11.

There can be no dispute that the ESPA has been recognized by IDWR as a common ground water supply. CMR 50.

The petitioner herein is the holder of a ground water right and is claiming material injury to its water right by junior ground water rights.

Rule 20 of the CMR's provides in relevant part as follows:

> **01. Distribution Of Water Among The Holders Of Senior And Junior-Priority Rights**. These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply. (10-7-94)
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> **04. Delivery Calls**. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface **or ground water right** against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued. (10-7-94)

07. Sequence Of Actions For Responding To Delivery Calls. Rule 30 provides procedures for responding to delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district or designated a ground water management area. **Rule 40 provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created.** Rule 41 provides procedures for responding to delivery calls within areas that have been designated as ground water management areas. Rule 50 designates specific known areas having a common ground water supply within the state. (10-7-94)

The petitioner is located within the boundaries of Water District No. 130 and therefore Rule 40 of the CMR's governs the procedures for responding to a delivery call. Rule 40 provides in relevant part as follows:

040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (Rule 40).

01. Responding To A Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall: (10-7-94)

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or (10-7-94)

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director. (10-7-94)

03. Reasonable Exercise Of Rights. In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b., the Director shall consider whether the petitioner making the delivery

call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste. (10-7-94)

Rule 42 provides for the manner in which the Director is to make a determination of material injury, as follows:

042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (Rule 42)

01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following: (10-7-94)

a. The amount of water available in the source from which the water right is diverted. (10-7-94)

b. The effort or expense of the holder of the water right to divert water from the source. (10-7-94)

c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply. (10-7-94)

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. (10-7-94)

e. The amount of water being diverted and used compared to the water rights. (10-7-94)

f. The existence of water measuring and recording devices. (10-7-94)

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill

> of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system. (10-7-94)
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> h. The 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. (10-7-94)
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> 02. Delivery Call For Curtailment Of Pumping. The holder of a senior-priority surface 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. (10-7-94)

As set forth above, the petitioner herein in May of 1995 agreed to stay the proceedings relative to its delivery call petition, and it was not until March 2007 that petitioner sought to have the stay lifted. This mandamus proceeding came about when the respondent did not take action on the petitioner's Motion to Proceed. The stay has been lifted by reason of the modified alternative writ of this court.

It was just prior to petitioner's Motion to Proceed that the Idaho Supreme Court issued its decision in *American Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007) dealing with a challenge by the surface water users as to the constitutionality of the CMR's. In that action the surface water users sought to challenge the manner and process by which the Director responded to a delivery call against junior ground water pumpers. The surface water users asserted that the process was contrary to the law of this State and the State Constitution. The Supreme Court upheld the constitutionality of the CMR's, and regarding the process of responding to Delivery calls stated in part as follows:

> Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water. While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment

> of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.
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> Absent additional evidence that the Director abused his discretion or that the delay in the hearing schedule was unreasonable despite the self-imposed extensions (both of which are appropriate to an "as applied" challenge on a fully developed administrative record), there is no basis for setting aside the CM Rules based upon the lack of specifically articulated time standards. 145 Idaho at 875.

Further, the court in *American Falls Res. Dist. No. 2* stated that "Given the nature of the decisions which must be made in determining how to respond to a delivery call there must be some exercise of discretion by the Director." 145 Idaho at 875.

"The director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water." *Musser v. Higginson,* 125 Idaho 392, 395, 871 P.2d 809, 812 (1994); *DeRousse v. Higginson,* 95 Idaho 173, 505 P.2d 321 (1973); *Nettleton v. Higginson,* 98 Idaho 87, 558 P.2d 1048 (1977). It is therefore clear that it is the duty of the director to administer water in a duly established water district pursuant to the provisions of section 42-602 et seq. and that pursuant to section 42-603 the legislature authorized the Director to adopt rules and regulations for the distribution and administration of such water. Section 42-602 expressly provides that the provisions of Chapter 6, Title 42 "shall apply only to distribution of water within a water district." Based on the holding in *American Falls Res. Dist. No. 2,* it is not an abuse of discretion for the Director to hold hearings, if necessary, to develop the facts and information and to develop an appropriate administrative record for the administration of ground water rights.

The A & B delivery call has been pending since 1994. It is reasonable to assume that IDWR over the last 13 years has developed information that would be relevant to the

determination of material injury, if any. In fact, the Department in May 2005 issued the "A & B Scenario."

The Director has not yet responded to the A & B Delivery Call, as it did in the surface water users' Delivery Calls. The Director has not made any determination of material injury in accordance with Rule 42. The Director asserts that the A & B Delivery Call is "complex"; however, there is no showing that it is more complex than that of the Delivery Call of the surface users, and yet the Director was capable of responding to the surface users' Delivery Call within 60 days of the filing of the petition. There is no showing in the Director's two affidavits that he lacks any necessary information for the purpose of allowing him to make a material injury determination in accordance with Rule 42 and to respond to the Delivery Call in accordance with Rule 40. Mr. Schroeder's October 26, 2007 order requesting a report of preliminary findings also leads to the conclusion that the Director has all the necessary information in front of him with respect to a determination of material injury.

The court in *American Falls Res. Dist. No. 2*, in interpreting the CMR's, stated:

> The Rules simply require that a senior who is suffering injury file a delivery call with the Director and allege that the senior is suffering material injury. This is presumably to make the Director aware that such injury is occurring and to give substance to the complaint. Additionally, the Rules ask that the petitioner include all available information to support the call in order to assist the Director in his fact-finding. Nowhere do the Rules state that the senior must prove material injury before the Director will make such a finding. To the contrary, this Court must presume that the Director will act in accordance with Idaho law, as he is directed to do under CM Rule 20.02.

Both parties to this proceeding rely heavily for their respective positions on the Supreme Court's discussion of "timeliness" in *American Falls Res. Dist. No. 2*. In denying the surface users' constitutional challenge on the issue of a timely response to a Delivery Call, the court made it clear that "Absent additional evidence that the Director abused his discretion or that the

delay in the hearing schedule was unreasonable despite the self-imposed extensions (both of which are appropriate to an "as applied" challenge on a fully developed administrative record), there is no basis for setting aside the CM Rules based upon the lack of specifically articulated time standards." 143 Idaho at 878, 154 P.3d at 446. In *American Falls Res. Dist. No. 2* there was evidence before the court that there had been "timely relief in response to the Delivery Call."

As to the Delivery Call of A&B there is no evidence that they have been provided any type of relief. The Director has not made any effort to respond to the Delivery Call as he has done with respect to the Delivery Calls of the surface users, except to appoint a hearing officer and to schedule a hearing on March 18, 2008. The presumption exists that A & B is suffering material injury, and there is no evidence to the contrary. It appears that the hearing officer is of the opinion that the Director is capable of making preliminary findings of fact relative to the determination that must be made in accordance with Rule 42. If the Director can make preliminary findings of fact as to the issue of material injury as required under Rule 42, he should be able to make a preliminary finding of material injury, if any, and any such preliminary finding or order would then be the subject of the contested hearing on March 18, 2008. While the Director has set a hearing on the Delivery Call for March 18, 2008 before an independent hearing officer, it is unlikely that a final order, for purposes of judicial review, would be issued before the beginning of the 2008 irrigation season.

Agency action is "capricious if it is done without a rational basis" and "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *American Lung Assoc., etc. v. State, Dept. of Agriculture,* 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006). When this Court reviews an alleged abuse of discretion by the Director, this Court must determine whether the Director: (1) correctly perceived the issue as one of

discretion; (2) acted within the boundaries of such discretion and consistently with the legal standards applicable to the specific choices before him; and (3) reached his decision by an exercise of reason. *Crown Point Development, Inc. v. City of Sun Valley,* 144 Idaho 72, 76, 156 P.3d 573, 577.

The Director has correctly perceived the issue as one of discretion. However, the Director has not acted within the boundaries of such discretion. The Department has been gathering information for approximately 13 years regarding the A& B Delivery Call. The Department has even prepared a modeling scenario for A & B that would suggest that "80% of the drawdown experienced at A & B is the result of pumping outside of A & B." The fact that this is a senior ground water call to junior ground water users cannot make the Director's determination any more complex than those of the senior surface users. In *Musser* the Director refused to respond to a Delivery Call because he had not adopted rules to conjunctively manage surface and ground water rights, and the court concluded that the Director had abused his discretion and that his refusal was arbitrary and capricious. The Director has not shown by way of admissible evidence that he does not possess the information necessary for the purpose of making a preliminary determination of material injury, if any, under Rule 42, other then to say that the issue is complex.

For the reasons set forth above this court determines that the Director has abused his discretion in failing to make a preliminary determination as to the issue of material injury. There is no just cause as to why the director (as he did with respect to the Delivery Calls of the surface users) cannot make a determination of material injury in accordance with Rule 42 of the CM Rules and upon such a determination respond to the Delivery Call of A & B in accordance Rule 20.02 and 40 of the CM Rules, consistent with I.C. § 42-602. For these reasons Summary

Judgment should be entered in favor of the Petitioner. *Juker v. American Livestock Ins. Co.*, 102 Idaho 644, 645, 637 P.2d 792, 793 (1981).

CONCLUSION AND ORDER

The court having determined that there is no adequate remedy at law available to the petitioners and that the Director of the Department of Water Resources has abused his discretion in failing to make a determination as to the issue of material injury and/or to respond to the Delivery Call of A & B Irrigation District and good cause appearing:

1. The Respondent's Motion to Dismiss is DENIED.

2. The Petitioner's request for a Preemptive Writ of Mandate is GRANTED. The Director is hereby Ordered to make a determination of material injury, if any, in accordance with Rule 42 of the Conjunctive Management Rules on or before January 15, 2008. In the event that the Director makes a finding of material injury in accordance with Rule 42, the Director shall respond to the A & B Delivery Call in accordance with Rules 20.02 and 40 of the Conjunctive Management Rules consistent with I.C. § 42-602.

3. In the event that any party elects to contest any finding of material injury or the Director's Response to the A & B Delivery Call, such contest may be the subject of the hearing presently scheduled by the Director for March 18, 2008.

IT IS SO ORDERED.

DATED this 29 day of October, 2007.

John K. Butler, District Judge

CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 31 day of October, 2007, a true and correct copy of the foregoing MEMORANDUM DECISION RE: RESPONDENT'S MOTION TO DISMISS was mailed, postage paid, and/or hand-delivered to the following persons:

Roger D. Ling
Attorney at Law
P.O. Box 396
Rupert, Idaho 83350

John K. Simpson
Travis L. Thompson
Paul L. Arrington
Barker, Rosholt & Simpson, LLP
P.O. Box 485
Twin Falls, Idaho 83303-0485

Lawrence G. Wasden
Attorney General

Clive J. Strong
Deputy Attorney General
Chief, Natural Resources Division

Phillip J. Rassier
John W. Homan
Chris M. Bromley
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0098

Deputy Clerk