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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

In the Matter of DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427 **Blue Lakes Delivery Call**	**IGWA'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION**
In the Matter of DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148 **Clear Springs/Snake River Farm Delivery Call**	

COMES NOW Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively "IGWA"), through counsel, and submit this brief in support of IGWA's *Motion for Partial Reconsideration* filed September 4, 2007.

INTRODUCTION

On August 10, 2007, IGWA served upon Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs") identical *Notice[s] of Taking Rule 30(b)(6) Deposition Duces Tecum*. On August 22, 2007, Blue Lakes and Clear Springs (collectively the "Spring Users") filed a *Joint Motion for Protective Order* seeking to suppress the discovery of certain information and documents identified in IGWA's deposition notices. IGWA filed a *Motion to Compel Discovery Responses* on August 24, 2007. A hearing was held on the motions August 28, 2007, after which the Hearing Officer ordered, *inter alia*, that IGWA be precluded from discovering any information predating the partial decree of the Spring Users' water rights in the Snake River Basin Adjudication (SRBA) which occurred April 10, 2000.[1]

IGWA's *Motion for Partial Reconsideration* respectfully requests that the Hearing Officer reconsider and permit the discovery of "pre-decree" information. This supporting memorandum explains the absolute necessity and relevance of pre-decree information to the Idaho Department of Water Resources' (IDWR) administration of hydraulically connected surface and ground water rights.

ARGUMENT

The Director's 2005 Orders[2] rely extensively upon analysis of historic flow records and other data from as far back as 1902. (See Findings of Fact No. 5, 6, 17, 37, 50, 54, 55, 59, 60, and Attachment A to the 2005 Orders.) Consequently, the Hearing Officer's Order prohibiting the discovery of information predating the Spring Users' partial decrees in the SRBA entirely

[1] Specifically, the Hearing Officer ordered the suppression of pre-decree information relating to (a) the use and development of the Spring Users' water rights, (b) court decrees and decisions involving the Spring Users' water rights, and (c) water quantity, quality, and temperature of the Spring Users' water rights.

[2] As used herein, "Director" means the Director of the Idaho Department of Water Resources, and "2005 Orders" means the Director's Orders of May 19, 2005, and July 8, 2005.

impairs and prejudices the parties' ability to challenge the Director's Findings and Conclusions in the 2005 Orders which are the very subject matter of this administrative proceeding

The Hearing Officer ordered the suppression of pre-decree information on the purported basis that such information is not within the scope of IDWR's administration of water rights and not likely to lead to the discovery of relevant information As demonstrated below, however, information predating the Spring Users' partial decrees in the SRBA has always been and continues to be both relevant and essential to IDWR's proper administration of water between competing hydraulically connected surface and ground water rights under the Rules for Conjunctive Management of Surface and Ground Water Resources (the "Conjunctive Management Rules") (IDAPA 37 03.11 et seq.) It is obvious that the Spring Users fabricated the artificial "date of decree limitation" in an effort to suppress a large amount of information critical to IDWR's proper administration of water rights in accordance with Idaho law. The Hearing Officer's suppression of pre-decree information appears to be the result of the Spring Users' deliberate conflation of IDWR's role in the Snake River Basin Adjudication (SRBA) with IDWR's very different role in administering water between competing right-holders.

IDWR's role in the SRBA is limited to the recommendation of certain specific elements of each water right as set forth in Idaho Code §42-1411(2)(a-j). The analysis is specific to the individual water right and focuses on the maximum amount of water used under the right at any time Intra- and inter-year variations in water use and availability are not part of the recommendation Nor are interrelationships between competing water rights part of the SRBA. The resulting partial decrees define the maximum parameters of authorized water use under each water right, but do not create in the right holder an entitlement to command that the maximum authorized diversion under the decree or "paper right" be made available at all times To do so

would provide the right holder with a water supply greater in quantity and greater in certainty than ever existed historically. It would be patently unlawful to require junior ground water users to supply senior surface water users with a greater water right than naturally exists.

The Director's 2005 Orders clearly distinguish between "authorized diversion rates" (i.e decreed amounts) and actual quantities available which are subject to year-to-year and seasonal fluctuations. The Director's *Order of May 19, 2005* ("*Clear Springs Order*"), and *Order of July 8, 2005* ("*Blue Lakes Order*") congruently state:

> "Springs discharging in the Thousand Springs area do not discharge at a constant rate or at a rate that progressively increases or decreases from year-to-year. While there are overall increases or decreases in the discharge from individual springs between the years (inter-year variations), there are also pronounced within-year or intra-year variations in discharge."

(*Clear Springs Order* at Finding of Fact 50; *Blue Lakes Order* at Finding of Fact 45.) The Orders further recognize that "authorized rates of diversion" are the maximum rates at which water can be diverted, and that the Spring Users are not entitled to supplies that are enhanced beyond the natural conditions that existed at the time the rights were established:

> The rates of diversion authorized pursuant to Water Right Nos. . . . (Snake River Farm), and . . . (Crystal Springs Farm) . . . <u>are not quantity entitlements that are guaranteed to be available to Clear Springs at all times. Rather, the authorized rates of diversion are the maximum rates at which water can be diverted under these rights, respectively, when such quantities of water are physically available and the rights are in priority. . . . Clear Springs is not entitled to water supplies at its Snake River Farm or at its Crystal Springs farms that are enhanced beyond the conditions that existed at the time such rights were established; i.e., Clear Springs cannot call for the curtailment of junior-priority ground water rights simply because seasonally the discharge from springs is less than the authorized rates of diversion</u> for Clear Springs right unless such seasonal variations are caused by depletions resulting from diversion and use of water under such junior-priority rights."

(*Clear Springs Order* at Finding of Fact 55 (emphasis added); (see also *Blue Lakes Order* at Finding of Fact 50)). Thus, the Spring Users cannot call for the curtailment of junior-priority

ground water rights simply because seasonal spring discharges are less than the Spring Users' decreed maximum authorized rates of diversion.

IDWR's administrative role in responding to a "delivery call" by a senior surface water user seeking to curtail a junior ground water user necessarily transcends the decreed elements of a water right, including the date of decree. For purposes of curtailing ground water users under the Conjunctive Management Rules, IDWR considers actual water use and availability, including intra- and inter-year variations, among numerous other circumstantial factors not defined in a water right's license or decree. The SRBA District Court acknowledged in Basin-Wide Issue 5 that "the partial decree identifies the source of the rights in general terms .... [but] does not contain information regarding how each particular water right on the source physically affects one another for purposes of curtailing junior rights in the event of a delivery call." *In Re SRBA, Subcase No. 91-00005, Order on Cross Motions for Summary Judgment, Order on Motion to Strike Affidavits* at 19 (July 2, 2001); attached hereto as Exhbit A. In that proceeding IDWR submitted the *Third Affidavit of Karl J. Dreher* ("*Dreher Third Aff.*"; attached hereto as Exhibit B), then-Director of IDWR, explaining that, "[i]n order to accomplish conjunctive administration in accordance with the prior appropriation doctrine, detailed data regarding location, operation, priority, water usage, and hydrogeologic characteristics of the aquifer system are essential, not solely the priority and quantity of each diversion." (*Dreher Third Aff.* at 2-3, ¶5.) While a decree is the starting point for IDWR's administration of water rights, a decree is certainly not the ending point.

The Idaho Supreme Court recently acknowledged the reality that "water rights adjudications neither address, nor answer, the questions presented in delivery calls." *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources* ("*AFRD2*"), __ Idaho __, 154 P.3d 433,

447 (2007). The Court affirmed the Director's authority to consider factors not part of the decreed elements of a water right when administering hydraulically connected surface and ground water rights:

> Because of concepts like beneficial use, waste, reasonable means of diversion and full economic development, the [Director's water administration] decisions are highly fact-driven and sometimes have unintended or unfortunate consequences. . . . The district court noted that the CM Rules incorporate concepts to be considered in responding to a delivery call such as: material injury; reasonableness of the senior water right diversion; whether a senior water right can be satisfied using an alternate points and/or means of diversion; full economic development; compelling a surface user to convert his point of diversion to a ground water source; and reasonableness of use.

Id. at 440. The Court concluded that, "[c]learly, even as acknowledged by the District Court, the Director may consider factors such as those listed above in water rights administration." *Id.* at 447.[3] The Court further confirmed that the Director's actions in "responding to delivery calls, as conducted pursuant to the CM rules, do not constitute a re-adjudication." *Id.* at 447-448.[4]

Director Dreher distinguished between IDWR's role in recommending water rights in the SRBA and its role in administering water rights in the event of a delivery call:

> This administrative oversight is the responsibility of the Director of the Department of Water Resources, and it is clearly distinguishable from the judicial function of decreeing the elements of the water right, one of which is the maximum amount of water that may be diverted. In administering water rights, the Department of Water Resources cannot simply look at the quantity element of a water right as decreed. The quantity element sets the maximum limit for water

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[3] The Court's acknowledgement that "a partial decree is not conclusive as to any post-adjudication circumstances or unauthorized changes in its elements" reflects the potential for a water right's decreed elements to be modified by subsequent water use practices. *AFRD2*, 154 P.3d at 447. That statement should not be misread as a limitation on the Director's administrative authority to determine material injury, reasonableness of the diversion, reasonableness of use, full economic development, hydraulic interrelationships, and other factors necessary to IDWR's proper administration of water rights in response to a delivery call.

[4] The Court cited an earlier decision that likewise held that IDWR's evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication as reasonableness is not a decreed element of a water right. See *Schodde v. Twin Falls Land & Water Company*, 224 U.S. 107, 32 S.Ct. 470 (1912).

> distribution under the right. The Department must have the ability to determine what quantity of water is reasonably necessary for the authorized beneficial use, without undue waste, at the time when water is distributed to a particular right. Among the factors necessary to consider are the extent of beneficial use being made of the water, the need for water to satisfy that beneficial use during a particular time period, and whether a delivery call will be futile.

(*Dreher Third Aff.* at 7, ¶¶14-15.) Clear Lakes, *et al*, filed a cross motion for summary judgment in Basin-Wide Issue 5 proposing that conjunctive management be limited to the consideration of priority alone. The SRBA Court flatly rejected that concept, instead granting IDWR the "maximum degree of flexibility in administration." (*Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits* at 32 (July 2, 2001).) The parties ultimately stipulated to language for the conjunctive management provision, now referred to as the "interconnected sources" general provision, stating that water rights, unless specifically listed as being separate, shall be "administered as connected sources in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law." (*Settlement Agreement* at 3.)

At the very heart of the present administrative proceeding is whether the Director's 2005 Orders for the administration of hydraulically connected surface and ground water rights under the Conjunctive Management Rules are, in fact, "in accordance with the prior appropriation doctrine as established by Idaho law." There is no question that the Conjunctive Management rules are, on their face as a whole, constitutional. *American Falls Reservoir District No. 2 v Idaho Dep't of Water Resources* The unanswered question is whether the Director's 2005 Orders are in accordance with the prior appropriation doctrine and Idaho law. That question cannot be answered unless the parties have opportunity to challenge the Director's Findings and Conclusions and application of the Conjunctive Management Rules supporting the Orders. And the parties are incapable of fairly challenging the Directors' Findings and Conclusions without

access to the historical data upon which they are based—much of which predates the partial decree of the Spring Users' water rights in the SRBA.

Proper resolution of this administrative proceeding demands that the parties have access to the historical data bearing on the Director's application of Conjunctive Management Rules, which at the very least includes the following information:

> **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:
>
> a. The amount of water available and the source from which the water right is diverted.
>
> b. The effort or expense of the holder of the water right to divert water from the source.
>
> c. Whether the exercise of junior-priority water rights individually or collectively affects the quantity and timing of when water is available 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.
>
> d. . . .
>
> e. The amount of water being diverted and used compared to the water rights.
>
> f. . . .
>
> g. . . .
>
> h. The extent to which the requirements of the senior-priority surface water right could be met using alternative 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.

0.43MITIGATION PLANS (RULE 43).

03. Factors to be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available to the surface or ground water source at such time and place as necessary to satisfy the diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

c. . . . A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply."

IDAPA 37.03.11 (emphasis added).

The very underpinning of the Director's 2005 Orders rely extensively upon analysis of historic flow records, including annual and seasonal fluctuations. (See Findings of Fact No. 5, 6, 17, 37, 50, 54, 55, 59, 60, and Attachment C.) The reformulated ESPA ground water model results are "determined from stream gauges together with other stream flow measurements, for the period May 1, 1980 to April 30, 2002." (Finding of Fact 17.) Additionally, Attachment A to the 2005 Orders reflects "Average Annual Spring Discharges to the Snake River in Thousand Springs Area" the period 1902 through 2004, and, further, demonstrates spring flow discharges increasing from the turn of the century until the early 1950s as a result of flood irrigation practices, then gradually diminishing thereafter as a result of the conversion to sprinkler irrigation and winter storage after the Federal Reservoir Storage System was constructed. Such

information is germane to the Director's 2005 Orders and this administrative proceeding irrespective of whatever date the Spring Users' water rights were partially decreed in the SRBA.

CONCLUSION

The "pre-decree exclusion" is entirely artificial and disingenuously promulgated by the Spring Users in an effort to suppress a large amount of relevant information clearly necessary for IDWR's proper administration of water between competing right-holders. The suppression of pre-decree information impairs and prejudices the parties' ability to challenge the Findings and Conclusions supporting the Directors' 2005 Orders. Further, the exclusion prematurely determines that the factual basis of historic flow and other records relied upon extensively by the Director is irrelevant, effectively throwing out the Orders themselves. For the foregoing reasons, IGWA respectfully requests that the Hearing Officer reconsider and permit the discovery of information predating the partial decree of the Spring Users' water rights in the SRBA in order to afford the junior-priority water users the ability to carry their burden to show that the delivery calls are invalid or futile.

RESPECTFULLY SUBMITTED.

DATED this 6th day of September, 2007

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By _____
CANDICE M. McHUGH
Attorneys for IGWA

EXHIBIT A

In Re SRBA, Subcase No. 91-00005
Order on Cross Motions for Summary Judgment;
Order on Motion to Strike Affidavits **(July 2, 2001)**

EXHIBIT B

Third Affidavit of Karl J. Dreher

EXHIBIT A

In Re SRBA, Subcase No. 91-00005
Order on Cross Motions for Summary Judgment;
Order on Motion to Strike Affidavits **(July 2, 2001)**

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	)	**Subcase 91-00005** **(Basin-Wide Issue 5)**
Case No. 39576	)	**ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT; ORDER ON MOTION TO STRIKE AFFIDAVITS**

I.
SUMMARY

This order denies the respective motions for summary judgment and orders the following: 1) Consistent with the Idaho Supreme Court's directive on remand the matter needs to proceed to evidentiary hearing; 2) Based on the evidence now in the record, some general provision on conjunctive management may be factually "necessary" to define or efficiently administer water rights; 3) The general provisions proposed by IDWR cannot be decreed as recommended; 4) The modifications to the general provisions proposed by the cross-motion also cannot be decreed; 5) Additional facts are required for purposes of decreeing a general provision on conjunctive management; and 6) The Court sets forth how it intends to proceed following the evidentiary hearing.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on the cross-motions for summary judgment was held in open court on April 17, 2001. At the close of the hearing, the Court took the matter under advisement. The Court notified the parties that the motion to strike would be decided on the briefing. The parties were then given an additional 10 days, or until April 30, 2001, to file additional briefing on the motion to strike. Therefore, this matter is deemed fully submitted for decision the next business day, or May 2, 2001.

III.
PROCEDURAL BACKGROUND

Basin-Wide Issue 5 was designated by the SBRA Court in 1995. Former Presiding Judge Daniel C. Hurlbutt, Jr. framed Basin-Wide Issue 5 as whether various general provisions recommended by IDWR for each of the three test basins (Basins 34, 36, and 57) were necessary for the definition or the efficient administration of water rights in each of the test basins. ***Amended Order Designating Basin-Wide Issue 5*** (Dec. 21, 1995). Included in Basin-Wide Issue 5 were recommended general provisions on conjunctive management for each of the three test basins. At the time, each respective recommended general provision on conjunctive management was uniquely crafted for the specific basin to which it applied.

2. Judge Hurlbutt ultimately ruled *inter alia*, that the general provisions for conjunctive management were not "necessary" to either define or efficiently administer water rights. ***Memorandum Decision and Order Re: Basin-Wide Issue 5*** (April 26, 1996). On appeal, the Idaho Supreme Court reversed and remanded the matter to the SRBA District Court with the following directive:

> Here of course, the Director's proposed conjunctive management provisions were designed to address within the SRBA the ground water and surface water interconnections and impacts relating to three specific Basins. The general provisions proposed for each of the Basins were not identical, but were distinctively crafted evidently due to the unique characteristics of each of the individual reporting areas.
>
> We conclude that the order of the district court denying the inclusion of general provisions dealing with interconnection and conjunctive management of surface and ground water rights in Basins 34, 36 and 57 must be vacated and the matter remanded to the district court for the purpose of holding an evidentiary hearing to determine factually whether the proposed general provisions for each of those areas is necessary either to define or to efficiently administer the water rights decreed by the court in the adjudication process. Because each of the proposed general provisions regarding interconnection and conjunctive management in Basins 34, 36 and 57 is separate and distinct, each Basin's conjunctive management provision must be discretely considered in reaching the factual determination whether the respective general provision is necessary either to define or to more efficiently administer water rights in that particular Basin.

A & B Irrigation Dist. v. Idaho Conservation League, 131 Idaho 411, 422-23, 958 P.2d 568, 579 (1997), *vacated in part on reh'g.* (Apr. 22, 1998)(hereinafter "*A & B*").

> **We remand this proceeding to the SRBA district court for the purpose of holding an evidentiary hearing to determine whether the conjunctive management general provisions proposed for Basins 34, 36 and 57 are necessary to define or to administer water rights efficiently in any of those particular Basins.**

Id. at 425 (emphasis added).

Following remand, Judge Hurlbutt ordered IDWR to file Supplemental Director's Reports for each test basin including recommendations regarding the conjunctive management general provisions.[1] Subsequently, IDWR filed respective Supplemental Director's Reports, including recommendations on conjunctive management.[2] In each of the Supplemental Director's Reports, the previously proposed general provisions on conjunctive management were modified from the provisions originally before the Supreme Court in *A & B*. IDWR changed the recommended provisions to a standardized or "generic" format, which is the same for each test basin, and this same format is intended for the remainder of the sub-basins in SRBA. These changed provisions are the proposed general provisions on conjunctive management presently before the court.

On December 17, 2000, then Presiding Judge Barry Wood issued an order setting an initial evidentiary hearing on the objections to the conjunctive management general provision recommendations. The order required IDWR to pre-file testimony, addressing the following issues:

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1 ***Order Requesting Supplemental Director's Report from Idaho Department of Water Resources for Irrigation Season and Conjunctive Management General Provisions in Reporting Areas 1, 2 and 3*** (Dec. 9, 1998); and ***Amended Order Requesting Supplemental Director's Reports from Idaho Department of Water Resources for Irrigation Season and Conjunctive Management General Provision in Reporting Areas 1, 2 and 3*** (May 5, 1999).

2 *Supplemental Director's Report, Reporting Area 3, IDWR Basin 36, Regarding Revision of the Following Period of Use (for Irrigation Water Uses), Conjunctive Management General Provisions (Supplemental Director's Report)* (Aug. 2, 1999); *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of the Following Period of Use (for Irrigation Water Uses), Conjunctive Management General Provisions (Supplemental Director's Report)* (June 24, 1999); *and Supplemental Director's Report, Reporting Area2, IDWR Basin 57, Regarding Revision of the Following Period of Use (For Irrigation Water Uses) Conjunctive Management General Provisions (Supplemental Director's Report)* (July 26, 1999).

1) A precise definition of conjunctive management;
2) The basis for IDWR's generic recommendation for a general provision addressing conjunctive management;
3) The interplay between the sub-basin specific language and the general interconnection language, and;
4) An explanation of how the proposed general provision is tailored to provide specific exceptions for each sub-basin within the overall Snake River Basin.

Pursuant to the order, IDWR filed a Supplemental Director's Report responding to each issue raised. At the initial evidentiary hearing held February 24, 2000, the parties were given the opportunity to cross-examine a representative of IDWR on the content of the pre-filed testimony.

On May 26, 2000, Judge Wood issued a trial scheduling order, outlining how the court intended to approach the Supreme Court's directive on remand. The order also required the parties to participate in mediation. As a result of settlement efforts the trial schedule was stayed. On January 29, 2001, this court issued an order resetting the trial schedule.

On January 16, 2001, a scheduling conference was held wherein the parties represented to this Court that after the six months of settlement efforts, the parties once again needed the issues defined in order to effectively prepare for trial. Then, on January 19, 2001, the state of Idaho ("the State" or "Movants") filed a *Motion For Summary Judgment*, together with a supporting affidavit, moving the court to find that the proposed general provisions on conjunctive management are necessary to define the water rights in the SRBA and to efficiently administer water rights in the Snake River basin. Parties were given the opportunity to join in or oppose the motion. Clear Lakes Trout Company, et al. ("cross-movants" or "Trout Companies") filed a cross-motion for summary judgment in response, also asserting that a general provision on conjunctive management is necessary to define or efficiently administer water rights in the Snake River basin. However, the cross-movants argue IDWR's proposed language should be modified so as to protect existing water rights and filed proposed revisions to IDWR's recommended provisions.

Oral argument was held on the motions April 17, 2001.

IV.
ISSUES ON REMAND AND STANDARDS OF REVIEW

A. ISSUE ON REMAND.

In *A & B*, the Idaho Supreme Court remanded to this Court with the express directive to hold an evidentiary hearing to determine factually whether the proposed general provisions on conjunctive management in each of the three test basins are "necessary to define or to administer water rights efficiently in any of those particular basins." *Id.* at 425.

B. STANDARD OF REVIEW FOR THE INCLUSION OF A GENERAL PROVISION IN A PARTIAL DECREE.

Idaho Code § 42-1412(6) states in relevant part: "The decree shall also contain an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights." In *A & B*, the Idaho Supreme Court stated:

> A general provision is a provision that is included in a water right decree regarding the administration of water rights that applies generally to water rights, or is necessary for the efficient administration of the water rights decreed.
>
> . . . .
>
> Whether a general provision is "necessary" depends upon the specific general provision at issue and involves a question of fact, (defining the proposed general provision and the circumstances of its application), and a question of law, (determining whether the general provision facilitates the definition or efficient administration of water rights in a decree). A general provision is "necessary" if it is required to define the water right being decreed or to efficiently administer water rights in a water right decree.

Id. at 414.

"The factual question involves defining the proposed General Provision and the circumstances under which it is applied. The legal question involves whether the provision will facilitate the efficient administration of water rights in a decree." *State v. Nelson*, 131 Idaho 12, 15, 951 P.2d 943, 946 (1998).

C. STANDARD OF REVIEW FOR CROSS-MOTION FOR SUMMARY JUDGMENT.

Rule 56(c) of the Idaho Rules of Civil Procedure allows for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment

as a matter of law. In order to make that determination, a court must look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any. . . ." I.R.C.P. 56(c).

On cross-motions for summary judgment, the court "must examine each motion separately, reviewing the record and the reasonable inferences that can be drawn from it in favor of each party's opposition to the motions for summary judgment." *First Security Bank of Idaho v. Murphy,* 131 Idaho 787, 780, 964 P.2d 654, 657 (1998). Summary judgment is to be granted with caution, and if the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment motion will be denied. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991).

The party moving for summary judgment always has the burden of proving the absence of a material fact even though this burden may be met by circumstantial evidence. *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). Once the moving party has presented evidence and properly supported the motion for summary judgment, the nonmoving party must present evidence and must not rest on mere speculation. *Id.* The Idaho Rules of Civil Procedure provide:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

I.R.C.P. 56(e). If there are no material facts in dispute, the court may enter a judgment in favor of the party entitled to prevail as a matter of law. *Barlow's Inc. v. Bannock Cleaning Corp.,* 103 Idaho 310, 312, 647 P.2d 766, 768 (Ct. App. 1982)

On cross-motions for summary judgment, where both parties "rely on the same facts, issues, and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment." *Eastern Idaho Agricultural Credit Ass'n v. Neibaur,* 130 Idaho 623, 626, 944 P.2d 1386, 1389 (1997). "[W]here the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). However, where cross-motions for summary judgment are made

based upon different theories, the court should not consider the cross-motions to be a stipulation that there are no genuine issues of material fact. *Eastern Idaho Agricultural Credit Ass'n,* 130 Idaho at 626.

D. THE ISSUES IN THIS CASE CANNOT BE RESOLVED ENTIRELY ON SUMMARY JUDGMENT.

On May 26, 2000, then Presiding Judge, Barry Wood, issued a trial scheduling order for Basin-Wide Issue 5. ***Order Setting Trial Date, Final Pre-Trial Motions and Briefing Schedule for Basin-Wide Issue 5 (Conjunctive Management General Provisions) and Order for Alternative Dispute Resolution – I.R.C.P. 16,*** Subcase 91-00005 (May 26, 2000). The scheduling order defined the scope of the issues to be tried on conjunctive management and the manner in which the evidentiary hearings would proceed based on Judge Wood's interpretation of the Supreme Court's directive in *A & B*. This Court concurs with the reasoning and the procedural steps set forth in that scheduling order.

On remand in *A & B*, the Idaho Supreme Court directed the SRBA court to conduct an evidentiary hearing. Judge Wood previously conducted the first of what was intended to be a series of evidentiary hearings. IDWR pre-filed testimony explaining the basis for its recommendations and the parties were given the opportunity to cross-examine IDWR on the same. To date, the parties have not yet been given the opportunity to present their own evidence. Simply put, the "evidentiary hearing" has not been completed.

Recognizing that this Court has yet to fully comply with the directive of the Supreme Court, but at the same time acknowledging the need to narrow the scope of the issues, the Court instructed the parties in the scheduling order to consider I.R.C.P. 56(d) in responding to the motion. This Court also takes into account that until a final judgment (partial decree) has been entered, the parties are entitled to have a new sitting judge reconsider the rulings of a predecessor. *Farmers Nat'l Bank v. Shirey,* 126 Idaho 63, 878 P.2d 762 (1994). As a result, the Court permitted the cross-motions to proceed despite the Supreme Court's directive that an evidentiary hearing be held. Lastly, resolving the issue of conjunctive management is one of the major objectives of the SRBA. The ultimate decision will impact virtually every water user in the Snake River Basin. In all likelihood, review of this Court's decision will be sought whatever the result. Accordingly, at this stage of the proceedings, the

parties should have the opportunity to fully develop their factual record, albeit within the parameters set forth in this decision. In this regard, the Court's ruling on this motion will focus the issues to be ultimately litigated at the evidentiary hearing and allow the parties to prepare accordingly.

V.
THE MOTIONS TO STRIKE

Clear Lakes Trout Company, Pristine Springs, Inc., *et al.*, ("Trout Companies") have filed a *Motion to Strike All Affidavits Filed in Response to Trout Companies' Motion for Summary Judgment* and a *Motion in the Alternative to Strike Portions of the Affidavits of Karl Dreher Which Violate I.R.C.P. 56(e)*. The State has filed its own *State of Idaho's Motion to Strike Affidavits*. In addition, the State has filed the *State of Idaho's Response to Trout Companies' Motions Strike Affidavits*. Finally, the American Falls-Aberdeen Ground Water District and Bingham Ground Water District have filed their *American Falls-Aberdeen and Bingham Ground Water Districts' Response to Motions to Strike*.

Because the Court is not deciding this matter on summary judgment and is requiring that the matter proceed to an evidentiary hearing, the affidavits are not decisive in this case. However, for purposes of clarifying some misconceptions regarding the scope of these proceedings and the role of the Court, the issues need to be addressed.

A. THE TROUT COMPANIES' *MOTION TO STRIKE ALL AFFIDAVITS.*

In their *Motion to Strike All Affidavits Filed in Response to Trout Companies' Motion for Summary Judgment*, the Trout Companies argue that the affidavits filed by the State and the Idaho Ground Water Users Association in opposition to the *Trout Companies' Motion for Summary Judgment* are inadmissible as evidence under I.R.E. 401 and 701. The Trout Companies argument is premised on the their reasoning that because the Trout Companies' *Motion for Summary Judgment* was focused on the format or wording of the general provision (which they view as solely a question of law) and not the determination of whether the general provision is necessary (which they view as a question of fact), the testimony in the affidavits is irrelevant. Thus, the issue is whether the fashioning of the general provision, should one be determined to be necessary, is a process divorced from the facts precluding the need for the proffered affidavits.

The Idaho Rules of Evidence state: "All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible." I.R.E. 402. "Relevant Evidence" is that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. Rule 701 provides that:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

I.R.E. 701. However,

> If scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

I.R.E. 702.

Judge Wood, in the ***Order Setting Trial Date, Final Pre-Trial Conference, Discovery Deadlines, Pre-Trial Motions and Briefing Schedule for Basin-Wide Issue 5 (Conjunctive Management General Provisions) and Order for Alternative Dispute Resolution—I.R.C.P. 16*** (May 26, 2000), described the process the SRBA Court would take in complying with the Supreme Court's remand. Judge Wood wrote that: "The first inquiry is whether the proposed general provisions on conjunctive management are necessary to either define or to efficiently administer the water rights decreed by the court." *Id.* at 2. "If the factual determination is made that a general provision on conjunctive management is necessary, then the format or wording of the general provision should be determined." *Id.* at 3. Judge Wood recognized two primary concerns with the proposed general provisions: first, that the proposed wording was vague and would leave wide latitude for future interpretation; and second, that the proposed general provisions could be interpreted so as to incorporate by reference IDWR's administrative rules on conjunctive management. *Id.* at 3-4. Judge Wood went on to write that:

> In light of the foregoing concerns, in the event the Court determines that a general provision on conjunctive management is factually necessary, the Court perceives the next step in the process as formatting the general

> provision in manner so as to accomplish IDWR's purposes for recommending conjunctive management but at the same time dispel concerns that the selected wording for the general provision can be interpreted to diminish the scope of the water right. Although the Director's Report is afforded prima facie weight as to factual matters, the specific language used in the general provision in the Court's view is not afforded such weight. *State v. United States,* 128 Idaho 246, 256, 912 P.2d 614, 624 (1995) (presumption goes to **facts** set forth in Director's Report). Further, notwithstanding the Director's Report, the Court cannot order that vague or ambiguous provisions, or provisions that can be interpreted to alter existing Idaho law, be contained in the decree. The Court views this matter as an issue of law. If and when the Court arrives at this issue, the parties will have the opportunity to present legal argument on the issue. This issue is also within the scope of the evidentiary hearing.

Id. at 4 (emphasis in original).

This Court agrees with the Judge Wood's reasoning. However, the Court would point out that the drafting of a general provision is different from the interpretation of a general provision. In drafting a general provision, the Court would necessarily have to shape the language within the framework of the facts presented to the Court and the applicable law. As the State points out in its brief, the Court cannot determine the specifics of the general provision in a vacuum. Nevertheless, as Judge Wood pointed out, the ultimate question of whether a particular provision is vague, ambiguous, or contrary to existing law is an issue of law for this Court to decide.

The issues raised by the Trout Companies in their cross-motion is not only one of challenging a particular term or provision as being vague, ambiguous or contrary to law, but also deals with issues of the practical mechanics of administering water rights and the hydrologic interconnection of water sources in the Snake River basin. Accordingly, the Court finds that the proffered affidavits are relevant, and therefore, will deny the Trout Companies' *Motion to Strike All Affidavits Filed in Response to Trout Companies' Motion for Summary Judgment.*

B. THE TROUT COMPANIES' *MOTION IN THE ALTERNATIVE TO STRIKE PORTIONS OF THE AFFIDAVITS OF KARI DREHER WHICH VIOLATE I.R.C.P. 56(e).*

In this motion, the Trout Companies have objected to certain statements made in the

Affidavit of Karl Dreher,[3] specifically, to statements in paragraphs 6, 8, 12, 13, and 14. The Trout Companies' contend that the statements are not facts or opinions as to facts, but are legal opinions and conclusions.

This Court disagrees. The Court has reviewed the statements and finds the content to be factual and consist of circumstances affecting the efficient administration of water rights based on IDWR's historical administration of water rights.

C. THE TROUT COMPANIES' MOTION TO SUBMIT THEIR OWN AFFIDAVITS IN SUPPORT; THE *STATE OF IDAHO'S MOTION TO STRIKE AFFIDAVITS*.

In their *Motion to Strike All Affidavits Filed in Response to Trout Companies' Motion for Summary Judgment,* the Trout Companies move the Court to permit them to file additional affidavits in support of the their motion for summary judgment. In this regard, the State filed the *State of Idaho's Motion to Strike Affidavits* (Apr. 10, 2001). The State argues that the *Second Sisco Affidavit* and the *Anderson Affidavit* are untimely and that under I.R.C.P. 56 does not permit the filing of affidavits with a reply brief. The State also argues that even if the Court's *Order Modifying Briefing Schedule* modified the time frame, and the Court permits the filing of the affidavits with a reply brief, that the affidavits are still untimely as they were not mailed until the deadline, but should have been mailed at least three days earlier (citing to *Ponderosa Paint Manufacturing, Inc. v. Yack,* 125 Idaho 310, 316, 870 P.2d 663, 669 (Ct. App. 1994).

The Court denies both motions. Because the matter is proceeding to an evidentiary hearing, the Trout Companies *et al.* will have the opportunity to present additional evidence. In the same regard, because the matter is proceeding to evidentiary hearing, the Court finds no prejudice to the State.

VI.
DISCUSSION

A. INTRODUCTION

The proposed general provisions recommended by IDWR for the "conjunctive management" of hydraulically connected ground and surface water sources for each of the three test basins (Basins 34, 36 & 57) are as follows:

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[3] Mr. Dreher is the Director of the Idaho Department of Water Resources.

> The following water rights from the following sources of water in Basin ____ shall be administered separately from all other water rights in Basin ____.
>
> Water Right No. Source
>
> The following water rights from the following sources of water in Basin ____ shall be administered separately from all other water rights in the Snake River Basin:
>
> Water Right No. Source
>
> All water rights within Basin ___ are from connected sources of water in the Snake River Basin and **shall be administered conjunctively**.[4]

(emphasis added).

Defining exactly what is meant or intended by IDWR's use of the term "conjunctively" gives rise to many of the issues surrounding the recommended general provisions. The issue is raised that the use of the term can reasonably be interpreted to incorporate IDWR's administrative rules for conjunctive management into the partial decree. The Idaho Supreme Court has already ruled that the administrative rules "do not appear to deal with the rights on the basis of 'prior appropriation' in the event of a call as required." *A & B* at 422, 958 P.2d at 579 (citing *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994)). The Supreme Court has also stated that administrative rules are "subject to amendment or repeal by the IDWR" thereby compromising the certainty and finality of a partial decree. *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). The argument is also made that the term "conjunctively" can be interpreted to provide for some other system for administering water rights that is inconsistent with the constitutionally protected prior appropriation doctrine. In this regard, the cross-movants have proposed the following modified provisions:

> Unless specified below, all water rights within Basin _____ are from connected sources of water in the Snake River Basin and **shall be *administered in accordance with priority***.

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[4] Again, its important to acknowledge that these recommended provisions are not the same general provisions that were before the Supreme Court in *A & B*. The format and language is the same for each test basin and IDWR intends to follow the same format for the remainder of the sub-basins throughout the Snake River basin.

The following water rights from the following sources of water in Basin _____ shall be administered separately from all other water rights in the Snake River Basin:

Water Right No.	Source

The following water rights from the following sources of water in Basin _____ shall be administered separately from all other water rights in Basin _____:

Water Right No.	Source

The following water rights in Basin _____ shall be administered separately from each other:

Water Right No.	Source

(emphasis added)

IDWR defines conjunctive management in its administrative rules as the "[l]egal and hydrological integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having common ground water supply." I.D.A.P.A. 37.03.11.03. In the December 30, 1999, *Supplemental Director's Repor,t* IDWR elaborated on this definition:

> In practical terms, conjunctive management is the combined administration of water rights from "hydraulically connected" surface and ground water sources recognizing the relative priorities of the rights, the physical characteristics and significance of source connectedness, and the differences in impacts occurring from surface water diversion versus impacts from ground water diversions. "Hydraulically connected" surface water and ground water sources simply means that within these sources, a portion of the surface water can become ground water or vice versa. These definitions provide distributing water to rights from connected surfaces and ground water sources in accordance with prior appropriation doctrine while recognizing the delay and distributed effects of ground water diversions on hydraulically connected surface water sources.

Supplemental Director's Report, Basin-Wide Issue 5 (Conjunctive Management General Provisions) (Dec. 30, 1999).

In general terms, the concept of conjunctive management pertains to the combined or integrated administration of hydraulically connected ground and surface water sources pursuant to a single priority schedule. Although Idaho law recognizes a legal

interrelationship between hydraulically connected ground and surface water sources, historically the two sources have not been administered together. *See, e.g., Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994) (holding IDWR had a duty to administer senior surface spring right even if required curtailing junior groundwater right); I.C. § 42-226 *et seq.* (groundwater management statutes which take into consideration senior surface rights). However, the implementation of a comprehensive administrative program as between ground and surface sources raises a variety of factual, legal, and policy issues that are not present when simply administering surface rights. These issues have not been addressed in Idaho.

Factually, an exact understanding of the physical interrelationships between all the various ground and surface rights is not available based on existing technologies. To complicate matters, existing relationships vary with climatic conditions and are subject to change as a result of geological activity. Legally, the principles defining the prior appropriation doctrine developed primarily out of the appropriation and administration of surface rights. These same principles raise entirely new issues when applied to interrelated ground and surface water sources. For example, the administrative closure of a junior well and the immediacy of the effect on a senior surface right raise issues regarding the scope of the respective rights. This lag time also exacerbates the ever-present conflict between protecting constitutional protected water rights and the policy of promoting the most productive use of water within the state.

B. SUMMARY OF ARGUMENTS RAISED BY THE PARTIES

Four primary arguments were made either in support of, or in opposition to, the cross-motions. The movants (the state of Idaho and those parties joining in the motion for summary judgment)[5] assert that general provisions on conjunctive management are necessary to define or efficiently administer water rights. The movants argue that the general provisions should be decreed as recommended. The cross-movants and those joining in the cross-motion also agree that general provisions on conjunctive management are necessary but that the language proposed by IDWR needs to be modified so as to ensure the rights are

[5] The Court acknowledges that some parties only joined in the State's motion in part.

administered in accordance with the prior appropriation doctrine. As previously indicated, the cross-movants have submitted proposed revisions to IDWR's recommended language.

Most parties are in agreement that general provisions on conjunctive management are necessary, the dispute is on the content of the provisions. However, the argument was also advanced that a general provision on conjunctive management is not "necessary" because IDWR already possesses the authority to conjunctively administer ground and surface water. This argument relies on the Supreme Court's reasoning in *A & B* regarding the necessity of general provisions for incidental stock watering. Lastly, the argument was raised that the determination of necessity is simply a question of fact and cannot be resolved on summary judgment. Each position is addressed below in the context of the existing facts in the record, which the Court views as significant in focusing the issues to be tried, and applicable legal parameters.

C. FACTS FOR PURPOSES OF NARROWING SCOPE OF ISSUES

For purposes of summary judgment there are certain general facts supported by the record that the Court views as significant for purposes of narrowing the scope of the issues to be tried as well as ruling on the cross-motions. *See Keesee v. Fetzek*, 111 Idaho 360, 361, 723 P.2d 904, 905 (Ct. App. 1986) (findings of fact and conclusions of law are encouraged in summary judgment motions). In addition to the affidavits filed in conjunction with the cross-motions, IDWR previously filed the respective *Supplemental Director's Reports* in each of the three test basins recommending the general provisions on conjunctive management. Each of the recommendations carries *prima facie* weight as to factual matters. *State v. United States*, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995) (presumption goes to facts set forth in Director's Report). IDWR also pre-filed the direct testimony of Karl Dreher, which addressed each of the issues raised by the court. The parties were then given the opportunity to cross-examine David Tuthill, the Adjudication Bureau Chief for IDWR, relative to the pre-filed testimony on behalf of Karl Dreher. Many of the facts presented in the foregoing are not only uncontroverted, but all parties are in general agreement as to such facts. These facts include the following:

1. There exists some degree of hydraulic connection between most sources of water in the Snake River Basin.

2. The degree or significance of the connectivity impacts the degree to which one source affects another. The greater the degree of connectivity between ground and surface sources, the greater the potential for the diversion of groundwater to impact connected surface sources, and vice versa.

3. The timing of the impact between ground and surface sources is different than as between surface sources. Between surface sources the rate of impact of a particular diversion or curtailment of a diversion on a hydraulically connected source is more readily ascertainable and with greater certainty than as between ground and surface sources. As between ground and surface sources, the rate of impact between sources varies significantly, not only between rights but also as a result of existing conditions. The rate of impact can be from a matter of days to a matter of years and cannot readily be determined with certainty.

4. Factors that affect connectivity and timing include geological conditions, water table level, seasonal climatic conditions and seismic activity.

5. Presently, IDWR does not possess the hydrologic or geological data, nor does the technology presently exist at this time, to make precise determinations quantifying the interrelationships between all water rights under all conditions. In certain sub-basins, IDWR can determine in a general sense how groundwater diversions from a certain area will impact connected surface sources and how surface diversions will affect groundwater flows. However, IDWR does not possess the data necessary to determine how each individual water right specifically impacts every other water right.

6. The degree of connectivity between sources is not a static concept. Assuming IDWR could ascertain the significance or degree of connectivity between all sources, the relationship can vary depending on existing climatic conditions. Geological conditions are also subject to change in the future as a result of seismic activity. The result of the 1983 earthquake in the Challis, Idaho area, illustrates such an example.

7. As technology progresses and IDWR conducts more fieldwork, collects more data, and performs more studies, IDWR will develop a better understanding of the hydraulic relationship between the various sources. Data collection and technology development is an evolving and on-going process.

8. As between surface sources, a partial decree references the source of the water right. The partial decree typically does not provide which junior rights will be curtailed or the order of the curtailment to satisfy a particular water right. These determinations are made by IDWR (based on its existing knowledge of the interrelationship of the various rights) in discharging its duty to administer the water rights consistent with Idaho law. Existing law provides recourse for water right holders contending unlawful aggrievance by IDWR's administrative actions.

9. Historically, the administration of ground and surface water rights, which are hydraulically connected has not been integrated.

10. Finally, IDWR's recommended general provisions carry *prima facie* weight as to factual content.

D. APPLICABLE LAW, LEGAL PARAMETERS AND CONCLUSIONS.

1. Scope of the Supreme Court's Directive on Remand:

The Supreme Court's directive on remand in *A & B* does not require that this Court quantify the degree of relationship between specific water rights. A significant source of confusion, not only for the parties but also for the Court is the interpretation of the Supreme Court's directive to this Court on remand in *A & B*. The problem arises as a result of the following language in *A & B* wherein the Supreme Court stated:

> Conjunctive Management combines legal and hydrologic aspects of the diversion and use of water under water rights arising both from surface and groundwater sources. **Proper management in this system requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.**

A & B, 131 Idaho at 421, 958 P.2d at 578 (emphasis added). The Supreme Court then goes on to cite to the 1994 Interim Legislative Report, which states:

> To conjunctively manage these water sources a good understanding of both the hydrological relationship and legal relationship between ground and surface rights is necessary.
>
> Although these issues may need to be resolved by general administrative provisions in the adjudication decrees, they generally relate to two classic

> elements of a water right—its source and priority. The SRBA should determine the ultimate source of the ground and surface water rights being adjudicated. This legal determination must be made in the SRBA.
>
> . . . .
>
> If the SRBA proceeds and these issues are not addressed, a major objective for the adjudication will not have been served.

Id. at 422, 958 P.2d at 579 (quoting, 1994 INTERIM LEGISLATIVE COMMITTEE REPORT ON THE SNAKE RIVER BASIN ADJUDICATION pp.36-37). Finally, the Supreme Court states: "We remand this proceeding to the SRBA district court for the purpose of holding an evidentiary hearing to determine whether the conjunctive management general provisions proposed for Basin 34, 36 and 57 are necessary to define or administer water rights efficiently in any of those particular basins." *A & B* 131 Idaho at 424, 958 P.2d at 581. As a result of this language there has been disagreement among the parties regarding the scope of the issues that the Court is required to address on remand relative to the issue of conjunctive management.

The SRBA is presently in the process of decreeing the relative priority dates of all claimed surface and groundwater rights. The Court is also in the process of decreeing the source of each water right with regard to whether a particular water right has a surface or groundwater source. Thus, these two issues raised in *A & B* are already being addressed. Also, in furtherance of resolving the issue of integrating the administration of ground and surface water into a single priority schedule within these proceedings, the Court can also determine factually which ground and surface rights share a common source within a particular sub-basin and relative to the entire Snake River basin, irrespective of the degree of the connectivity. At present, all water sources within the Snake River basin, unless otherwise recommended by IDWR are presumed to be from a common source. Parties seeking to demonstrate that their particular water right does not share a common source should have the opportunity at a future point in these proceedings to demonstrate by a preponderance of the evidence that their particular water right does not share a common source (e.g., perched aquifer etc.). *See A & B*, 131 Idaho at 421-22. The Court can also consider and take into account how certain rights have been historically administered, including those rights that have been administered pursuant to prior decrees. *Idaho Conservation League*, 131 Idaho 334, 955 P.2d at 1113.

Despite the disagreement regarding the scope of the Supreme Court's directive, the scope of these proceedings should not include a factual determination of the specific interrelationships or the degree of connectivity between specific water rights (i.e. which particular junior water rights will be curtailed in the event of a delivery call by a senior). Factually, the Court could not make findings as to the exact relationships. As indicated by IDWR, the technology and the data do not presently exist for making such determinations. Even if the technology and data did exist the task of making such factual determinations would be monumental in terms of scope. Lastly, the specific interrelationships are dynamic as opposed to static. Therefore, any factual determinations made by the Court would be subject to change depending on climatic conditions and future geological activity.

Legally, the Court also does not need to adjudicate the specific interrelationships between water rights. IDWR is charged with the duty of administering water rights in accordance with the prior appropriation doctrine and determines specific interrelationships based on information not necessarily contained in the partial decree. For example, as between surface rights, the partial decree identifies the source of the rights in general terms. The partial decree identifies the particular stream source from which the water rights are diverted. The partial decree need not contain information regarding how each particular water right on the source physically affects one another for purposes of curtailing junior rights in the event of a delivery call. Rather, IDWR makes this determination based on its knowledge and data regarding how the water rights are physically interrelated. Mechanisms are available for water right holders in disagreement with IDWR's administrative actions to challenge and seek review of the same. This same legal reasoning should apply as between ground and surface sources, and therefore, a determination of the specific physical interrelationships between all water rights need not be made in the SRBA. This ruling is also consistent with the May 26, 2000, scheduling order previously issued by Judge Wood.

2. THE "NECESSITY" STANDARD

Another issue addressed by the parties concerns the appropriate standard for determining whether a general provision is "necessary" to define or efficiently administer water rights. The argument is raised that based on the Supreme Court's reasoning in *A & B*

regarding a general provision on incidental stockwater, that general provisions on conjunctive management are not necessary to either define or efficiently administer water rights. Whether a general provision is necessary can be separated into two issues, a jurisdictional or constitutional issue and a factual issue. The jurisdictional or constitutional issue focuses on whether or not the inclusion of an administrative provision in a general provision, which authorizes IDWR to administer water and for which IDWR already possesses the requisite administrative authority, constitutes an impermissible delegation of authority by this Court. *See, e.g., State v. Idaho Conservation League,* 131 Idaho 329, 333, 955 P.2d 1108, 1112 (1998) (holding no impermissible delegation); *State v. United States,* 128 Idaho 246, 912 P.2d 614 (1995) (upholding constitutionality of I.C. § 42-1412(6)); *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931) (upholding constitutionality of administrative provision in decree). The factual issue as stated in *A & B* is simply a factual determination as to whether the proposed general provision is necessary to define or efficiently administer a water right. Although the jurisdictional issue was raised in the course of these proceedings, it is the opinion of this Court that the Idaho Supreme Court has previously decided the constitutional or jurisdictional issue. The only issue now before this Court on remand is the factual issue. *See, e.g., North Snake Ground Water District' (NSGWD's) Response to Trout Companies' Cross-Motion For Summary Judgment* (IDWR already has statutory authority to implement conjunctive management). Furthermore, the Supreme Court's analysis on general provisions in *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998) ("*Nelson*") issued subsequent to *A & B,* in large part answers the factual determination now before the Court.

In *A & B*, the Idaho Supreme Court upheld Judge Hurlbutt's finding that a general provision on incidental stock water was not necessary to define or efficiently administer water rights in the SRBA. The Supreme Court discussed that because stock watering is included as a beneficial use pursuant to I.C. §§ 42-111, 42-113, and 42-114 and because IDWR possesses the authority to define incidental stock watering regulations for the administration of a water right, that a general provision on incidental stock watering was not necessary. *A & B* at 415, 958 P.2d at 572. The argument is now made by analogy that because Idaho's groundwater management statutes, I.C. § 42-226 *et seq.*, provide for the management of groundwater taking into account the impact on senior surface rights, and because IDWR has promulgated administrative rules that define conjunctive management,

that general provisions on conjunctive management are also not necessary. This argument misinterprets the Supreme Court's ruling on incidental stockwater in *A & B* and is inconsistent with the Supreme Court's subsequent ruling in *Nelson*.

In *A & B*, the Idaho Supreme Court upheld Judge Hurlbutt's ruling that a general provision on incidental stockwater was not necessary to define or efficiently administer a water right. However, contrary to the argument now before the Court, Judge Hurlbutt's ruling was not based on an impermissible delegation of authority by the Court where existing statutes and administrative rules on incidental stockwater were already in existence. Judge Hurlbutt ruled that the Court could not legally imply a purpose of use for stockwater via a general provision. "[T]o find that an irrigation right included stock water as a purpose of use, the court would have to ignore well-established and fundamental principles of water law by decreeing an implied purpose of use." ***Memorandum Decision and Order Re: Basin-Wide Issue 5*** (April 26, 1996) at 8. As a result of Judge Hurbutt's ruling and affirmation by the Supreme Court, incidental stockwater, where applicable, is now expressly included with irrigation as a purpose of use in the partial decree.

The jurisdictional argument on necessity is also inconsistent with the Supreme Court's reasoning in *Nelson*. In *Nelson*, the Supreme Court specifically reasoned that because IDWR had the power to issue rules and regulations regarding the administration of water rights, and because rules and regulations are subject to amendment or repeal, that including general provisions in a decree "will provide finality to water rights, and avoid the possibility that the rules and regulations could be changed at the sole discretion of the Director of the IDWR." *Nelson,* 131 Idaho at 12, 951 P.2d at 947.

This Court has the authority to include administrative provisions in a partial decree or general provision without exceeding its jurisdictional boundaries. Idaho Code § 42-1412(6) expressly states that: "The decree shall also contain an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights." In *State v. United Sates* (Basin-Wide Issues 2 & 3), 128 Idaho 246, 912 P.2d 614 (1995), the Idaho Supreme Court upheld the constitutionality of the exact provision based on the same constitutional challenge. The Idaho Supreme Court ruled that: "It is within the constitutional authority of the court to include in its decrees 'such general provisions necessary for the definition of the rights or for

the efficient administration of the water rights.'" *Id.* at 262, 912 P.2d at 630 (quoting I.C. § 42-1412(6)). The Idaho Supreme Court as part of its analysis, quoted language from *Silkey v. Tiegs*, 51 Idaho 344, 5 P. 1049 (1931), which relied on a prior U.S. Supreme Court decision where the U.S. Supreme Court upheld the authority of a court to put an administrative provision in a water right decree where there was an "absence of legislative action of the subject, and of the necessity which manifestly existed for supervising the use of the stream . . . ." *State v. United States* (Basin-Wide Issues 2 & 3), 128 Idaho at 262, 912 P.2d at 630 (quoting *Silkey* at 358, 5 P.2d at 1055; *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U.S. 371, 385 (1910)). Although this particular language gives rise to the confusion with respect to the issue now before the Court, this Court does not interpret the Idaho Supreme Court's decision upholding the constitutionality of I.C. § 42-1412(6) to be strictly limited to the situation where the legislature has failed to address the subject sought to be addressed by the inclusion of an administrative provision. The Court arrives at this conclusion for several reasons. In *State v. Idaho Conservation League,* 131 Idaho 329, 955 P.2d 1108 (1998), the Idaho Supreme Court reiterated that "the requirement that the district court include in its decree those provisions necessary for the executive to administer the rights decreed is not an impermissible delegation." *Id.* at 333, 955 P.2d at 1112.

Next, the legislature has conferred broad authority on IDWR to issue "procedural and operative rules and regulations as may be necessary for the operation of its business." I.C. § 42-1734 (19)(1996); *Nelson* at 16, 951 P.2d at 947. IDWR presumably could promulgate regulations relative to all aspects of carrying out its administrative duties. Therefore, to conclude that administrative provisions can only be included in a decree where the legislature has not acted on a particular subject, the Court would again have to find that I.C. § 42-1412(6) is *per se* unconstitutional in direct contravention of the Idaho Supreme Court's prior ruling.

Even assuming for the sake of argument that this Court cannot include administrative provisions relative to subjects already acted on by the legislature; the legislature has not fully acted in this matter with respect to Idaho's groundwater management statutes. Idaho's groundwater management statutes, I.C. § 42-226 *et seq.*, do not apply to water rights with priorities earlier than 1951. Thus, the legislature has not acted in this area as to all water rights. *See, e.g., Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994)

(groundwater statutes do not apply to priorities prior to enactment). Even though IDWR's rules on conjunctive management would apply to pre-1951 ground water rights, in *Nelson* the Idaho Supreme Court expressly stated that because administrative rules and regulations are subject to change, including general provisions in a partial decree is necessary because it provides the finality that is essential in a partial decree. *Nelson,* 131 Idaho at 16, 951 P.2d at 947.

Lastly, the legal standard for the inclusion of a general provision as to administration is the "**efficient** administration" of water rights. Implicit in this standard is the acknowledgment that IDWR already possesses the authority to administer water rights. Thus, the administrative provisions contained in the decree are not necessarily conferring upon IDWR additional administrative authority. Rather, the provisions serve more of a notice or explanatory function to water right holders regarding how their water right will be administered as opposed to specifically delegating authority to IDWR. In *Idaho Conservation League*, the Supreme Court specifically held that a general provision based on historic practices "assures efficient administration because it avoids controversy among the water right holders by clearly notifying them of the mechanism for administering water in the Reynolds Creek Basin." *Idaho Conservation League* at 334-35, 955 P.2d at 1113-14. IDWR has indicated that one of the impediments to efficiently administering ground and surface water together is the potential for controversy, including legal action, every time a water right is affected by IDWR's administration of ground and surface water together. *See, e.g., Musser*. As between surface rights, the reason for IDWR's administrative conduct is more readily apparent. Water users can observe water levels and anticipate if and when their right will be affected. The reason for IDWR's administrative conduct may not be as apparent when carrying out its administrative duties as between ground and surface sources. To the extent the potential for controversy can be eliminated through a general provision each time IDWR takes or declines to take administrative action related to the combined management of ground and surface water, efficient administration is promoted. The Idaho Supreme Court has already acknowledged in *Idaho Conservation League*, that notifying water right holders as to how their rights will be administered in order to avoid future controversy is consistent with the efficient administration of a water right and can be a justification for a general provision. *Idaho Conservation League* at 334-35, 955 P.2d at 1113-14. This Court does not

interpret this reasoning to be limited to notification of historic practices. The goal is to put water users on notice to avoid future controversy.

This Court acknowledges that IDWR is already required to administer water rights in accordance with Idaho law, and as such, every legal principle on Idaho water law need not be included in a partial decree to put water users on notice as to how their respective rights will be administered. However, conjunctive management is not the typical administrative duty. Historically ground and surface water have not been managed together and the implementation of such an administrative plan potentially affects all water rights in the Snake River basin. Thus the potential for future controversy is almost certain. Because of the attendant complexities, the reasoning behind IDWR's administrative actions may not be as readily apparent as in the situation of the administration of surface rights only. The Idaho Supreme Court and the Idaho Legislature have both acknowledged that the resolution of the conjunctive management issue is one of the most important objectives of the SRBA. Therefore, to the extent certain legal principles may need to be included in a general provision on conjunctive management to avoid future controversy, and at the same time prevent the unintended modification of Idaho water law doctrine, some legal principles may need to be included in a general provision. However, this is a factual determination of necessity, not an issue of jurisdiction.

In sum, the issue of whether this Court has the jurisdiction to decree a general provision on conjunctive management has already been decided. The issue is factually whether or not a general provision on conjunctive management is necessary to define or efficiently administer a water right.

3. TO THE EXTENT MANAGEMENT OF GROUND AND SURFACE SOURCES IS TO BE INTEGRATED, FACTUALLY SOME GENERAL PROVISION MAY BE NECESSARY.

Although parties will have the opportunity to present evidence and argument to controvert this preliminary finding at the evidentiary hearing, based on the present state of the record, the Idaho Supreme Court's holdings in *Musser, Nelson*, and *Idaho Conservation League*, and for the other reasons set forth below, lacking further evidence at this time, the Court concludes that some general provision on conjunctive management may be necessary to both define and efficiently administer water rights in the Snake River basin.

The starting point for this Court's reasoning is the recognition in Idaho that the prior appropriation doctrine applies as between hydraulically connected ground and surface water right sources. To the extent ground and surface sources are hydraulically connected, the water rights are treated legally as if from the same source irrespective of the fact that one water right is a surface diversion and the other diversion is from a well. A junior groundwater user is *not per se* insulated from a senior surface call simply because the junior right is diverting from a well. As a result of this recognized legal relationship, ground and surface rights must be regulated and administered by IDWR in conjunction with one another so as to give proper effect to vested priorities. This was illustrated in *Musser*, where a writ of mandamus against IDWR for its failure to administer ground and surface water accordingly, was upheld by the Supreme Court.

In furtherance of this administrative duty, IDWR promulgated rules and regulations for purposes of implementing the integrated management of ground and surface sources. *See,* I.D.A.P.A. 37.03.11, *et seq.* In *Nelson*, which was issued after the decision in *A & B*, Judge Hurlbutt previously ruled that certain recommended general provisions for Basin 34 were not necessary because the same provisions were included in IDWR's promulgated rules and regulations.[6] The Supreme Court reversed and reasoned:

> [T]he IDWR has the power to issue 'rules and regulations as may be necessary for the conduct of its business.' These rules and regulations are subject to amendment or repeal by the IDWR. Additionally, the IDWR's Director is in charge of distributing water from all natural water resources or supervising the distribution. Including these General Provisions in a decree will provide finality to water rights, and avoid the possibility that the rules and regulations could be changed at the sole discretion of the Director of IDWR.
>
> Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property.

Nelson, 131 Idaho at 16.

IDWR has promulgated rules and regulations on conjunctive management. Consequently, the identical concerns regarding administrative rules and regulations raised by

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[6] *One of the general provisions* at issue dealt specifically with identifying the rights within Basin 34 that would be administered separately from other rights. This is part of the recommended general provision that is at issue now.

the Supreme Court in *Nelson*, are now present in the instant case.[7] Furthermore, in *A & B*, the Idaho Supreme Court commented on the administrative rules adopted by IDWR. "The Rules adopted by IDWR are primarily directed toward an instance when a 'call' is made by a senior right holder, **and do not appear to deal with the rights on the basis of 'prior appropriation' in the event of a call as required**." *A & B* at 422, 958 P.2d at 579 (emphasis added). Therefore, to the extent IDWR has in effect administrative rules and regulations on conjunctive management, some general provision on conjunctive management appears to be necessary to satisfy the concerns raised by the Supreme Court in *Nelson* if for nothing more than to assure that conjunctive management does not alter the prior appropriation doctrine.

In addition to the administrative rules, IDWR has also recommended general provisions on conjunctive management. In general, the stated objectives for the recommended general provisions are to provide IDWR with the flexibility needed to administer ground and surface rights as a result of the complexities associated with the integrated management of ground and surface water sources in the Snake River basin and to alert water right owners that their rights will be administered accordingly. The necessity for the general provisions to accomplish the objective sought is accorded *prima facie* weight at least as to factual content. *State v. United States* (Basin-Wide Issues 2 & 3), 128 Idaho 246, 256, 912 P.2d 614, 624 (1995) (holding presumption goes to factual matters.). The factual necessity of having a general provision to alert water right owners as to how their water right will be administered in an effort to avoid future is supported by existing law. *Idaho Conservation League* at 335, 955 P.2d at 1114. Whether or not the recommended provisions as worded facilitate the objective or raise other issues is a separate legal issue. *Nelson* at 15, 951 P.2d at 946. Most parties to Basin-Wide Issue 5, including the movants and cross-movants, are in agreement that a general provision on conjunctive management is necessary. To date, no factual evidence has been presented to the contrary. Most of the parties' disagreement goes to the specific language used in the recommended provisions and the

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[7] One argument made is that the administrative rules and the related general provisions at issue in Basin 34 were based on historical practices. In this Court's view, whether the general provision is based on historical practice or actual hydraulic connection, the Supreme Court's reasoning regarding certainty in a decree applies in either situation.

arguably various interpretations to which the recommended provisions are subject.[8] Therefore, at this stage of the proceeding, at least to the factual necessity of a general provision on conjunctive management, IDWR's recommendation should be accorded *prima facie* weight.

The argument was raised that factually IDWR already has the mechanism for integrating the management of ground and surface water. This argument is the counter-part to the jurisdictional argument. The argument relies on Idaho's groundwater management statutes, I.C. § 42-226, *et seq*. Specifically, the argument points to I.C. § 42-237a, which provides in relevant part as follows:

> In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district . . . .

I.C. § 42-237a(g). The statutes then establish a procedure for the determination of adverse claims asserted by adversely affected senior ground or surface water rights. *See, e.g.*, I.C. § 42-237b.

This Court disagrees that the groundwater management statutes eliminate the need for a general provision on conjunctive management. First, the groundwater management statutes do not apply to water rights prior to their enactment in 1951. *Musser*, 125 Idaho at 396, 871 P.2d at 813 (statutes do not affect rights to the use of groundwater acquired before enactment of the statute). Second, the groundwater management statutes do not accomplish IDWR's objective of alerting water right holders how their respective rights will be administered for purposes of avoiding future controversy. Third, the groundwater management statutes do not resolve the issue regarding IDWR's administrative rules on conjunctive management and the need for finality in a partial decree as expressed in *Nelson*. Lastly, the failure to include or oversimplify any general provision on conjunctive management, even if the general provision does little more than recite existing law, will from a practical matter leave the issue unresolved and subject to litigation in the future in a forum

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[8] The only other position advanced regarded the legal argument relative to the Court's jurisdiction to decree an administrative general provision. That issue has already been addressed.

outside of the SRBA. The legislature and the Supreme Court have already acknowledged that one of the main objectives of the SRBA is to resolve the legal relationship between ground and surface water. It is the present opinion of this Court, the only way to memorialize and give effect to the ultimate resolution of the issue may be to reduce the resolution into a general provision.

4. IDWR's Recommended Provisions Cannot be Decreed as Recommended As A Matter of Law.

Although the Court preliminarily concludes that some general provision on conjunctive management is factually necessary, the provisions as recommended by IDWR raise some obvious issues of law. The Court does not take issue with the sections of the recommended general provisions identifying those water rights intended to be administered separately from other sources within a particular sub-basin or from the other rights in the entire Snake River basin. These provisions essentially further define the source element for purposes of expanding administration to include connected groundwater. In the partial decrees that have been issued by the SRBA Court, the source element is specifically stated for surface rights, but for groundwater rights the source element simply indicates "groundwater." The identification of connected and non-connected sources provides the starting point for IDWR to administer rights and puts water right holders on notice as to which source their water right shares in common for purposes of administration. The determination as to the general connectivity of water rights is a factual recommendation made by IDWR and is accorded *prima facie* weight. In the SRBA, there also exists a presumption that all water in the Snake River basin is hydraulically connected unless proven otherwise by a preponderance of the evidence. *See, A & B,* 131 Idaho at 422-23, 958 P.2d at 579-80. Parties seeking to overcome the general presumption in the SRBA or the presumption created by IDWR's recommendation have the burden to object and present evidence to overcome the presumption.

The legal issues of concern to the Court pertain to the language "shall be administered conjunctively." The term "conjunctively" is not specifically defined in the general provision. A significant part of these proceedings has been devoted to ascertaining exactly what is meant or intended by the use of the term "conjunctively." In this case, the Court would unequivocally be creating an ambiguity by including the undefined term in the

general provision. Even if the parties were now in agreement as to the meaning of the term without including more specifics in the general provision, the potential for litigation in the future over the use of the term is virtually certain. The SRBA Court already expends a considerable amount of effort interpreting the meaning and application of prior existing decrees.[9] The legislature has also enacted I.C. § 42-1427 to address the problem of claims based on prior ambiguous decrees. At the very least, one of the goals of the Court is to avoid the issuance of ambiguous decrees so that the same issues do not have to be re-litigated in the future. The inclusion of an ambiguous term in a partial decree also clearly compromises the finality and certainty of the decree as enunciated by the Supreme Court in *Nelson*.

More importantly, to the extent that one must refer to IDWR's administrative rules on conjunctive management to ascertain what is meant by the use of the term "conjunctively," or the use of the term can be interpreted to incorporate IDWR's current administrative rules into the general provision, the very issue of their transitory nature raised by the Supreme Court in *Nelson* will not have been remedied. As expressed by the Supreme Court, because rules and regulations are subject to amendment and repeal, there is no finality in the partial decree. Furthermore, the Supreme Court has already indicated that IDWR's administrative rules do not deal with the rights on the basis of 'prior appropriation' in the event of a call as required. *A & B* at 422, 958 P.2d at 579. IDWR's explanation of the use of the term "conjunctively" indicates a broader connotation than simply stating that water will be administered as if from a common source. In other words, the use of the term "conjunctively" is not simply a word chosen as a synonym for "together" or "integrated," etc. The term is intended as a term of art, which incorporates a certain amount of process, methodology and legal principle. To the extent the Court decrees the term "conjunctively" in the general provision without further clarification or definition, it could be interpreted that the Court has decreed that the rights be administered in some other manner than in accordance with the prior appropriation doctrine. The undefined term, and ultimately the

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[9] For example, in Basin 36, the Court spent a considerable amount of effort interpreting what the "other purposes" language contained in the *New International* Decree meant. ***Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Adjudicative Facts; Order of Recommitment with Instructions to Special Master*** (Subcases 36-00003A *et al.*) (Nov. 23, 1999). In 1934 when the decree was issued all parties were probably in agreement as to what was intended by the use of the term. Today, nobody agrees on the meaning, and the Court must use canons of interpretation in order rule on the matter.

water right, would be then be subject to IDWR's present interpretation of the term. IDWR could interpret the term to be consistent with whatever administrative action it was engaged in at the particular time. The Supreme Court has already ruled that IDWR's rules on conjunctive management do not deal with rights on the basis of prior appropriation in the event of a call. *A & B* at 422, 958 P.2d at 579. Any general provision that could be interpreted to permit the administration of water rights other than in accordance with the prior appropriation doctrine could be argued at some future date to be an unconstitutional taking or diminishment of a vested water right. At a minimum, inserting an undefined term such as "conjunctively" in a general provision creates too much uncertainty in the decree and leaves too much latitude for "mischief."

5. The Court Cannot Decree the Language Proposed By The Cross-Movants.

The cross-movants propose that the language "shall be administered conjunctively" be replaced with the language "shall be administered according to priority." The modification was proposed in an attempt to protect existing rights out of concern that IDWR's proposed language can be interpreted to modify the prior appropriation doctrine. However, the language proposed by the cross-movants is not an entirely accurate statement of the law. The prior appropriation doctrine as developed in Idaho does not require that water rights sharing a given source be administered according to strict priority. The prior appropriation doctrine also recognizes various principles that protect junior water rights which should be incorporated into the administration of water rights. For example, the concept of "futile call" prevents the curtailment of a junior right on the same source if curtailment would not provide water to the senior in sufficient quantity to apply to beneficial use. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P2d 1220, 1223 (1976); citing *Albion – Idaho Land Co v. NAF Irrigation Co* , 97 F. 2d 439, 444 (10th cir. 1938); *Neil v. Hyde*, 32 Idaho 576, 586, 186 P. 710 (1920); *Jackson v. Cowan*, 33 Idaho 525, 528, 196 P. 216 (1921). The relative location of the points of diversion on a given source gives rise to this concept. The diverting of water from one source and substituting with water from another source also does not violate the prior appropriation doctrine provided seniors and intervening juniors are not injured. *See, e.g., Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918). A water right holder also

does not possess an absolute right to the means or method of diversion. A senior can be compelled to change the means or method of diversion provided that the expense of the alteration must be borne by the subsequent appropriators. *Parker v. Wallentine,* 103 Idaho 506, 513, 650 P.2d 648, 655 (1982). A water user also does not have the right to waste water irrespective of priority date. *State v. Hagerman Water Right Owners,* 130 Idaho 727, 947 P.2d 400. To the extent these concepts are integrated into a comprehensive plan for administering ground and surface water and result in water being administered in a manner differing from strict priority, the prior appropriation doctrine is not necessarily violated. The proposed language could be interpreted to preclude such concepts from being integrated into an administrative plan.

However, this Court agrees with the cross-movants that a general provision on conjunctive management needs to include language that clarifies that the prior appropriation doctrine is not subordinated to the concept of conjunctive management. Implicit in the efficient administration of water rights is the recognition that a senior should not be required to resort to making a delivery call against competing junior rights in times of shortage in order to have the senior right satisfied. The Idaho Supreme Court made this pointedly clear in the *Musser* case. Instead, IDWR should look to the respective decrees on a common source and if necessary, curtail junior rights or make other delivery adjustments to satisfy rights in a manner that is not inconsistent with the prior appropriation doctrine. Mechanisms such as the delivery call are nonetheless in place should a water right holder dispute the administrative action or lack thereof. However, coordinating this same concept to the integrated management of ground and surface sources adds an entirely new dimension to the administration of water rights and introduces new issues that are not easily resolved via historical prior appropriation doctrine principles. The delayed impact of junior well diversions on senior surface rights raises questions regarding the point in time that a junior right can be curtailed. Since curtailment of a junior right may not have an immediate affect on senior rights, legal and factual issues arise concerning how far in advance of an anticipated impact on the senior surface right a curtailment can occur. Further, any anticipated future impact also would need to factor into account the likelihood of intervening climatic conditions such as a wet year. Also, given the present lack of knowledge, data and technology, concerning the interrelation of water rights it is questionable whether or not it

can it be determined with any degree of certainty which specific junior rights should be curtailed. Nonetheless, the integrated management of ground and surface sources will require that IDWR make these determinations. These determinations in all likelihood will be perceived to test the boundaries of the scope of the prior appropriation doctrine. It is not a new concept that an inherent conflict exists between the administration of rights according to the prior appropriation doctrine and the policy of promoting maximum and rational economic development of the water resources of the state. *See, e.g.*, I.C. § 42-226 (while 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) This conflict is greatly exacerbated when applied as between ground and surface sources. Nonetheless, the prior appropriation doctrine is constitutionally protected. It is in this regard that a general provision on conjunctive management needs to also include express provisions aimed towards protecting (or further defining) existing vested rights. This permits IDWR the greatest amount of administrative latitude within the boundaries permitted by law, and at the same time makes it clear that the administrative latitude is not intended to exceed existing legal boundaries.

6. A General Provision On Conjunctive Management Should Allow For The Maximum Degree Of Flexibility In Administration But Also Provide A Mechanism For Protecting Existing Rights

The complexities, present lack of knowledge, and evolving state of technology regarding the interrelation of ground and surface water require that the integrated management of ground and surface water will have to rely on a great degree of flexibility. At present, it is not possible to quantify how every right in the Snake River basin impacts each and every other right and integrate that data into a comprehensive provision which sets forth specific administrative guidelines in order to protect existing priorities. Therefore, in order to promote this necessary flexibility, a general provision on conjunctive management should also include a concomitant provision that makes it equally clear that flexible administration is not intended to modify the prior appropriation doctrine. In this Court's view this could be accomplished by incorporating a framework of standards for contesting IDWR's administrative conduct. Although it can be argued that because the burdens and standards of proof are already existing law and they do not need to be reiterated in a general provision,

this Court disagrees.[10] While this argument may have merit as to other administrative provisions, conjunctive administration is not an analogous situation. Conjunctive administration creates too many unknowns regarding the application of the prior appropriation doctrine that will ultimately be left to the sole discretion of IDWR to resolve. Failure to also include such a provision would essentially leave water right holders without any recourse in the event there was disagreement with the way in which water rights were administered, as the Court will have arguably redefined the scope of the water right.

VII.
SCOPE OF EVIDENTIARY HEARING AND SUBSEQUENT PROCEEDINGS

A. SCOPE OF EVIDENTIARY HEARING

Although the Court has preliminarily determined that some general provision on conjunctive management may be necessary to define or efficiently administer a water right, but that an evidentiary hearing is still necessary, the scope of the evidentiary hearing should focus on the following:

1. Evidence Controverting Court's Determination That Some General Provision May Be Necessary.

In compliance with the Supreme Court's Directive and Judge Wood's prior order, parties will not be precluded from presenting additional factual or expert evidence regarding the factual necessity of a general provision to either controvert this Court's preliminary finding or IDWR's prior testimony.

2. Further Evidence Directed At Crafting A General Provision.

As indicated previously, the Court cannot craft a general provision outside the context of the facts in the record. Parties should be prepared to present evidence that they want considered for purposes of decreeing a general provision on conjunctive management. The Court does not view a general provision on conjunctive management as defining specific

[10] For example, the proposed general provisions indicate which water rights share, or will be administered as if from a common source. However, the proposed provisions do not indicate the degree or significance of the connections within the sources. These are administrative determinations made by IDWR. As such, a senior dissatisfied with IDWR's administration and intending to make a delivery call would have the burden of proof to show by a preponderance of the evidence which particular juniors shared a significant connection. At that point, the burden would shift to the junior to show by clear and convincing evidence that curtailment would be futile. These respective burdens would also include a threshold for the degree of injury that would have to be demonstrated.

hydraulic relationships. Rather, the Court views a general provision on conjunctive management as establishing a framework, consistent with Idaho law, that alerts parties regarding the administration of their water rights; and sets forth procedures and standards for contesting such administration. An analogy to these procedures and standards would be the legal standards on tort liability that apply to an infinite spectrum of factual situations and can be followed through to a legal conclusion.

B. PROCEEDINGS FOLLOWING THE CLOSE OF EVIDENCE

Following the evidentiary hearing, the Court intends to proceed with Basin-Wide Issue 5 in substantially the following manner.

1. Following the close of evidence, the parties will have the opportunity to submit proposed findings of fact. The court will enter Findings of Fact.

2. The parties will have the opportunity to file objections to the Findings of Fact consistent with the standard set forth in I.R.C.P. 52(b). The Court will then issue Final Findings of Fact.

3. The parties will then have the opportunity to file proposed conclusions of law on the wording and format of the general provisions. The Court will enter Conclusions of Law.

4. The parties will have the opportunity to file objections to the Conclusions of Law consistent with the Standards of I.R.C.P. 52(b). The court will then issue Final Conclusions of Law.

5. The parties will then have 42 days from the final order to appeal.

VIII.
CONCLUSION

For the above-stated reasons, the Court denies the cross-motions for summary judgment and orders that the matter to proceed to evidentiary hearing as scheduled.

IT IS SO ORDERED.

DATED July 2, 2001.

ROGER S. BURDICK
Presiding Judge of the
Snake River Basin Adjudication

EXHIBIT B

Third Affidavit of Karl J. Dreher

Movant: State of Idaho

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20634

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	)	**Subcase No. 91-00005**
	)	Basin-Wide Issue 5
	)	(Conjunctive Management General Provision)
Case No. 39576	)	
	)	**THIRD AFFIDAVIT OF KARL J. DREHER**
	)	

STATE OF IDAHO)
) ss.
County of Ada)

KARL J. DREHER, being first duly sworn upon oath, deposes and says:

1. I make the following statements based on personal knowledge.

2. I am the Director of the Idaho Department of Water Resources. My professional qualifications and history are described in the *Affidavit of Karl J. Dreher*, Subcase No. 91-00005 (December 30, 1999) on file with the Snake River Basin Adjudication Court.

3. In my capacity as Director of the Idaho Department of Water Resources, I have the authority and responsibility for the administration of water rights within the State of Idaho.

4. I am familiar with the recommended general provisions at issue as part of Basin-Wide Issue No. 5, known as the conjunctive management general provisions. Further, I am familiar with the files and record in Subcase No. 91-00005 now before the SRBA District Court, including the briefs of the parties supporting or opposing the State of Idaho's pending motion for summary judgment.

5. Conjunctive administration, or conjunctive management, of surface and ground water rights from connected sources means that the distribution of water under the rights will be administered in accordance with the prior appropriation doctrine including appropriate recognition that the effects of ground water diversions on connected surface water sources may be substantially delayed in time and spatially dispersed. In order to accomplish conjunctive administration in accordance with the prior appropriation doctrine, detailed data regarding location, operation, priority, water usage and

hydrogeologic characteristics of the aquifer system are essential, not solely the priority and quantity of each diversion.

6. The recommended general provisions for the conjunctive management of interconnected surface and ground water rights cannot be construed to allow the Department of Water Resources to administer decreed water rights in any manner not in accordance with the prior appropriation doctrine, as set forth in well-established Idaho law.

7. The very purpose of conjunctive management general provisions is to allow for the administration of water rights in accordance with the respective priority dates of all water rights to use interconnected surface and ground water comprising a common source of supply. Without such general provisions, right holders for ground water may assert that ground water rights are immune from conjunctive administration based on respective priority dates because the decreed source (ground water) is not decreed to be connected to a decreed surface water source.

8. To date, rights to the use of interconnected surface and ground water have not been administered conjunctively in Idaho except in isolated instances, primarily on a case-by-case basis under the provisions of I.C. § 42-237a(g).

9. A principal objective of conjunctive administration of water rights by the Department of Water Resources will be to fully recognize the relative priority dates of the respective water rights subject to conjunctive administration. Attributing significance to the relative priority dates of interconnected surface and ground water rights, other than on a case-by-case basis, will constitute a change from past administration of water rights

from connected ground water and surface water sources in Idaho, which generally has administered surface and ground water sources separately.

10. Recognizing the relative priority dates of interconnected surface and ground water rights does not mean that the decreed quantity and priority date of a water right are the only factors to be considered in the administration of interconnected surface and ground water rights. In administering water rights under the prior appropriation doctrine, the Department of Water Resources also must consider the delayed and spatially dispersed effects of ground water diversions on connected surface water sources, as well as whether the right holder calling for delivery of water can place the water to beneficial use in accordance with the decreed elements of the water right. To do otherwise could result in the needless curtailment of thousands of junior priority water rights without increasing water available for senior water rights. This would block "full economic development of underground water resources" counter to the requirements of I.C. § 42-226.

11. Administering interconnected surface and ground water rights conjunctively means that the Department of Water Resources will recognize that the sources of water are connected in varying places and to varying degrees throughout the basin. The Department's administration will be based upon the best hydrogeologic information available at any given point in time, which is consistent with how surface water rights are currently administered. The Department will not administer the rights to the use of water from interconnected surface and ground water sources as if the connected sources are comprised solely of surface water or solely of ground water.

12. The first paragraph of the general provision submitted by the Trout Companies would appear to require the Idaho Department of Water Resources to administer water rights solely according to priority, without considering the actual effects of a junior diversion upon a senior diversion calling for delivery of water. Adopting this approach to water rights administration would require the Department to immediately curtail all junior ground water diversions and junior surface water diversions from interconnected sources as soon as the surface water flows within the system became inadequate to satisfy more senior surface water rights within the basin. Such curtailment would appear to be required regardless of whether the reduction in junior ground water diversions or junior surface water diversions results in any meaningful increase in surface water flows.

13 Such an approach to water rights administration would be inconsistent with my understanding of the principles of the prior appropriation doctrine and would also be inconsistent with the manner in which surface water rights are currently administered under the prior appropriation doctrine in Idaho. In any basin in which the surface water streams are fully appropriated, under the Trout Companies' approach there would appear to be no opportunity for the continued utilization of any ground water resources within the basin. However, under the prior appropriation doctrine a junior right holder is subject to curtailment only if curtailment would result in the availability of water for a beneficial use under a senior water right or if, absent sufficient mitigation, injury is occurring. Junior surface water rights within the Snake River Basin presently are not curtailed unless curtailment is necessary to satisfy a beneficial use of water under a senior surface water right. Thus, junior surface water rights are frequently allowed to continue diverting even

though more senior priority water rights in another portion of the basin are being curtailed. Water rights administration on the Boise River is an example of such administration.

14. Under the prior appropriation doctrine, a water right defines the maximum quantity entitlement of the right holder. However, the amount of water that may be diverted under the right at any point in time is limited to the amount necessary to achieve the beneficial use authorized under the right. An example of why this is an essential consideration in administering water rights occurs in Basin 36, where irrigation water rights have recently been partially decreed in the SRBA. Rights to use surface water in the Hagerman Valley were originally appropriated by beneficial use through flood irrigation. In more recent times, many of the right holders for irrigation in the Hagerman Valley have converted from flood irrigation to sprinkler irrigation. Because these water rights had not otherwise been changed, the Department of Water Resources, under my direction, recommended the water quantity element for these water rights be sufficient to provide for flood irrigation. The SRBA District Court decreed the quantity element of these water rights consistent with the Department's recommendation. However, it would be wholly inappropriate to now simply distribute water in priority to these rights based on the decreed amount when beneficial use is made through sprinkler irrigation and the decreed amount is not reasonably needed for sprinkler irrigation. It would only be appropriate to distribute the decreed amount in priority when for economic or other reasons, use of water by flood irrigation is necessary to achieve the beneficial use authorized under the rights and the decreed amount of water is reasonably needed. Efficient water rights administration requires that there be some oversight to ensure that

water is only diverted from the public resource as necessary to satisfy the beneficial use for which it was appropriated. This administrative oversight is the responsibility of the Director of the Department of Water Resources, and it is clearly distinguishable from the *judicial function of decreeing the elements of the water right*, one of which is the maximum amount of water that may be diverted.

15. In administering water rights, the Department of Water Resources cannot simply look at the quantity element of a water right as decreed. The quantity element sets the maximum limit for water distribution under the right. The Department must have the ability to determine what quantity of water is reasonably necessary for the authorized beneficial use, without undue waste, at the time when water is distributed to a particular right. Among the factors necessary to consider are the extent of beneficial use being made of the water, the need for water to satisfy that beneficial use during a particular time period, and whether a delivery call will be futile.

16. Circumstances under which the distribution of water to a decreed water right for irrigation could be precluded due to a lack of beneficial use exist where the lands to which the right is appurtenant have been placed in a federal cropland set-aside program, or the lands are furloughed as part of an electric power demand buy-down program. Although valid irrigation water rights continue to exist for the lands in such programs, distribution of water under the appurtenant water rights cannot occur if there are no authorized beneficial uses being made under the water rights, including distribution from the state's water bank.

17. The change in water rights administration that would be required under the first paragraph of the Trout Companies' proposed general provision would not serve to

define any water right in the SRBA and would inhibit the efficient administration of water rights within the Snake River Basin because the Idaho Department of Water Resources would be forced to allow the waste of water. For example, the most junior water rights presumably would be the first water rights curtailed, and these water rights presumably would be ground water rights. The locations of the points of diversion for the most junior ground water rights may be geographically the most distant and could have the least impact on the senior water right. Such an administrative approach is not required by the prior appropriation doctrine as implemented by Idaho law.

Further your Affiant sayeth naught.

DATED this 23rd day of March, 2001.

KARL J. DREHER
Director
Idaho Department of Water Resources

SUBSCRIBED AND SWORN TO BEFORE ME this 23rd day of March, 2001.

RITA I. FLECK NOTARY PUBLIC STATE OF IDAHO (seal)

NOTARY PUBLIC for Idaho
Residing at: Boise, Idaho
My Commission Expires: 1/25/2006

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March 2001, I caused to be served a true and correct copy of the foregoing **THIRD AFFIDAVIT OF KARL J. DREHER** by the method indicated:

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