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

\_\_\_\_\_)  
IN THE MATTER OF DISTRIBUTION )  
OF WATER TO WATER RIGHTS NOS. )  
36-07210, 36-07427, AND 36-02356A )  
)  
**Blue Lakes Delivery Call** )  
\_\_\_\_\_)  
)  
IN THE MATTER OF DISTRIBUTION )  
OF WATER TO WATER RIGHTS NOS. )  
36-04013A, 36-04013B, AND 36-07148 )  
(SNAKE RIVER FARM) )  
)  
**Clear Springs, Snake River Farm** )  
**Delivery Call** )  
\_\_\_\_\_)

**SPRING USERS' RESPONSE TO  
IGWA'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

COME NOW, Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs"), by and through counsel of record, and hereby respond to the Idaho Ground Water Appropriators, Inc.'s ("IGWA") *Motion for Partial Summary Judgment*, filed in this matter on October 19, 2007. For the following reasons, IGWA's Motion should be denied.

**INTRODUCTION**

**A. Issues presented by IGWA's Motion for Partial Summary Judgment**

IGWA's *Motion for Partial Summary Judgment* (hereinafter "*IGWA's Motion*") lists seven propositions or issues for which it seeks judgment as a matter of law. IGWA's *Memorandum in Support of Ground Water Users' Motion for Partial Summary Judgment* (hereinafter "*IGWA's Memorandum*") appears to revise the list of issues to the six at pages 3-5 of the supporting memorandum. This response to IGWA's *Motion* is based on the following understandings.

The first issue in *IGWA's Motion* is an abstract legal proposition that "Idaho Law does not guarantee absolute levels of artesian pressure to appropriators of non-geothermal spring water sources." This issue is not mentioned in *IGWA's Memorandum*. Therefore, it is assumed that the issue has been withdrawn from consideration. IGWA appears to have replaced this issue with the first and second issues listed at pages 3 and 4 of its *Memorandum*, which are addressed in this response.

The second, third, and fourth issues in *IGWA's Motion* are restated as the fifth, fourth, and third issues, respectively, at page 4 of *IGWA's Memorandum*, and are addressed in this response.

The fifth issue in *IGWA's Motion*, asserting that a water right decree does not create "a guaranteed minimum water supply" is not included in the list of issues at pages 3-5 of *IGWA's Memorandum*, but is discussed in IGWA's "Argument" at pages 24-29, and is therefore addressed in this response.

The sixth issue in *IGWA's Motion* is restated as the sixth issue in IGWA's *Memorandum* at page 5, and is addressed in this response.

The seventh issue in *IGWA's Motion*, relating to mitigation, is not mentioned in *IGWA's Memorandum*. Therefore, it is assumed that the issue has been withdrawn from consideration.

## **B. Material Facts**

*IGWA's Memorandum* does not identify undisputed material facts that support its *Motion*. In addition, IGWA alleges various facts in its briefing without any supporting reference (e.g. “The ESPA . . . contains approximately one billion acre feet of water”; *IGWA's Memorandum* at 2; “The existence of pressurized ground water is manifest by flows from the springs that supply the Spring Users’ water rights”; *Id.* at 11; “alleged shortages upon which the Curtailment Orders are based are due to the recession of waste water discharged from the springs”; *Id.* at 18; “Climatic conditions cause every source of water in this state to experience inter-year fluctuations depending upon the state of drought or lack thereof”; *Id.* at 25).

Furthermore, although *IGWA's Memorandum* references portions of its witnesses’ testimony and reports, IGWA fails to demonstrate that “there is no genuine issue as to any material fact” offered by those witnesses. I.R.C.P. 56(c). Blue Lakes’ and Clear Springs’ expert witnesses have filed testimony and reports that rebut IGWA’s claims on numerous matters which may or may not be material to *IGWA's Motion*, including, but not limited to, historic spring flows and the Swan Falls Agreement.<sup>1</sup>

With respect to IGWA’s overlapping claims and issues already covered by the Blue Lakes’ and Clear Springs’ *Joint Motion*, Blue Lakes and Clear Springs incorporate the arguments and authority set forth in their opening *Memorandum* and their *Joint Reply in Support of Partial Summary Judgment*. For the reasons identified below, IGWA’s motion should be denied.

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<sup>1</sup> See direct testimony and reports, and rebuttal testimony filed by Dr. Charles E. Brockway, Eric Harmon, Norm Young, and Larry Land.

## ARGUMENT

### I. The “Reasonableness” of Blue Lakes’ and Clear Springs’ Diversions

The decreed source of Blue Lakes’ water rights is Alpheus Creek. *Stenson Aff.*, Ex. B. Blue Lakes’ diversion structure diverts the entire flow of Alpheus Creek into a pipeline that conveys the water to Blue Lakes’ fish rearing facilities. May 19, 2005 Order, p. 12. ¶ 55; *Second Stenson Aff.*, Carlson Depo, Vol. 1, p.158, Ins. 9-19. Blue Lakes’s current diversion structure and pipeline were constructed or reconstructed in 1999-2000. The pipeline replaced an open ditch. May 19, 2005 Order, p. 12. ¶ 55.

In response to Blue Lakes’ water delivery call, the Water District 130 Watermaster and an IDWR registered professional civil engineer inspected Blue Lakes’ diversion facilities on April 11, 2005. *Id.*, p. 15-16, ¶s 66, 68-71. Based on the inspection, the Director applied the “factors” in Rule 42 of the Conjunctive Management Rules (CMRs), and found that:

1. Blue Lakes has expended reasonable efforts to divert water from its source (citing Rule 42.01.b., *Id.*, p. 15, ¶ 66);
2. Blue Lakes has “adequate water measuring and recording devices” (citing Rule 42.01.f., *Id.*, p. 15, ¶ 69);
3. Blue Lakes “is employing reasonable diversion, conveyance efficiency, and conservation practices” (citing Rule 42.01.g. *Id.*, p. 15, ¶ 70); and
4. “there are no alternate reasonable means of diversion or alternate points of diversion that Blue Lakes Trout should be required to implement to provide water for water right no. 36-077427 during times the right would not otherwise be satisfied” (citing Rule 42.01.h., *Id.*, p. 15-16, ¶ 71).

The decreed source of Clear Springs’ water rights is “Springs.” *Stenson Aff.*, Ex. B. In response to Clear Springs’ water delivery call, the Water District 130 Watermaster and an IDWR registered professional civil engineer inspected Clear Springs’ diversion facilities on May 5, 2005. *Id.*, p. 15-16, ¶s 64, 68-70. Based on this inspection, the Director made the same four

findings regarding Clear Springs' diversion works and measuring devices, with the exception that he found one collection box to be in disrepair and leaking 2 cfs of water. *Id.* This collection box has been repaired.

IGWA has not presented any facts or opinions to dispute the Director's site-specific findings that Blue Lakes' and Clear Springs' means of diversion are reasonable, and that there are no reasonable alternate means of diversion. During his deposition, IGWA's water administration expert, Ron Carlson, testified that he inspected Blue Lakes' diversion and conveyance facilities, and that there is nothing more that Blue Lakes could do to divert more water from Alpheus Creek. *Second Steenson Aff.*, Ex. B, Carlson Depo, Vol. 1, p.158, Ins. 9-19, p. 160, Ins. 2-15. Similarly, Mr. Carlson inspected Clear Springs' diversion facilities, and found them to be reasonable, diverting all the spring flow in the vicinity of the diversions. *Id.*, Ex. C, Carlson Depo., Vol. II, Ex. A, p. 75, Ins. 3-21; p. 221, Ins. 4-17; p. 223, ln. 3 - p. 224, ln. 6.

**A. IGWA's Arguments Do Not Provide a Basis For Summary Judgment**

Notwithstanding IDWR's findings and Mr. Carlson's acknowledgment that Blue Lakes' and Clear Springs' diversions are reasonable, capturing all available flow from the decreed sources at the decreed points of diversion, IGWA's summary judgment memorandum describes the spring diversions as "archaic and inefficient" because Blue Lakes and Clear Springs "have not installed wells, pumps, or any other mechanism for the extraction of water from the ESPA."

IGWA argues that, for purposes of conjunctive administration, spring diversions are per se unreasonable because they do not comply with the Ground Water Act's requirement that ground water users "chase" water into the aquifer by drilling wells to a "reasonable pumping level," before junior ground water rights are subject to priority administration. *IGWA's Memorandum*, p. 12-14; *Carlson Direct Testimony*, p. 7, Ins. 15-17.

IGWA also argues that Blue Lakes' and Clear Springs' failure to chase water into the aquifer by drilling wells is per se unreasonable under what IGWA calls the "law of reasonable use." In its exposition, IGWA cites the "full economic development" phrase of I.C. § 42-226 (section 1 of the Ground Water Act), *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911), *AFRD No. 2 v. IDWR*, 154, P.3d 433 (2007), and individual court decisions from a few other states.<sup>2</sup>

In these arguments, IGWA does not identify any finding or fact or conclusion of law in any order that it is challenging. IGWA does not allege that the Director has misapplied any provision of the CMRs. IGWA offers no facts or opinions to establish that it is reasonable or feasible for Blue Lakes or Clear Springs to "chase water" into the aquifer. IGWA's single vague complaint is that "the Curtailment Orders grant a right in the Blue Lakes' and Clear Springs' to utilize inefficient means of diversion." *IGWA's Memorandum*, p. 10. This complaint makes little sense, in view of the fact that, long before the orders were issued, Blue Lakes' and Clear Springs' diversions were established, reviewed and approved by IDWR through licensure, reviewed again by IDWR in the SRBA, and confirmed by the SRBA District Court's decrees.

Thus, IGWA presents no basis for summary judgment as to its arguments that Blue Lakes' and Clear Springs' means of diversion are not reasonable. The 2005 Orders do not find that Blue Lakes' and Clear Springs diversions are unreasonable per se. As discussed above, IGWA has not disputed the Director's site-specific findings that Blue Lakes and Clear Springs are "employing reasonable diversion, conveyance efficiency, and conservation practices" and that there are no alternate reasonable means or points of diversion.

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<sup>2</sup>Decisions from other jurisdictions will not be addressed here because Idaho law governs the Director's responses to the Blue Lakes' and Clear Springs' water delivery calls

**B. The Ground Water Act's Reasonable Pumping Level Provision Does Not Apply to Surface Water Rights**

Mr. Carlson acknowledges that springs do not meet the Ground Water Act's definition of ground water as "all water under the surface of the ground." "[T]he definition – yeah, the definition doesn't cover water that – after it's seen the light of day." I.C. § 42-226. *Id.*, p. 47, ln. 22-p. 49, ln. 8. As discussed in Blue Lakes' and Clear Springs' prior briefing, several IDWR rules define ground water consistent with the statutory definition, and identify spring water as "surface water." *Joint Reply*, p. 19-20. The provisions of the CMRs that define and distinguish between ground water and surface water sources are particularly relevant in this conjunctive management proceeding:

**10. Ground Water.** Water under the surface of the ground whatever may be the geological structure in which it is standing or moving as provided in Section 42-230(a), Idaho Code.

**22. Surface Water.** Rivers, streams, lakes and springs when flowing in their natural channels as provided in Sections 42-101 and 42-103, Idaho Code.

Despite the clear statutory and regulatory definitions and distinctions between ground water and surface water (including streams and springs), IGWA argues that: (1) the Hearing Officer should instead adopt the opinion of former IDWR Director Ken Dunn and IGWA's expert, Ron Carlson, that spring water is ground water under the Ground Water Act and for purposes of water right administration (*IGWA's Memorandum*, p. 13), and (2) the SRBA District Court's *Connected Sources Partial Decrees* and the State's implementation of conjunctive management render the statutory and regulatory definitions of source, as well as the sources of water rights as decreed by the SRBA District Court, "meaningless" (*IGWA Response to Joint Motion*, p. 15) "matter of convenience." *Second Steenson Aff.*, Ex. B, Carlson Depo. Vol. 1. p. 102, ln. 25 - p. 103 , ln. 2.

Mr. Carlson's theories regarding the "blurring" between ground water and surface water sources are made clear by the following testimony from his deposition:

- A. The source of supply, I think, has changed with conjunctive management, because if we're saying we now have one source, then it's all the same source. And if we're administering one source irrespective of the source, then the law that applies may very well be the Ground Water Act. And if that's the case, then every water user out there has the same responsibility to chase their water to a reasonable pumping limit.
- Q. So you think the consequence of conjunctive management is that the Ground Water Act applies to all water rights in the State of Idaho?
- A. That would be my argument.

*Id.* p. 103, lns. 12-24.

- Q. And with respect to your view of source, as I understand it, your view is that the fact that the decree says Alpheus Creek doesn't necessarily bind the administrator to treat the source as Alpheus Creek; is that correct.
- A. I think that's correct.

*Id.*, p. 111, lns. 19-24.

- Q. Because essentially, in your view, every water right is a ground water right; correct?
- A. Every water right has access to the entire source now, rather than that unique portion of the water supply that's defined in the water right.
- Q. Where the source is ultimately ground water, correct?
- A. Right.
- . . .
- Q. Does the Ground Water Act, do you think, apply by its terms to surface water?
- A. I don't think initially it did.
- Q. Okay. Has it –
- A. I think it's morphed because of conjunctive management.
- Q. Okay. And how did the Ground Water Act morph?
- . . .
- A. Well, it's morphed because prior to that we never had an issue between a claim that ground water was somehow to be regulated and administered as part of the surface water supply.
- Q. Okay. Did the Act itself morph?
- A. No. The – I think the – the interpretation of – or the application of the act morphed.
- Q. Okay. And is that morphing reflected in administrator's memoranda or any other documents of the type you described earlier?
- A. I think it came out of – probably an offshoot of the Musser case and an offshoot of the conjunctive management rules.
- Q. How did it come out of an offshoot of the Musser case?



- A. Well, my opinion is the Musser case was a devastatingly bad piece of legal work. And as a result of that, we have a principle now that – that did something that – relative to conjunctive management that never existed prior to that.

*Id.*, p. 113, ln. 15 - p. 115, ln 25.

“There is no indication that the words of the Ground Water Act should be interpreted in any way other than as they are normally used.” *Parker v. Wallentine*, 103 Idaho 506, 511, 650 P.2d 648, 653 (1982). Mr. Dunn’s and Mr. Carlson’s contrary view that spring water should be treated as ground water is as irrelevant now as it was when they worked for IDWR. As an administrative agency, IDWR “is a creature of statute, limited to the power and authority granted it by the Legislature and may not exercise its sub-legislative powers to modify, alter, or enlarge the legislative act which it administers.” *Welch v. Del Monte Corp.*, 128 Idaho 513, 524, 915 P.2d 1371, 1372 (1996).

The clear and unambiguous language of I.C. § 42-226 precludes any interpretation that the Ground Water Act’s reasonable pumping level “requirement” applies to surface water:

The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the **ground water resources of this state as said term is hereinafter defined** and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. **Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels** as may be established by the director of the department of water resources as herein provided.

The Ground Water Act addresses the legislature’s concern about overdrafting of aquifers by ground water pumping. See *Mem. in Support of Joint Motion*, p. 17-18. The Ground Water Act confers upon the Director certain powers to administer and enforce the Act and to effectuate “the policy of this state to conserve its ground water resources.” I.C. § 42-237a. Each of those powers relates to the withdrawal of ground water through the use of wells:

**42-237a. POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES.** In the administration and enforcement of this act and in the effectuation of **the policy of this state to conserve its ground water resources**, the director of the department of water resources in his sole discretion, is empowered:

a. To require all flowing **wells** to be so capped or equipped with valves that the flow of water can be completely stopped when the wells are not in use.

b. To **require both flowing and nonflowing wells to be so constructed and maintained as to prevent the waste of ground waters** through leaky wells, casings, pipes, fittings, valves or pumps either above or below the land surface.

c. To prescribe uniform scientific methods to determine water levels in and calculate waters withdrawn from **wells**.

d. To go upon all lands, both public and private, for the purpose of inspecting **wells**, pumps, casings, pipes, and fittings, including wells used or claimed to be used for domestic purposes.

e. To order the cessation of use of a **well** pending the correction of any defect that the director of the department of water resources has ordered corrected.

f. To commence actions to enjoin the illegal opening or excavation of **wells or withdrawal or use of water therefrom** and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears to the director of the department of water resources that the determination of such action or proceeding might result in **depletion of the ground water resources of the state contrary to the public policy expressed in this act**.

g. To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings **to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available**. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, **he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.** (Emphasis added.)

Nowhere does IGWA or Mr. Carlson reference this statute. These provisions were added by the 1953 of the Ground Water Act (entitled “An Act Relating to the Underground Water Resources of the State of Idaho . . .”), along with the reasonable pumping level provision

in I.C. § 42-226. Subsection g. is particularly significant because it defines the Director's powers and duties to effectuate I.C. § 42-226. Multiple provisions of the CMRs cite subsection I.C. § 42-237a.g. as statutory authority. (*See, e.g.*, Rule 10.01 "Areas having Common Ground Water Supply" and Rule 10.18 "Reasonable Ground Water Pumping Level" among others).

The 1953 Ground Water Act also added the following portion of I.C. § 42-231, which also defines the Director's duties:

It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

(The Ground Water Acts of 1951 and 1953 are attached to this *Memorandum*.)

Contrary to Mr. Carlson's assertion that the concept of conjunctive management did not exist before the Idaho Supreme Court issued its *Musser* decision in 1994, 40 years earlier, in subsection g of I.C. §42-237a, the legislature clearly provided for the administration of junior ground water rights that "affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge."

Indeed, the 1953 Act specifically provided for conjunctive administration of ground and surface water rights through water districts:

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 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**; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream in an organized water district, to incorporate such area in a separate water district to be created in the same manner provided for in section 42-604 of title 42, Idaho Code. The

administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of title 42, Idaho Code, as the same have been or may hereafter be amended, except that **in the administration of ground water rights either the director of the department of water resources or the watermaster in a water district or the director of the department of water resources outside of a water district shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided**, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with underground water, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

I.C. § 42-237a.g. (emphasis added).

The Ground Water Act effectuates the legislature's stated purpose to "conserve the state's ground water resources" by providing for the administration of ground water rights to protect all senior ground and surface water rights that are affected by ground water withdrawals. The purpose of the Act was not to protect junior ground water rights from conjunctive administration. To the contrary, the Act specifically provided for such administration. As is clear from the language of I.C. § 42-237a.g., the Act was intended to bring ground water rights under the state's existing administrative authority, not to subsume conjunctive administration to the Ground Water Act. The legislature took special care to make this intention clear:

INTERPRETATION. The executive and judicial departments of the state shall construe the provisions of this act, wherever possible in harmony with the provisions of title 42, Idaho Code, as amended; and nothing herein shall be construed contrary to or in conflict with the provisions of article 15 of the Constitution; and except where otherwise provided in this act, the provisions of said title 42, Idaho Code, as amended, **shall continue to govern ground water rights in this state.**

I.C. § 42-239 (emphasis added).

The highlighted phrase in this statute emphasizes that the Act's requirements pertain to "ground water rights."

Nothing in the Act can be construed to obliterate the distinction between ground water and surface water, or exclude senior spring right holders from the ambit of the senior surface water rights to be protected from junior ground water pumping. Nothing in the Act imposes any obligation on appropriators of surface water rights, or qualifies, or limits priority administration of junior ground water rights in order to protect senior surface water rights.

IGWA provides no basis to construe the Ground Water Act to require senior surface water users to “chase” water into the aquifer. IGWA merely quotes the words “reasonable pumping level” from I.C. § 42-226, and characterizes it as a “requirement” that applies to “all appropriators of Idaho’s ground water resources” from which surface water rights should not be exempted. *IGWA’s Memorandum*, p. 13. Even isolating the one sentence in the Ground Water Act upon which IGWA relies does not yield IGWA’s interpretation of the Act.

The sentence is: “Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels.” [W]hen construing a statute, its words must be given their plain, usual and ordinary meaning.” *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823 828 P.2d 848, 852 (1992). The phrase “reasonable ground water pumping levels,” relates only to “prior appropriators of underground water,” i.e. those who divert water from underground (diversion is an essential element of an appropriation). Surface water right holders divert water from surface sources (rivers, streams, lakes and springs), not from water “underground.” “Maintenance of” or to “maintain” means to “cause or enable (a condition or state of affairs) to continue; keep (something) at the at the same level or rate.” OXFORD AMERICAN DICTIONARY (2006). In the subject sentence, “maintenance of” means to enable “[p]rior appropriators of underground water” to “continue” or “keep” pumping water at “reasonable ground water pumping levels.” This is the natural, ordinary meaning of the

sentence. Nothing in the sentence suggests the initiation of any new activity, as would be required for a surface water user to construct a well to “chase” water into the aquifer. Only a prior appropriator who pumped water from underground could be “protected in the maintenance of a reasonable ground water pumping level.” The clash between IGWA’s apparent interpretation of the sentence and its actual words is demonstrated by substituting the word “surface” for the word “underground” in the sentence so that it reads as follows: “Prior appropriators of **surface** water shall be protected in the maintenance of reasonable ground water pumping levels.” The dissonance in this construction is immediate. What is the ground water pumping level in a river, stream, lake or spring?

The Conjunctive Management Rules confirms the plain and ordinary meaning of the Ground Water Act. Rule 10.18 explains that the purpose of a “reasonable ground water pumping level” is to protect “senior-priority ground water rights against unreasonable lowering of ground water levels.”

**C. The *Policy* of Reasonable Use Does Not Require Surface Water Users to “Chase” water into the Aquifer**

In its exposition of the so-called “law of reasonable use,” IGWA cites I.C. § 42-226. As previously discussed, this statute does not support the proposition that a surface water right holder is required to drill a well to “chase” water into an aquifer.

IGWA also relies upon *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911) in this argument. The holding in *Schodde* was that an appropriator has no right to appropriate the current of the stream in order to operate a means of diversion. *Schodde* certainly does not mandate the conclusion that spring diversions are per se unreasonable for purposes of conjunctive management unless the spring users drill wells to chase water. In its concluding paragraph, the Court stated: “As we have pointed out the court below did not question the right

of the plaintiff to take by proper means from the river the quantity of water actually appropriated by him for beneficial use and our decree of affirmance will therefore not in any way affect such rights.” *Id.* at 125-126. Here, the Director has specifically found that Blue Lakes’ and Clear Springs’ means of diversion are reasonable or “proper means” of diverting water from their sources.

Mr. Carlson recognizes that Blue Lakes and Clear Springs have done everything possible to divert water from their decreed sources. He explained that IDWR has not, heretofore, required surface water users to take the extraordinary step of drilling wells to “chase” water:

- A. Of course, the -- the standard arises out of my experience in water distribution. And let me treat it with an example. I have a stream, say the Snake River down by Blackfoot, where the flows get very low during the summer. And I have a canal down there whose water right is on. And the canal says, "We can't get our water. And I say, "Well, let me look at the gauge. There's plenty of water at that gauge to supply your need. So obviously you need to do more to get water." And so they mobilize their equipment and they go out into the river and they divert -- they do what they have to do to take the water supply that's available and then get it to their headgate. And so that's -- that's the extrapolation, I guess, that I'm making in my comment.
- Q. Okay. So in that circumstance, you're requiring the water user to extend their diversion works into the natural channel of the source of their water right; correct?
- A. Uh-huh.
- Q. You require them to drill a well?
- A. I haven't.
- Q. Okay. Why not?
- A. Well, because the department has always had this difference between ground water and surface water. And so the drilling of the well has not been an agreed-upon method of acquiring that water supply.

*Second Steenson Aff.*, Ex. B, p. 157, ln. 4 - p. 158, ln. 8.

IGWA also cites *AFRD No. 2 v. IDWR*, 154 P.3d 433 (2007), suggesting that the Idaho Supreme Court “affirmed the law of reasonable use.” The portion of the opinion merely recites the factors of Rule 42 and observed that the Director has discretion to consider them, as he has

done in response to the Blue Lakes’ and Clear Springs’ water delivery calls. Again, this case does not mandate that surface water users drill wells as a precondition to conjunctive administration of hydraulically-connected ground water rights that are depleting their surface water supplies.

In its briefing to the district court in *AFRD No. 2 v. IDWR*,<sup>3</sup> IDWR assured the district court that the CMRs are constitutional because they “emphasize the importance of priority more than any other principle or policy,” including the policy of “reasonable use.”

Further, the provisions of the Rules that deal with reasonableness, efficiency and the policy of full and optimum development are limited and the burden falls on the Director to establish the facts for their application. The plain language of the rules demonstrates that constitutional application is not only easily possible, but probable.

For instance, **Rule 20.03** (‘Reasonable Use of Surface and Ground Water’) is a ‘General Statement of Purpose and Policy’ that **recites policy language from the Idaho Constitution and the Idaho Code regarding reasonable use and full and optimum development of the state’s water, but imposes no such standards or requirements of its own.** The Rule does not require, instruct or authorize the Director to apply the stated policies in any particular way, or to reach any particular outcome. **Rule 20.03 is, in name and substance, a ‘merely hortatory’ statement of general policy and purpose.** *Bonner General Hosp. v. Bonner County*, 133 Idaho 7, 10, 981 P.2d 242, 245 (1999) (holding that a codified statement of legislative purpose that did not purport to impose requirements was ‘merely hortatory’). Further, Rule 20.03 explicitly recognizes the rule that first in time is first in right. Rule 20.03 (‘reasonable use includes the concepts of priority in time and superiority in right’). Thus, the plain language of Rule 20.03 simply cannot support the argument that Rule 20.03 renders the Rules incapable of valid application under any circumstances. Rather, **the Rule reflects the presumption of priority administration.**

**Rule 42** (‘Determining material Injury and Reasonableness of Water Diversions’) provides a list of factors that the Director ‘may’ consider in determining whether a senior is ‘using water efficiently and without waste.’ Rule 42.01. Thus, on its face, **Rule 42 also respects senior rights and presumes entitlement to the full amount of water absent any proven facts that would require a contrary results [sic]** under applicable principles of the prior appropriation doctrine as established by Idaho law. The plain terms of Rule 42.01 demonstrate that a valid and constitutional application of the rules is at least as likely, if not more so, than any invalid application.

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<sup>3</sup>IGWA’s counsel, Candice McHugh, signed this brief in her capacity as counsel for IDWR at the time.



The same analysis applies to Rule **40.03** (**‘Reasonable Exercise of Rights’**). Rule 40.03 incorporates the permissive language and factors of Rule 42 expressly and because ‘reasonable exercise’ under Rule 40.03 requires consideration of whether there has been a ‘material injury and whether a senior is ‘diverting and using water efficiently and without waste.’ Rle 40.03. Thus, Rule 40.03 is identical to Rule 42 for purposes of determining what constitutes a ‘reasonable exercise of rights.’ Accordingly, **under Rule 40.03, there is a presumption the senior has a right to receive the full amount set forth in the partial decree.** It follows that a valid application of Rule 40.03 clearly is possible, and the Rules cannot be facially invalid.

Thus, **the Rules are best and most accurately viewed as presuming that the rule ‘first in time is first in right’ controls absent facts to the contrary.** The Plaintiffs’ argument essentially assumes that the Rules will be used to subject senior rights to some form of strict scrutiny and/or micromanage the senior’s use of water. To the contrary, **the permissive and hortatory nature of the language for considering reasonableness, efficiency, and the policies of optimum and full development of the state’s water lends itself to just the opposite; administration in accordance with priority is presumed and required, and the Rules impose a burden on the Director, when responding to a delivery call, to determine a factual basis for distribution less that the full quantity off water stated in the decree.**

*Id.*, p. 18-20 (emphasis added).

Under Idaho’s prior appropriation doctrine, the reasonableness of the use and diversion of water is determined upon the adjudication of the water right with respect to the particular circumstances of each appropriator. *Beasley v. Engstrom*, 31 Idaho 14, 18 (1917) (“What constitutes reasonable use of water [in any particular situation] is a question of fact and depends upon the circumstances of each case,” including methods for diverting and conveying water commonly employed in the area where the water is used.). Blue Lakes and Clear Springs hold decreed water rights that identify specific points of diversion. The Director reviewed Blue Lakes’ and Clear Springs’ diversions and made recommendations to the SRBA District Court based upon that review. If their diversions were per se unreasonable for purposes of administration such that drilling wells was required, at a minimum a remark to that effect would have been necessary for the administration and definition of the rights. That this per se position

was not raised in the SRBA is evidence that IDWR did not hold IGWA's view, and precludes IGWA from raising it now.

IGWA's argument on this point urges the Hearing Officer to adopt a riparian application of "reasonable use." The "reasonable use" of surface water under the riparian doctrine allows landowners whose property abuts a natural water course the right to make "reasonable use" of the water, with "reasonableness" defined in terms of the needs of all other riparians. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 579 (1973). By alleging that Blue Lakes' and Clear Springs' means of diversion are "unreasonable" per se, IGWA claims there is no basis for delivering water to their senior surface water rights under a delivery call. Stated another way, IGWA claims that junior ground water right holders should be allowed to pump out-of-priority since their use is more "reasonable" as compared to Blue Lakes and Clear Springs. This so-called allocation of water on a riparian "reasonable use" basis is incompatible with the prior appropriation doctrine and contrary to Idaho law.

Reasonableness in the context of the prior appropriation doctrine means that water is being diverted and used efficiently and without waste with respect to the particular circumstances of the land on which the water is being applied. The riparian right, however, is proportionate, not exclusive, and is not measured by a specific quantity of water. 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* at 158 (1971). Reasonableness in a riparian context means that each user should not use more than his fair share so as to not impair the use by downstream users. *Id.* at 202 ("[r]iparian proprietors required to suffer some diminution of flow as a result of diversions by other riparians...."). The critical difference between the two doctrines is that the riparian user is expected to share the resource in times of shortage to allow as many other downstream users to benefit from the resource as possible. *Half*

*Moon Bay Land Co. v. Cowell*, 173 Cal. 543, 548-50, 160 P. 675, 678 (1916). The prior appropriation doctrine is less concerned with sharing the resource because the scarcity of water would result in all users receiving less than their needed amount of water.

The riparian doctrine of reasonable use has no application in the administration of water rights in a prior appropriation state like Idaho. Any attempt to graft a riparian-type allocation scheme onto the doctrine of prior appropriation through the guise of a comparison of the “reasonableness” of an appropriator’s diversion is without merit. The application of this riparian concept of “reasonable use” to guide the administration of water rights is incompatible with the doctrine of prior appropriation and has been repudiated by the Idaho Supreme Court for many years. *Drake v. Earhart*, 2 Hasb. 750, 756, 23 P. 541, 543 (Idaho Terr. 1890).

## **II. Idaho Law and the Conjunctive Management Rules Do Not Distinguish Between “Natural” and “Artificial” Groundwater for Purposes of Conjunctive Administration**

IGWA’s summary judgment motion and supporting memorandum reiterate IGWA’s response to Blue Lakes’ and Clear Springs’ summary motion on IGWA’s claim that Idaho law distinguishes between “natural” and “artificial” or “waste” groundwater in the ESPA for purposes of conjunctive administration. IGWA argues that the Curtailment Orders are invalid because: 1) they are based upon shortages of “waste” water which resulted from irrigation runoff; and 2) Spring Users can only make a lawful delivery call for natural water supplies provided from the ESPA which have not diminished. *IGWA’s Memorandum* at 14, 18. By this reference, Blue Lakes and Clear Springs incorporate herein their prior reply to IGWA’s arguments on this issue. *See Joint Reply*, p. 20-28.

The history of irrigation development on the Snake River Plain and its effect on the ESPA does not alter conjunctive administration. Nothing in Idaho’s water distribution statutes

in Chapter 6, Title 42, or the Ground Water Act, distinguishes between “natural” and “artificial” groundwater for purposes of administration of hydraulically connected surface and ground water sources. To the contrary, CJM Rule 10.19 defines the Ground Water Act’s statutory phrase “reasonably anticipated average rate of **future natural recharge**” from I.C. §42-237a.g. (emphasis added) as:

The estimated average annual volume of water recharged to ***an area having a common ground water supply from*** precipitation, underflow from tributary sources, and stream losses and also ***water incidentally recharged to an area having a common ground water supply as a result of the diversion and use of water for irrigation and other purposes.***

Rule 10.19 (emphasis added).

Rule 50 declares the ESPA to be “an area having a common ground water supply,” and therefore subject to administration pursuant to the rules. *See* Rules 50 and 20.01. The Rules thus expressly provide that conjunctive administration applies to so-called “artificial” ground water from canals and irrigated lands. For this reason and those previously stated, IGWA’s motion on this issue must be denied, and Blue Lakes’ and Clear Springs’ are entitled to judgment as a matter of law.

### **III. The “Swan Falls” Agreement does Not Prevent Priority Administration of the Blue Lakes’ and Clear Springs’ Decreed Senior Surface Water Rights.**

The Swan Falls Agreement was reached in 1984 between the Idaho Power Company (“Idaho Power”) and the State of Idaho. Idaho Power Company had licensed and decreed water rights at its Swan Falls Power Plant in the amount of its Power Plant capacity of 8,400 cfs, and those water rights were challenged by the State. *Idaho Power Company v. State of Idaho*, 104 Idaho 575, 578, 661 P.2d 741, 744 (1983). Following years of litigation and lengthy negotiations, Idaho Power and the State reached a settlement, providing in the Swan Falls Agreement that Idaho Power is entitled to an unsubordinated water right for its Swan Falls

facility of 3,900 cfs from April 1 through October 31, and 5,600 cfs from November 1 through March 31, measured at the Murphy gauge immediately downstream of Swan Falls. *Stenson Aff.*, Ex. L at 3, ¶ 7(A). Above that amount, Idaho Power Company's water rights are subject to subordination to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law, including legislatively enacted public interest criteria. *Id.*; I.C. § 42-203C. Idaho Power Company also subordinated its Swan Falls water rights to then existing uses, including persons dismissed from Ada County Case No. 81375, as well as persons beneficially using water prior to October 1, 1984, and filing an application of claim for such use by June 30, 1985. *Stenson Aff.*, Ex. L at 4, ¶ 7(C), (D).

IGWA erroneously argues that, pursuant to the 1984 Swan Falls Agreement, ground water rights supplied by the ESPA are protected against delivery calls by spring water rights so long as the minimum flows provided for under the Agreement at the Murphy gauge are maintained. As shown in Blue Lakes' and Clear Springs' opening *Memorandum* and their *Joint Reply*, under the plain and unambiguous language of the Swan Falls Agreement, and the legislation implementing it, only the hydropower water rights listed in the Agreement are subject to subordination under the Agreement. Blue Lakes and Clear Springs were not parties to the Agreement, which was negotiated and signed by the Idaho Power Company and the State of Idaho, and therefore cannot be affected by its terms. Accordingly, based on the plain and unambiguous language of the Swan Falls Agreement, the Hearing Officer should grant Blue Lakes' and Clear Springs' motion for partial summary judgment, and deny IGWA's motion for partial summary judgment. This ruling can and should be reached without considering any extrinsic evidence outside the Agreement.

In its motion, IGWA does not discuss the plain language of the Swan Falls Agreement, which does not support its argument, but instead relies upon the personal understanding and perceptions reflected in the *Affidavit of Kenneth A. Dunn* ("*Dunn Aff.*"), and policies contained in various State Water Plans. The Dunn Affidavit admits that "[t]he Agreement does not specifically discuss spring users' water rights at Thousand Springs." *Dunn Aff.* at ¶6. IGWA thus must concede that its argument is not supported by the plain language of the contract.

In his Affidavit, Mr. Dunn states his belief that "it was understood by all parties" to the Swan Falls Agreement that "the spring users' water rights would have adequate water, so long as the minimum stream flows at the Murphy gauge were met." *Dunn Aff.* at ¶ 6. Mr. Dunn is mistaken that all parties to the Agreement had such an understanding. For example, the Hon. Judge Thomas Nelson, former counsel for the Idaho Power Company during the Swan Falls Agreement negotiations, testified to a legislative committee in 2004 that there were "a number of problems" with the thought of some, like IGWA here, that "the Swan Falls Agreement subordinated the rights of spring flow users below Milner particularly in the Thousand Springs Reach." *See Second Steenson Aff.*, Ex. Z at 7-8 (9/2/04 Interim Committee Minutes).

Among the reasons given by Judge Nelson for this erroneous view perpetuated in this proceeding by IGWA were that: (1) the terms of the Agreement, including the subordination provision in Section 7, define Idaho Power Company's rights, and no one else's; (2) Section 17 of the Agreement provides that the Agreement is the entire Agreement between the parties, and there are no other promises, covenants, or understandings outside of it; (3) the parties to the Agreement were the State and Idaho Power Company, which had no authority to act for anyone else; and (4) the State had no authority to unilaterally subordinate existing uses of non-parties, which would have raised substantial constitutional problems. *Id.*

It is apparent that IGWA's and Mr. Dunn's belief that the Swan Falls Agreement subordinated the water rights of Blue Lakes and Clear Springs is not shared by other former IDWR officials. As set forth at pp. 46-48 of Blue Lakes' and Clear Springs' opening *Memorandum*, subsequent IDWR Director Karl Dreher submitted a memorandum to a legislative committee rejecting the view now taken by IGWA here. *Stenson Aff.*, Ex. M. Mr. Dunn's view also is not shared by Norman Young, the administrator responsible for IDWR's water-related regulatory programs at the time of the Swan Falls Agreement, and who provided technical assistance to the negotiating team drafting the Agreement.<sup>4</sup> *Affidavit of Norman C. Young* ("*Young Aff.*") at 2. According to Mr. Young, the Swan Falls Agreement does not prevent holders of rights to divert and use water from any upstream source, including the spring users, from calling for water in accordance with their priority rights. *Young Aff.* at 15. As he observes, the holders of rights from streams, springs, ground water and other sources did not sign the Agreement. *Id.* Moreover, because non-consumptive uses from the springs do not deplete or alter the timing of flows used in Idaho Power Company's hydropower facilities, these uses did not drive the negotiations. *Id.*

Mr. Dunn further states in his Affidavit submitted by IGWA his perception that at the time of the Swan Falls Agreement, "there was no concern or expectation that spring users would be able to make a delivery call against the ground water users to improve their supplies so long as the minimum flows were met." *Dunn Aff.* at ¶6. This perception that delivery calls were foreclosed by unspecified spring users who did not sign the Agreement is contradicted by the language of Agreement itself. Paragraph 14 of the Swan Falls Agreement provides:

This Agreement shall not be construed to limit or interfere with the authority and duty of the Idaho Department of Water Resources ["IDWR"] or the Idaho Water

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<sup>4</sup> The Affidavit of Norman C. Young was submitted as rebuttal testimony in this matter on behalf of Clear Springs.

Resource Board ["IWRB"] to enforce and administer any of the laws of the state which it is authorized to enforce and administer.

*Stenson Aff.*, Ex. L at 8, ¶ 14.

Thus, the State agreed under the Swan Falls Agreement that except for the express provisions regarding subordination of Idaho Power Company's listed water rights, the authority and duty of IDWR and the IWRB regarding enforcement and administration of water rights would remain unaffected. Such legal authority includes IDWR's "clear legal duty" to enforce and administer water rights in accordance with the priority system. *Musser v. Higginson*, 125 Idaho 392, 395 (1994). It also includes the IWRB's duty in formulating State Water Plans to "protect[] and preserve[]" "existing rights, established duties, and the relative priorities of water established in article XV, section 3" of the Idaho Constitution. I.C. § 42-1734A(1)(a). See also I.C. § 42-1738 (IWRB "shall have no power or authority" to "modify, set aside or alter any existing right or rights to the use of or the priority of such use as established under existing laws"); IDAPA 37.02.01.30.01 ("Pursuant to the provisions of Sections 42-1734A and 42-1734B, Idaho Code, the board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all *unappropriated water resources* . . .") (emphasis added).

With respect to IGWA's discussion of various State Water Plans, as demonstrated by Blue Lakes' and Clear Springs' opening *Memorandum* at pp. 44-46, such plans are policy pronouncements which cannot supersede Idaho water law or the prior appropriation doctrine, and which do not give rise to any additional regulatory power or alter the legal authority of the IWRB or any other state agency. IGWA's misunderstanding of the State Water Plans it has raised and their relation to the Swan Falls Agreement is evident in IGWA's misstatement that the Swan Falls Agreement "established a zero flow at Milner Dam," an erroneous premise which



IGWA uses to support its assertion that the maintenance of minimum flows downstream at the Murphy gauge under the Agreement effectively secured spring discharges necessary to maintain the minimum flows. As the *Dunn Affidavit* states, pre-existing "Policy 32 of the State Water Plan originally had a 'zero' flow at Milner and that did not change after the Swan Falls Agreement." *Dunn Aff.* ¶ 8 at 4.

IGWA is also wrong in its statement that the State Water Plan "implemented" the Swan Falls Agreement. The Swan Falls Agreement was implemented by the legislation agreed to by the parties to the Agreement and enacted by the legislature. See I.C. §§ 42-203B, C, and D. IGWA's argument regarding the impact of the Swan Falls Agreement is incompatible with that implementing legislation. Under the implementing legislation, in order for IDWR to grant to a ground water user, or any other party, a water right to trust water made available by the Swan Falls Agreement subordination, IDWR must first determine whether the proposed use would significantly reduce the amount of trust water available to Idaho Power Company, and if so, then apply public interest criteria which include assessing economic impacts on electric utility rates in Idaho. I.C. § 42-203C. This legally mandated process under the Agreement and legislation, under which subordination of Idaho Power Company's water rights cannot occur until IDWR makes such determinations regarding impact of proposed water uses on water supply or rates for power, does not square with IGWA's theory that the Agreement subordinated not only Idaho Power's rights, but also the Blue Lakes' and Clear Springs' rights, which have nothing to do with power supply or rates.

Indeed, if the Swan Falls Agreement had subordinated Blue Lakes' and Clear Springs' water rights to ground water development, one would expect some mention of this alleged subordination in the Statement of Legislative Intent ("Statement") adopted in conjunction with

the Swan Falls implementing legislation. *See Second Steenson Aff.*, Ex. Y. at 58-61 (Statement of Legislative Intent in Senate Journal). Instead, the Statement explains that "[a]t issue was *whether the water rights of Idaho Power Company should be subordinated* to future appropriators. . . ." *Id.* at 58 (emphasis added). The Statement reiterates that "[t]his legislation is intended to resolve conflicts over *whether an existing water right for power is subordinated.*" *Id.* at 59 (emphasis added). Moreover, the Statement explains in some detail the statutory provisions described in the paragraph above, under which the statutory water supply and public interest criteria must be satisfied for each proposed appropriation of trust water before Idaho Power Company's water rights in such appropriated water become subordinated. *Id.* at 60. By contrast, there is no mention whatsoever in this detailed Statement of Legislative Intent of any subordination of spring water rights, or application of statutory criteria to enable such subordination to occur.

In short, IGWA's argument that the Swan Falls Agreement protects ground water rights against delivery calls by spring water rights so long as the Agreement's minimum flows are maintained at the Murphy gauge finds no support in the language of the Swan Falls Agreement, its implementing legislation, or its legislative history. Blue Lakes and Clear Springs maintain that they are entitled to summary judgment on this issue based on the plain and unambiguous language of the contract. *See Joint Reply* at 32-36. However, to the extent that the Hearing Officer considers the extrinsic evidence offered by IGWA, as demonstrated above factual disputes concerning such evidence preclude the granting of summary judgment in IGWA's favor.

#### **IV. Ground Water Rights in Water Districts are Administered by Watermasters, Not "Local Ground Water Boards".**

IGWA's argument that "a local ground water board is the only entity authorized to order curtailment of junior-priority ground water users" is in direct conflict with Idaho's water

distribution statutes, the SRBA Court's order authorizing interim administration, and the Department's water district orders and CMRs. IGWA even goes so far to contradict its own arguments in this case as well as prior representations to the Idaho Supreme Court as to how the CMRs "harmonize" Idaho Code § 42-607 and the "local ground water board" provisions in Idaho Code § 42-237. Finally, IGWA further contradicts its prior agreement not to oppose interim administration of junior ground water rights through water districts, along with its members' express support for the creation of Water District 130 - the water district authorized to administer and curtail their junior priority ground water rights.

At a minimum, the Hearing Officer should hold IGWA to its prior representations and promises. Since IGWA previously supported interim administration through water districts and is representing and has represented to the Supreme Court that the CMRs provide the Director with authority to administer junior ground water rights, it has no basis to now "cry foul" and claim that the "local ground water board" is the only entity authorized to curtail junior priority ground water rights. In addition, IGWA's own expert admits that a "local ground water board" is unnecessary when a water district is established. As described below, through the creation of water districts and the Ground Water Act's deferment to those districts for administration, the Director and watermasters are clearly authorized to administer junior priority ground water rights. Therefore, IGWA's argument fails as a matter of law.

**A. The Ground Water Act Defers the "Local Ground Water Board" Process to Administration in Water Districts Pursuant to Chapter 6, Title 42.**

The use of a local ground water board is an *option*, not a mandatory procedure in administering ground water rights. If a senior water right holder believes that his use is "being adversely affected by one or more user[s] of ground water rights of later priority ... such person,

as claimant, *may make a written statement under oath of such claim to the director of the department of water resources.*” I.C. § 42-237b (emphasis added). IGWA’s argument about the “mandatory” language in I.C. § 42-237b and the Director’s duty to convene a “local ground water board” only applies if the process is initiated by the senior in the first place.

Neither Blue Lakes nor Clear Springs initiated the local ground water board process in this case. For example, Clear Springs’ President Larry Cope sent the Director a letter on May 2, 2005 requesting “water rights administration in Water District 130 pursuant to I.C. Section 42-607 in order to effectuate the delivery of Clear Springs Foods, Inc. a/k/a Clear Springs, water rights number 36-04013A, 36-0413B, and 36-07148.” SRF at 672.<sup>5</sup> As such, Clear Springs requested distribution through the water district and the watermaster, not a “local ground water board”. Accordingly, the local ground water board process was not initiated in this case, nor was it necessary, given that the interfering junior priority ground water rights had already been included in water districts.

The optional nature of a “local ground water board” process was further clarified by the Legislature when it amended section 42-237a and deferred administration of ground water rights to the water district procedures in Chapter 6, Title 42:

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 determine 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 ... ***The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of Title 42, Idaho Code, as the same have been or may hereafter be amended.***

I.C. § 42-237a.g (emphasis added).

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<sup>5</sup> This citation refers to the Department’s *Partial Agency Record* for Clear Springs’ Snake River Farm call.

The statute clarifies that once ground water rights have been included in water districts, the administration of those rights “shall be carried out” in accordance with the provisions set up in Title 42, Idaho Code – specifically Chapter 6, the chapter governing water distribution within water districts. In fact, Chapter 6 was amended in 1992 to specifically add the term “ground water” to various sections. Accordingly, a local ground water board is not required to administer ground water rights located within a water district. IGWA’s own expert agrees.

In his written direct testimony, IGWA’s expert Ron Carlson states that “the Department used Local Ground Water Boards in the past to settle these disputes because it was mandated by the Ground Water Act.” *Carlson Direct Testimony*, p. 7, lns. 18-19. During his deposition testimony, however, Mr. Carlson testified that a local ground water board is not required when there is a water district in place:

Q. Okay. Do you believe that chapter 6 of Title 42 applies to the administration of ground water rights?

A. I think it can. I think there – I certainly - it’s not inappropriate.

Q. Okay. And do you know of any aspect of Chapter 6 of Title 42 that calls for the formation of a local ground water board in the administration of ground water rights?

A. If you – if you have a water district and you have a watermaster, then you have a process for distribution in place. I think a call is only an avenue when there’s not a – when there’s not a water district and there’s not administration by a watermaster.

Q. So when there is a water district in place, I take it from what you’re saying that one is not required to first seek formation of a local ground water board before administration will take place?

A. I think that’s true.

Q. Okay. And the reference to local ground water board is in 42-237 subs (b), (c), (d)?

A. That’s right.

Q. Do you recall the reference?

A. That’s right.

Q. But in any case, again, to be clear, in your view, for administration of ground water rights within a water district to proceed, there doesn’t first have to be formation of a local ground water board; correct?

A. Once there’s a water district, you’ve got a process.

*Second Steenson Aff.*, Ex. B, Carlson Depo., p. 96, ln. 1 – p. 97, ln. 8.

In this matter Water District 130 was created in 2002 to specifically incorporate decreed ground water rights so that those rights could be administered within the district pursuant to the procedures in Chapter 6, Title 42. The “local ground water board” process is simply inapplicable in water districts where a watermaster, such as the watermaster in Water District 130, is distributing the water to the various rights.

The Department’s CMRs, which IGWA argued in favor of in both this matter and before the Idaho Supreme Court in the *AFRD #2* case, provide additional support for the Department’s authority to administer ground water rights through water districts, not “local ground water boards.”

**B. The Department’s Conjunctive Management Rules Provide for Administration Through Water Districts Not “Local Ground Water Boards”.**

Pursuant to Section 42-603, the Department promulgated the CMRs in 1994 to assist in “responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.” Rule 1. The Rules contain procedures to administer junior priority ground water rights outside of water districts (Rule 30), within water districts (Rule 40), and within groundwater management areas (Rule 41). None of the Rules mention or require the use of a “local ground water board”.

Confusingly, in opposing Blue Lakes’ and Clear Springs’ summary judgment motion in this case IGWA claimed that “[a]ny attempt by the Spring Users to curtail junior-priority ground water pumping *is without question governed by the CM Rules.*” *IGWA Response to Joint Motion for Summary Judgment* at 16 (emphasis added). If the Rules govern the calls in this case

as IGWA suggests, they required the following with respect to administration of ground water rights:

upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, *the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.*

Rule 30.09 (emphasis added).

Rule 40 governs administration within water districts. As discussed above, water district administration is performed through a watermaster pursuant to Chapter 6, Title 42, not a “local ground water board” process.<sup>6</sup>

**VI. Blue Lakes’ and Clear Springs’ Decreed Water Rights Provide for Water Distribution Pursuant to Idaho’s Prior Appropriation Doctrine and Climatic Conditions Regarding Water Supply Do Not Justify Out-of-Priority Ground Water Diversions.**

Blue Lakes and Clear Springs have never claimed their water rights “guarantee” minimum water supplies. Instead, Blue Lakes and Clear Springs have expected their decrees to be honored for purposes of administration as against hydraulically connected junior priority ground water rights. While a water right’s quantity element is not “guaranteed” to be met at all times due to climatic factors, IGWA’s summary judgment claim on this issue is confusing. IGWA seeks judgment as a matter of law that a water right decree defines “maximum parameters of authorized water use” and that it “does not create a guaranteed minimum water supply at all times”. *IGWA Motion* at 2, ¶ 5. It is undisputed that a water right holder cannot divert water in excess of his decreed quantity. It is further undisputed that a water right is not a

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<sup>6</sup> Similar to the Ground Water Act, the Rules were promulgated at a time when ground water rights in Idaho had yet to be incorporated into water districts, hence the procedures under Rule 30 for administration of rights not included within a water district. Even so, Rule 30 contemplates that, in response to a petition, the Director could “create a new water district following the procedures of Section 42-604, Idaho Code, provided that the water rights to be included in the new water district have been adjudicated.” Rule 30.07.e. Accordingly, the CMRs plainly provide for administration by water districts, and not by a “local ground water board”.

“guarantee” that the water supply will be available due to climatic conditions. Accordingly, the purpose of IGWA’s motion must be examined. If it is offered as a defense to administration of junior priority ground water rights, which IGWA’s briefing suggests, it should be rejected for the reasons identified below.

IGWA spends much of its fifth claim for summary judgment alleging that just because a water right is decreed, it does not “guarantee a water supply sufficient to fill the right at all times.” *IGWA’s Memorandum* at 25. Although IGWA is factually correct that a decree does not “guarantee” a particular type of water year, i.e. wet, dry, or average, IGWA fails to recognize that a decree’s priority date is a “guarantee” as against hydraulically connected junior priority water rights.<sup>7</sup> Accordingly, IGWA’s argument that a SRBA decree only defines the “maximum parameters of authorized water use” is just another legal “sleight-of-hand” in an attempt to justify out-of-priority ground water right diversions. Stated another way, IGWA believes that if a drought affects a water supply then its members are somehow free to deplete that water supply to the detriment of a senior because the senior’s water right is subject to changes in water supply caused by climatic conditions.

IGWA further claims that the “[I]nterrelationships between specific water rights or the capability of a shared source to serve all decreed water rights is simply not part of the SRBA.” *IGWA’s Memorandum* at 26. Again, IGWA misses the point about the purpose behind the adjudication and the basic foundation of Idaho water law. The SRBA decrees water rights so they may be administered through water districts pursuant to Chapter 6, Title 42. That

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<sup>7</sup> IGWA’s so-called example that the “water rights of Twin Falls Canal Company typically run dry by June” is without any factual basis. The water rights of Twin Falls Canal Company, although similarly injured by diversions under junior ground water rights, are not the subject of this proceeding. Since IGWA has provided no facts to back up this assertion in the Surface Water Coalition hearing case it is not surprising that this statement contains no specific references here. Accordingly, IGWA’s use of a factually incorrect and unsupported example is misleading and should be ignored



administration, and Idaho's prior appropriation doctrine, is predicated upon water shortages, and the reality that those with junior rights are curtailed to satisfy seniors. "First in time is first in right" no matter the type of water year. Contrary to IGWA's assertions, Idaho's law of prior appropriation was not established to address the "capability of a shared source to serve all decreed water rights". *IGWA's Memorandum* at 26. Instead, the opposite is true - the prior appropriation doctrine provides certainty to senior water right holders and demands curtailment of juniors if there is insufficient water to serve all decreed rights. *See Nettleton v. Higginson*, 98 Idaho 87, 91 (1977) ("it is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation; i.e. first in time is first in right.")

As such, IGWA's repeated claims that "inter- and intra-year fluctuations in the state's water resources" fail to acknowledge that water rights are administered regardless of the state of the water supply. If supplies are sufficient to satisfy all rights then no juniors are curtailed. If the water supply drops, or even fluctuates, those with junior rights are curtailed first. Even IGWA's own witness, Ron Carlson, recognized this fundamental concept of administration in his deposition testimony:

- A. Many of the water districts, the watermaster -- because there were great diurnal fluctuations in the flows. You may have high flows in the morning, very low flows in the afternoon. Watermaster goes out in the morning and makes his distribution, and by afternoon we've got a senior who's out of water. So there had to be things in some districts that actually accommodated for an ever-changing flow regime within the district. And that's why I'm saying because we had storage, we didn't have to deal with, as a general principle --some of the tributaries, we had those problems, but as a general principle, we didn't have that kind of -- that need to go out multiple times during the day, potentially, to assure that the water was properly distributed. In other districts what I suspect the watermaster would do would -- he would learn about what that -- what that diurnal change was going to be and he may set a diversion too high in the morning so that it would be -- it would be right sometime

- midday. And of course, I can point out some times when that was a source of controversy for the junior too.
- Q. Sure. So it sounds like that in such water districts where they didn't have storage to make up for the difference in diurnal fluctuations, that in any case, at all times, whatever the flow would be, the administrative paradigm was in priority; is that right?
- A. Unless it was a futile call, that's correct.
- Q. Unless it's a futile call. So if the flow is low, it doesn't change the order of priority in which water rights are to be distributed, is that correct, as compared to when it's higher or at a more moderate level?
- A. I didn't understand that question.
- Q. Yeah. So you talked about varying flows throughout the day, and flows may vary from one day to the next and one month to the next; isn't that correct?
- A. That's correct.
- Q. Okay. So the quantity of water available, whether it's on the scale from lower to moderate to high, wouldn't affect the priority system of delivery, would it?
- A. Yes, it would.
- Q. Okay. Explain that to me.
- A. Well, if -- we may be saying the same thing.
- Q. Okay.
- A. But if you look at the principle that you start with the oldest water right and you fill until you've used up the water supply, then all you do is, you get higher flows, of course you get to fill more water rights. And if that's the question you were asking, that's correct.
- Q. In any case, at any flow level it's in order of priority of administration?
- A. The oldest guy is going to get it first.

*Second Steenson Aff.*, Ex. B, Carlson Depo., Vol I, p. 27, lns. 6-26, p. 28, lns. 1-26, p. 29, lns. 1-17.

Blue Lakes and Clear Springs are not seeking a “constant water supply in sufficient quantity to fill their water rights at all times regardless of climatic conditions”. They are seeking proper distribution of water that is being wrongfully diverted by junior priority ground water rights. Accordingly, if climatic conditions cause the water supplies in Blue Lakes’ and Clear Springs’ surface water sources to vary or go down, they have no recourse. However, if those supplies are varied or lowered because of diversions by junior priority ground water rights, Idaho water law requires administration to curtail the out-of-priority use. Accordingly, to the extent

IGWA's motion seeks a ruling that would limit administration of junior priority rights on the basis that a decree does not "guarantee" a minimum water supply, it should be denied.

**VII. Junior Ground Water Users Must Prove that Their Out-of-Priority Diversions are not Injuring Senior Priority Water Rights Once Hydraulic Connectivity is Established.**

In light of the hydraulic connectivity of the ESPA, IGWA's argument that there is no reasonable certainty that the curtailment will in fact supply water to the Spring Users has no merit. It is some of IGWA's members, as junior appropriators, that bear the burden of showing that the Spring Users' calls are futile or that some other lawful defense applies in relation to any specific junior appropriator.

Water rights with hydraulically connected sources are administered conjunctively in Idaho pursuant to the water distribution statutes and the Department's CMRs. Furthermore, conjunctive administration is conducted in accordance with the priority system that is the foundation of Idaho water law. *See* IDAHO CONST. art. XV, § 3 ("Priority of appropriations shall give the better rights as between those using the water"); I.C. § 42-106 ("As between appropriators, the first in time is first in right"). In times of shortage, the priority of water rights is enforced through curtailment of junior appropriators. *See* I.C. § 42-607.

According to Tim Luke, the section manager for the water distribution section of the Department, "the prior appropriation doctrine applies to connected ground and surface water sources" and "when a hydraulically-connected junior ground water right is diverting water that would otherwise flow to a connected senior surface water right ... the junior ground water right under the prior appropriation doctrine is subject to curtailment." *Second Steenson Aff.* Ex. A at p. 130 lns. 5-17.

One of the primary purposes for the institution of the SRBA was to obtain a list of water rights sufficient to permit this priority administration of hydraulically connected water rights. *See Steenson Aff.*, Ex. E at 36-37 (Report of 1994 Legislative Committee). As a result of the decrees issued in the SRBA, the Department now has a list of water rights for purposes of administration. *Id.*, Ex. E at 27-29.

The SRBA Court has also made the legal determination of hydraulic connectivity with regard to decreed rights. The Conjunctive Management General Provision approved by the SRBA Court in Basin Wide Issue 5 provides that “Except as otherwise specified above, all other water rights within Basin \_\_\_ will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho Law.” *Steenson Aff.*, Ex. G. Arguing in favor of the form of the general provision that was adopted by the Court, the Director stated that this “establishes the connection between the sources and would enable IDWR to focus on the *extent* of connection, not the *existence* of connection.” *Second Steenson Aff.* Ex. I, p. 3. In its order approving the provision, the SRBA Court concluded that “as a matter of law ... a general provision on connected ground and surface sources is necessary to define the water rights decreed by the SRBA District Court by identifying hydraulically connected ground and surface sources for the purposes of administration and defining the legal relationship between connected sources.” *Steenson Aff.*, Ex. G, p. 4 ¶ 4.

The existence of a hydraulic connection between surface water sources in the Thousand Springs area and the Eastern Snake Plain Aquifer is not a matter of dispute. IGWA disputes the timing and relative proportional impact amongst springs and spring reaches that is associated with junior ground water pumping, but not the direct hydraulic connectivity. The Director has determined that “[o]ne of the locations at which a direct hydraulic connection exists between the

ESPA and springs tributary to the Snake River is in the Thousand Springs area.” *Blue Lakes Order* ¶ 7; *Clear Spring Order* ¶ 7. IGWA has disputed this finding of fact, but only “to the extent that direct hydraulic connection could be misinterpreted to mean direct and immediate. Time factors must be considered in any administration under a delivery call between surface and ground water users” *IGWA Summary of Positions on Director’s Orders related to the Blue Lakes Delivery Calls Exhibit 400A*. According to Charles M. Brendecke, an expert retained by IGWA, “The Eastern Snake Plain Aquifer underlies the broad area of the plain between the eastern mountains and the canyon below Milner. Flow in the aquifer is generally from the northeast to the southwest. The springs in the Thousand Springs Reach are a major outlet for this ground water flow.” *Direct Testimony of Charles M. Brendecke*, pp. 9-10. The CMRs specifically recognize that the ESPA is a common groundwater supply and “supplies water to and receives water from the Snake River.” Rule 50.

The direct hydraulic connection between the ESPA and the Thousand Springs area is also an important underlying assumption for both the Department’s modeling efforts and defenses that have been raised in this action by IGWA. “The Department uses a calibrated ground water model to determine the effects on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries from pumping a single well in the ESPA, from pumping a single well in the ESPA, from pumping selected groups of wells, and from surface water uses on lands above the ESPA.” *Blue Lakes Order*, ¶ 12; *Clear Spring Order*, ¶ 12. This model is “used by the department to simulate effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries, including springs in the Thousand Springs area.” *Id.* at ¶ 13. The Department’s ground water model shows that even if only those water rights that satisfy the “10% clip” are curtailed, the discharge of spring in the

Devil's Washbowl to Buhl Gage Spring Reach would increase "by an average of 51 cfs at steady state conditions." *Blue Lake Order*, ¶ 77. Even utilizing the "10% clip", the discharge in the Buhl Gage to Thousand Springs spring reach would increase "by an average of 38 cfs, varying from a seasonal low of about 14 cfs to a seasonal high of about 62 cfs, at steady state conditions." *Clear Springs Order*, ¶ 71.

IGWA contends that "spring discharges increased considerably from pre-development conditions at the turn of the 20<sup>th</sup> century until about the 1950s." *Direct Testimony of Charles M. Brendecke*, p. 15, lns. 10-11. Brendecke attributes this increase to the development of surface water irrigation on the ESPA during this period and speculates about the increased flow produced at the springs and specifically at the surface water sources for Blue Lakes' and Clear Springs' water rights. The results of Brendecke's speculation are certainly a matter of dispute, however, the underlying assumption that actions on the ESPA affect the flow of springs within the Thousand Springs area and specifically the source of Blue Lakes' and Clear Springs' water rights is not disputed.

IGWA and Mr. Brendecke acknowledge that the "ground water model can shed light on general relationships over large areas." *Direct Testimony of Charles M. Brendecke*, p. 14. This is, of course, only possible if there is a hydraulic connection that can be modeled. According to Mr. Brendecke, however, the model "cannot be expected to accurately predict the quantity and timing of water that might be delivered to a specific spring as a result of curtailment of a particular well." *Id.* This statement, if true, does not help IGWA and its junior ground water appropriator members.

Once the general relationship and hydraulic connectivity have been established, the junior appropriator bears the burden of showing that the quantity and timing of the impact

justifies a finding that curtailment would be futile. In *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 421-22 (1997), the Idaho Supreme Court held that all water within the Snake River system is considered interconnected, unless proven otherwise by a preponderance of the evidence. The burden is thus on the junior holder to show that water diverted from the ESPA or Snake River system is not tributary or does not injure senior water rights. *Martiny v. Wells*, 91 Idaho 215, 219 (1966).

Consequently, junior water rights must be curtailed in times of shortage ***unless the junior can prove***, by clear and convincing evidence, that his diversion and use of water does not injure a senior appropriator. *Moe v. Harger*, 10 Idaho 302, 305 (1904); *see also Cantlin v. Carter*, 88 Idaho 179, 186 (1964) (“A subsequent appropriator attempting to justify his diversion has the burden of proving that it will not injure prior appropriations”); *Silkey v. Tiegs*, 54 Idaho 126, 129 (1934) (“adherence to rule requiring protection of the prior appropriator, precludes relief to [the junior ground water user]”); *Jackson v. Cowan*, 33 Idaho 525, 528 (1921) (“The burden of proving that [the water] did not reach the reservoir was upon the appellants ... and this they fail to do”).

The Idaho Supreme Court reaffirmed the respective legal burdens in water right administration in *AFRD #2*:

The presumption under Idaho law is that the senior is entitled to his decreed water right ... The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of petition containing information about the decreed right. ... Once the initial determination is made that material injury is occurring or will occur, ***the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.***

*AFRD#2*, 143 Idaho 863, 154 P.3d at 449 (emphasis added). The above rules apply equally to water rights diverting from connected tributary sources, such as a junior priority ground water right that pumps from the ESPA.<sup>8</sup>

If “[t]he ESPA Ground Water Model relied upon by the Director is not capable of accurately predicting the increase discharge in particular springs stemming from curtailment of particular ground water rights,” then IGWA must find other evidence to satisfy its burden of proof. *IGWA’s Memorandum* at 30. IGWA has put forward no such evidence. Rather than meeting its burden and attempting to raise a valid defense such as futile call, IGWA argues that Curtailment Orders must be rejected because the *model* cannot prove with a “reasonable certainty” that the curtailment will be effective. *IGWA’s Memorandum* at 29-32. IGWA provides no authority for imposing on the Spring Users the burden of proving the validity of the model. Indeed, the law does not require such a showing by the Spring Users, the senior appropriators in this case.

IGWA then argues that, since some spring users junior to the curtailed ground water rights may receive an increase in flows following curtailment, or since another “non-calling” senior spring user may also receive water, then no such curtailment should take place. Were this true, priority administration would be turned on its head.<sup>9</sup> Surely, a senior water user’s

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<sup>8</sup>

*See Josslyn v. Daly*, 15 Idaho 137, 149 (1908) (emphasis added):

It seems self evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should, as we observed in *Moe v. Harger*, 10 Idaho 305, 77 Pac. 645, produce “clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion.” The burden is on him to show such facts.

<sup>9</sup>

In fact, IGWA’s assertion that “[t]he effect of curtailing ground water pumping in an attempt to increase ESPA overflow to specific springs would in large measure go to waste and would likely benefit junior-priority spring users not entitled to increased spring flows,” *IGWA’s Memorandum* at 32, must be rejected as nothing more than an attempt to “interfere with the water right of a downstream senior appropriator.” As the Supreme Court has recognized:

As a rule, the law of water rights in this state embodies a policy against the waste of irrigation water.



constitutionally guaranteed right to make a call for water is not abrogated merely because another senior water user who has not sought administration may receive some undefined benefit. IGWA cannot point to any legal requirement that the Spring Users show that curtailment would benefit solely the calling senior appropriator.

IGWA repeatedly uses the phrase “reasonable certainty” as though it were the legal standard for determining whether a curtailment is lawful. *See IGWA’s Memorandum* at 15 (“IDWR issued the Curtailment Order without reasonable certainty that its curtailment will specifically increase discharges ... any relief that would be intended by the proposed Curtailment Order is unknown and speculative and exceeds statutory and constitutional provisions requiring reasonable certainty”). Notably, however, IGWA fails to cite any of the “statutory and constitutional provisions” setting forth this alleged standard. IGWA cannot be allowed to turn the priority doctrine on its head by evading its burden of proof. Accordingly, summary judgment on this issue should be denied.

### CONCLUSION

The following testimony of Mr. Carlson, spokesman for IGWA’s theory that all water is ground water subject to the Ground Water Act and the Swan Falls Agreement, puts IGWA’s arguments in this case in perspective and provides a fitting conclusion.

Q. Okay. You know, Ground Water Act aside, you're talking about a concern that goes beyond -- and the Ground Water Act exists without it -- in terms of an appropriation of all of the stream flow, that would be of concern and would be denied as not in the public interest unless there was a subordination provision; correct?

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*Ward v. Kidd*, 87 Idaho 216, 392 P.2d 183 (1964). Such policy is not to be construed, however, so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the point of downstream diversion. *Martiny v. Wells*, 91 Idaho 215, 219, 419 P.2d 470 (1966).

*Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976).

- A. Let me try to address it this way: An application within the Eastern Snake Plain basin where the water supply stays within the box has -- the impact is limited to the extent of the beneficial use. When you move down to Thousand Springs and you demand water, you're not nonconsumptive. What you have is the most consumptive use from the aquifer. It's 100 percent consumptive. And so it's a different nature and there's a different set of facts. We wouldn't be having this argument or this discussion if, you know, Thousand Springs were someplace upstream on the Eastern Snake Plain and the water was still available to be recaptured and reused. So the fact that it's essentially an out-of-basin diversion.
- Q. Are you referring to Blue Lakes' water right, for example?
- A. I'm referring to any water right that demands water out of the -- out of the basin, so that the State does not have the ability to control and regulate the use of that water.
- Q. Is Blue Lakes' water right such a right?
- A. Probably.
- Q. Okay. In what way do you think Blue Lakes' right enables Blue Lakes to call for water out of the basin?
- ...
- A. Okay. So Blue Lakes' water right come out the Eastern Snake Plain Aquifer.
- Q. Right.
- A. And so to the extent that it's not a benign water right, one that cannot make a call, then it becomes a -- it has the character of an out-of-state -- out-of-state, out-of-basin diversion, because what -- what the outcome of the call might very well be is a curtailment of those that are using water upstream beneficially.
- Q. Now, that's the result of any call and curtailment, is it not, that it results in -- any call for priority delivery results in upstream curtailment of a water right, whether it's in the Eastern Snake Plain or anyplace else in the state of Idaho; isn't that correct?
- A. Well, but to the extent that the water -- to the extent that the water stays within the basin and is used by some senior within the basin, it's a different character than if you are diverting the water out of basin and ultimately out of state.
- Q. And what sense is Blue Lakes diverting water out of basin and out of state?
- A. Because all the water you use, that's the end of it. It's 100 percent consumed at that point.
- Q. Okay. And you examined Blue Lakes' facility, didn't you?
- A. Uh-huh.
- Q. Okay. Where in the process of Blue Lakes' use of water is it 100 percent consumed?
- A. I'm never going to see that water at Ashton. I'll never see it at American Falls. I'll never see it upstream again.
- Q. It will be seen downstream, won't it?
- A. It will be seen downstream out of some other place not to the benefit of eastern Idaho.

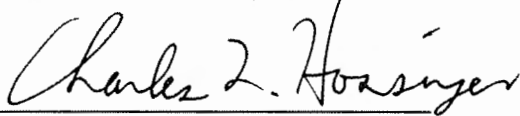
- Q. So you only want the water out of the Snake Plain basin to be used upstream for the benefit of eastern Idaho; is that the upshot here?
- A. I think that's the upshot of the water plan too.

*Stenson Second Aff.*, Ex. B, p. 227 ln. 8 - p. 230, ln. 15.

For the reasons identified above, and for the benefit of the rest of the people of Idaho, Blue Lakes and Clear Springs respectfully request the Hearing Officer to deny IGWA's motion.

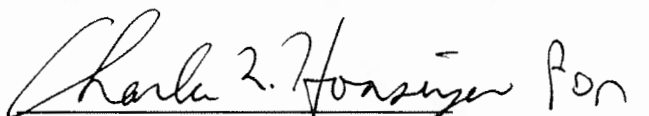
Dated this 31<sup>st</sup> day of October, 2007.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

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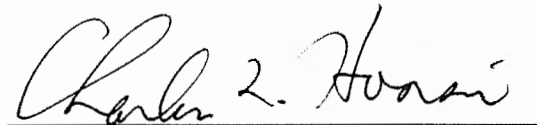
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charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter: provided, that the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter.

Approved March 19, 1951.

## CHAPTER 200

(S. B. No. 123)

### AN ACT

RELATING TO THE UNDERGROUND WATER RESOURCES OF THE STATE; DEFINING SUCH WATERS AS GROUND WATERS AND DECLARING THEM TO BE SUBJECT TO APPROPRIATION FOR BENEFICIAL USE; CONFIRMING GROUND WATER RIGHTS HERETOFORE ACQUIRED; EXCEPTING CERTAIN WELLS USED FOR DOMESTIC PURPOSES AND PROVIDING FOR INSPECTION THEREOF; DRAINAGE AND RECAPTURE OF IRRIGATION WATER; ESTABLISHING METHODS OF APPROPRIATION OF GROUND WATER; DEFINING THE TERMS GROUND WATER, WELL, WELL DRILLER, DOMESTIC PURPOSES AND WATER RIGHT; PRESCRIBING ADDITIONAL DUTIES OF THE STATE RECLAMATION ENGINEER WITH RESPECT TO GROUND WATERS; PRESCRIBING A PROCEDURE FOR THE APPROPRIATION OF GROUND WATER THROUGH APPLICATION, PERMIT AND LICENSE; DECLARING THE BUSINESS OF DRILLING FOR GROUND WATER TO BE AFFECTED WITH THE PUBLIC INTEREST AND REQUIRING REPORTS FROM WELL DRILLERS TO THE STATE RECLAMATION ENGINEER; PROVIDING FOR THE INTERPRETATION OF THIS ACT IN HARMONY WITH EXISTING WATER LAWS; PROVIDING THAT THE PROVISIONS OF THIS ACT ARE SEPARABLE; AND REPEALING ALL LAWS IN CONFLICT HEREWITH.

*Be It Enacted by the Legislature of the State of Idaho:*

SECTION 1. GROUND WATERS ARE PUBLIC WATERS. — It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined. All ground waters in this state are declared to be the property of the state, whose duty it shall be to

L. '51 c. 200  
Sec. 1  
Amended  
L. '53 c. 182  
Sec. 1, p. 278

supervise their appropriation and allotment to those diverting the same for beneficial use. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

SECTION 2. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. — The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act; providing such wells and withdrawal devices are subject to inspection by the department of reclamation and the department of public health. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

SECTION 3. DRILLING AND USE OF WELLS FOR DRAINAGE PURPOSES EXCEPTED. — The excavation and opening of wells and the withdrawal of water therefrom for the sole purpose of improving or preserving the utility of lands by draining them shall not be forbidden or governed by this act, and, likewise, there shall be excepted from the provisions of this act the excavation and opening of wells and withdrawal of water therefrom by canal companies, irrigation districts, and other owners of irrigation works for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use on or drainage of lands to which the established water rights of the parties constructing the wells are appurtenant.

SECTION 4. METHODS OF APPROPRIATION. — The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of diversion and application to beneficial use or by means of the application permit and license procedure in this act provided. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of chapter 2 of title 42, Idaho Code, may be completed under the provisions of said chapter 2 and rights to the use of ground water may be thereby acquired. But the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act.

#### SECTION 5. DEFINITIONS:

(a) "Ground water" is all water under the surface of

the ground whatever may be the geological structure in which it is standing or moving.

(b) "Well" is an artificial excavation or opening in the ground by which ground water is sought or obtained.

(c) "Well Driller" is any person or group of persons who excavate or open a well or wells for compensation or otherwise upon the land of the well driller or upon other land.

(d) "Domestic Purposes" is water for household use and livestock, and water used for all other purposes not in excess of 13,000 gallons per day.

(e) "Water Right" is the legal right, however acquired, to the use of water for beneficial purposes.

SECTION 6. DUTIES OF THE STATE RECLAMATION ENGINEER. — In addition to other duties prescribed by law, it shall be the duty of the state reclamation engineer to conduct investigations, surveys and studies relative to the extent, nature and location of the ground water resources of this state; and to this end, the state reclamation engineer may, on behalf of the state of Idaho enter into cooperative investigations, researches, and studies with any agency or department of the government of the United States, or any other state or public authority of this state, or private agencies or individuals.

SECTION 7. APPLICATION TO APPROPRIATE GROUND WATER. — For the purpose of establishing by direct means the priority right to withdrawal and use of ground water, any person desiring to acquire the right to the beneficial use of ground water pursuant to this act may make application to the department of reclamation for a permit to make such appropriation. Such application shall set forth:

1. The name and postoffice address of the applicant.
2. The source, location and description of the water supply in so far as the same is known to the applicant.
3. The nature of the proposed use.
  1. The location and description of the proposed well and ditch or other work, if any, and the amount or flow of water to be diverted and used.
  5. The estimated time within which such well and ditch, or other work, if any, will be completed and the water withdrawn and applied to use.
  6. In case the proposed right of use is for agricultural purposes, the application shall give the legal subdivisions of

L. '51 c. 200  
Sec. 6  
Amended  
L. '53 c. 182  
Sec. 2, p. 279

L. '51 c. 200  
Sec. 7  
Amended  
L. '53 c. 182  
Sec. 3, p. 279

land proposed to be irrigated, with the total acreage to be reclaimed as near as may be ascertained.

When any such application is made, the department of reclamation shall charge and collect from the applicant the fee provided for in Section 42-202, Idaho Code. All moneys received by the department of reclamation under the provisions of this act shall be deposited with the state treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the department of reclamation incurred in carrying out the provisions of this act.

L. '51 c. 200  
Sec. 8  
Amended  
L. '53 c. 182  
Sec. 4, p. 280

**SECTION 8. EXAMINATION OF APPLICATION.** — On receipt of application for permit to appropriate ground waters, it shall be the duty of the state reclamation engineer to make endorsement thereon of the date and hour of its receipt and to make a record of such receipt in some suitable book in his office. It shall be the duty of the state reclamation engineer to examine said application and ascertain if it is in due form, as above required. If, upon such examination the application is found defective, it shall be the duty of the state reclamation engineer to return the same for correction within thirty days from receipt of the application, and the date of such return with the reason therefor shall be endorsed on the application and a record made thereof in a book kept for recording the receipt of such applications. A like record shall be kept of the date of the return of corrected applications, but such corrected applications shall be returned to the state reclamation engineer within a period of sixty days from the date endorsed thereon by the state reclamation engineer; and if any such application be returned after such period of sixty days, such corrected application shall be treated in all respects as an original application. All applications which shall comply with the provisions of this act and with the regulations of the department of reclamation shall be numbered consecutively and shall be recorded in a suitable book kept for that purpose.

L. '51 c. 200  
New Secs.  
9 and 10  
Added  
L. '53 c. 182  
Sec. 5, p. 281

**SECTION 9. TIME FOR COMPLETION OF WORK— PERMIT— CANCELLATION OF PERMIT.** — Upon receipt of an application in due form as herein provided, the state reclamation engineer shall determine the time reasonably required to complete the proposed well and other works and apply such water to such proposed use which time, however, shall not be less than two years nor more than five years from the date of the permit; he shall then issue a permit pursuant to such application. The permit so issued by the state reclamation engineer shall be in a form pre-

L. '51 c. 200  
Sec. 9  
Amended and  
Renumbered  
L. '53 c. 182  
Sec. 6, p. 283

scribed by him and shall contain (1) the name and post-office address of the applicant; (2) the location and description of the proposed well; (3) the amount of flow or water to be diverted and used; (4) a description of the premises on which such water shall be used; and (5) the period of time within which such well shall be completed and such water applied to such use; provided that upon application by the permittee the state reclamation engineer may for good cause shown extend the time for such completion and application to use, but no such extension shall be for a period longer than five years.

If the work is not completed or the water applied to beneficial use as contemplated in the permit, the state reclamation engineer shall, thirty (30) days after the time limited therefor in the permit has expired, give notice by registered mail to the permittee at the address shown on his application, that unless the permittee appears within sixty (60) days after the mailing of such notice and shows the state reclamation engineer good cause why such permit shall not be canceled, then such permit will be canceled. Upon default of the permittee after such notice, or upon failure of the permittee to show good cause in accordance with said notice, the state reclamation engineer shall cancel such permit.

**SECTION 10. PROOF OF COMPLETION OF WORKS AND APPLICATION TO BENEFICIAL USE.** — Within thirty days after the expiration of the time limited in any permit issued under this section or at any time before such expiration, the permittee may give notice to the state reclamation engineer that he is prepared to prove that he has completed construction of his works and applied ground water to beneficial use in the manner contemplated by the permit. Such notice shall also state:

L. '51 c. 20  
Sec. 10, 11  
and 12  
Renumbered  
L. '53 c. 1:  
Sec. 7, p. 1

1. The name and postoffice address of the permittee.
2. The description of the well and other works, if any, constructed.
3. The amount of ground water that has been used.
4. The place and nature of such use, and if for irrigation, the description by legal subdivisions of the land so irrigated.
5. The date of priority which the permittee is prepared to establish. Such notice and such written proof as may be required to be submitted by such permittee shall be upon forms furnished by the state reclamation engineer and such statements shall be sworn to by the permittee and be supported by the affidavits of two disinterested witnesses.



Upon receipt of such notice the state reclamation engineer shall order its publication and conduct hearing on the same according to the procedure set forth in Section 42-217, Idaho Code.

**SECTION 11. FORM AND EFFECT OF LICENSE.** — The form and effect of the license confirming the right to use ground water under this act and the priority of such right shall be governed by the provisions of Sections 42-219 and 42-220, Idaho Code; provided, however, that no license shall issue pursuant to any permit which has been by the state reclamation engineer canceled in accordance with the provisions of this act.

**SECTION 12. ABANDONMENT WATER RIGHT — CHANGE OF POINT OF DIVERSION AND PLACE OF USE.** — The provisions relating to loss of water rights by nonuse and abandonment, as set forth in Section 42-222, Idaho Code, shall apply to ground water rights. The provisions of Section 42-222, Idaho Code, relating to change of point of diversion and change of place of use of water, shall be applicable to waters accruing from water rights, provided, that the withdrawal of waters from the same ground water supply at another location in lieu of withdrawal at the original location shall be considered a change of point of diversion.

**SECTION 13. LOGS OF WELL DRILLERS.** — The business and activity of opening and excavating wells is hereby declared to be a business and activity affecting the public interest in the ground water resources of the state, and every well driller is hereby required to keep a log of each well that may hereafter be excavated or opened by him and to furnish a copy of such log, duly verified, under oath, to the state reclamation engineer within thirty days following the completion of such well. Said logs shall become a permanent record in the office of the state reclamation engineer and be there available for public inspection. Said logs shall be upon forms prescribed by the state reclamation engineer and shall show:

(a) The location of the well with reference to legal subdivisions;

(b) The kind and nature of material in each stratum penetrated, and each change of formation with at least one entry for each ten foot vertical interval, and the time required to penetrate such interval;

(c) The name and address of the well driller and date of commencing drilling and date completed;

L. '51 c. 200  
Sec. 13  
Amended and  
Renumbered  
L. '53 c. 182  
Sec. 9, p. 289

(d) The size and depth of the well and location of water bearing aquifers;

(e) The size and type of casing and where placed in the well including number and location of perforations;

(f) The flow in cubic feet per second or gallons per minute in flowing well, and the shut in pressure in pounds per square inch;

(g) The static water level with reference to the land surface, and the drawdown with respect to the amount of water pumped per minute, when a pump test is made;

(h) The temperature of waters encountered, and other information as may be requested by the state reclamation engineer.

**SECTION 14. REPEAL OF CONFLICTING LAWS.** — All laws, acts, and parts of laws and acts of the state of Idaho in conflict in whole or in part with the provisions of this act, in so far as such conflict exists, are hereby repealed.

**SECTION 15. INTERPRETATION.** — The executive and judicial departments of the state shall construe the provisions of this act, wherever possible in harmony with the provisions of title 42, Idaho Code, as amended; and nothing herein shall be construed contrary to or in conflict with the provisions of Article XV of the constitution; and except where otherwise provided in this act, the provisions of said Title 42, Idaho Code, as amended, shall continue to govern ground water rights in this state.

**SECTION 16. SAVING CLAUSE.** — If any part or parts of this act shall be adjudged by the courts to be unconstitutional or invalid, the same shall not affect the validity of any part or parts thereof which can be given effect without the part or parts adjudged to be unconstitutional or invalid. The legislature hereby declares that it would have passed the remaining parts of this act if it had been known that such other part or parts thereof would be declared unconstitutional or invalid.

Approved March 19, 1951.

## CHAPTER 201

(S. B. No. 132)

(As Amended)

### AN ACT

AMENDING SECTION 25-1502 OF THE IDAHO CODE PROVIDING RAILROAD TRANSPORTATION OF CATTLE, HORSES

L. '51 c. 200  
New Sec. 27  
Added  
L. '53 c. 182  
Sec. 12, p. 291

L. '51 c.  
Sec. 14.  
Renumb.  
L. '53 c.  
Sec. 11.

L. '51 c.  
New Sec.  
Added  
15-21  
L. '53 c.  
Sec. 8,  
Sec. 23  
L. '53 c.  
Sec. 10



SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect from and after its passage and approval.

Approved March 12, 1953.

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## CHAPTER 181

(S. B. No. 75)

### AN ACT

APPROPRIATING MONEYS FROM THE GENERAL FUND OF THE STATE OF IDAHO FOR THE STATE SCHOOL FOR THE DEAF AND BLIND, FOR SALARIES, WAGES AND OTHER EXPENSES, FOR THE PERIOD COMMENCING JULY 1, 1953, AND ENDING JUNE 30, 1955; AND SUBJECT TO THE PROVISIONS OF THE STANDARD APPROPRIATIONS ACT OF 1945.

*Be It Enacted by the Legislature of the State of Idaho:*

SECTION 1. There is hereby appropriated out of the General Fund of the State of Idaho to the State School for the Deaf and Blind, for the purpose of paying salaries, wages and other expenses of said institution, for the period commencing July 1, 1953, and ending June 30, 1955, the sum of \$565,444.00, or so much thereof as may be necessary.

SECTION 2. The appropriations herein made are subject to the provisions of the Standard Appropriations Act of 1945.

Approved March 12, 1953.

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## CHAPTER 182

(S. B. No. 141)

### AN ACT

RELATING TO THE UNDERGROUND WATER RESOURCES OF THE STATE OF IDAHO; AMENDING SECTIONS 1 to 16, INCLUSIVE, OF CHAPTER 200 OF THE 1951 SESSION LAWS OF THE STATE OF IDAHO, REGULAR SESSION, AND ADDING NEW SECTIONS THERETO NUMBERED AS FOLLOWS: SECTION 9, 10, 15, 16, 17, 18, 19, 20, 21, 23, AND 27

AND CHANGING THE NUMBERS OF SECTIONS AS FOLLOWS: 9 TO 11, 10 TO 12, 11 TO 13, 12 TO 14, 13 TO 22, 14 TO 24, 15 TO 25, AND 16 TO 26; DECLARING THE POLICY OF THIS ACT; PROVIDING FOR THE ISSUING AND PUBLISHING OF NOTICE OF APPLICATION TO APPROPRIATE GROUND WATER, AND FOR PROTEST AND HEARING THEREON IN CRITICAL GROUND WATER AREAS; PRESCRIBING DUTIES AND POWERS OF THE STATE RECLAMATION ENGINEER WITH RESPECT TO GROUND WATERS; PROVIDING A PROCEDURE FOR THE ADMINISTRATIVE DETERMINATION OF ADVERSE CLAIMS BY THE CREATION OF LOCAL GROUND WATER BOARDS, FOR A HEARING AND DETERMINATION OF SUCH BOARDS, AND GIVING SUCH BOARDS AUTHORITY TO MAKE APPROPRIATE ORDERS ON SUCH ADVERSE CLAIMS, AND MAKING VIOLATIONS OF SUCH ORDERS MISDEMEANORS; PROVIDING FOR APPEALS TO DISTRICT COURT FROM DECISIONS OF STATE RECLAMATION ENGINEER AND LOCAL GROUND WATER BOARDS AND APPEALS FROM DECISIONS OF THE DISTRICT COURT TO THE SUPREME COURT; PROVIDING THAT PROVISIONS OF CHAPTER 14 OF TITLE 42, RELATIVE TO ADJUDICATION OF WATER RIGHTS SHALL BE APPLICABLE TO WATER RIGHTS ACQUIRED UNDER THIS ACT; PROVIDING VIOLATIONS OF THIS ACT SHALL CONSTITUTE MISDEMEANORS, AND CREATING A GROUND WATER ADMINISTRATION FUND.

*Be It Enacted by the Legislature of the State of Idaho:*

SECTION 1. That Section 1, Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended to read as follows:

Section 1. GROUND WATERS ARE PUBLIC WATERS.—It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined \* : *and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided.* All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the

same for beneficial use. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

SECTION 2. That Section 6, Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended to read as follows:

Section 6. DUTIES OF THE STATE RECLAMATION ENGINEER.—In addition to other duties prescribed by law, it shall be the duty of the state reclamation engineer to conduct investigations, surveys and studies relative to the extent, nature and location of the ground water resources of this state; and to this end, the state reclamation engineer may, on behalf of the state of Idaho enter into cooperative investigations, researches, and studies with any agency or department of the government of the United States, or any other state or public authority of this state, or private agencies or individuals. *It shall likewise be the duty of the state reclamation engineer to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of groundwater resources contrary to the public policy expressed in this act.*

SECTION 3. That Section 7, Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended to read as follows:

Section 7. APPLICATION TO APPROPRIATE GROUND WATER.—For the purpose of establishing by direct means the priority right to withdrawal and use of ground water, any person desiring to acquire the right to the beneficial use of ground water pursuant to this act may make application to the department of reclamation for a permit to make such appropriation. Such application shall set forth:

1. The name and postoffice address of the applicant.
2. The source, location and description of the water supply in so far as the same is known to the applicant.
3. The nature of the proposed use.
4. The location and description of the proposed well and ditch or other work, if any, and the amount or flow of water to be diverted and used.

5. The estimated time within which such well and ditch, or other work, if any, will be completed and the water withdrawn and applied to use.

6. In case the proposed right of use is for agricultural purposes, the application shall give the legal subdivisions of land proposed to be irrigated, with the total acreage to be reclaimed as near as may be ascertained.

When any such application is made, the department of reclamation shall charge and collect from the applicant the fee provided for in section 42-202 \* \* \*.

SECTION 4. That Section 8, Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended to read as follows:

Section 8. EXAMINATION OF APPLICATION.—On receipt of application for permit to appropriate groundwaters, it shall be the duty of the state reclamation engineer to make endorsement thereon of the date and hour of its receipt and to make a record of such receipt in some suitable book in his office. It shall be the duty of the state reclamation engineer to examine said application and ascertain if it is in due form, as above required. If, upon such examination the application is found defective, it shall be the duty of the state reclamation engineer to return the same for correction within thirty days from receipt of the application, and the date of such return with the reason therefor shall be endorsed on the application and a record made thereof in a book kept for recording the receipt of such applications. A like record shall be kept of the date of the return of corrected applications, but such corrected application shall be returned to the state reclamation engineer within a period of sixty days from the date endorsed thereon by the state reclamation engineer; and if such application be returned after such period of sixty days, such corrected application shall be treated in all respects as an original application. All applications which shall comply with the provisions of this act and with the regulations of the department of reclamation shall be numbered consecutively and shall be recorded in a suitable book kept for that purpose. *After an application has been duly filed with the state reclamation engineer, as in this act provided, it shall be the duty of the state reclamation engineer to make such further investigation as he may deem necessary to determine whether ground water subject to appropriation exists in the location or locations described in the application; and the state reclamation engineer may also require from the appli-*

*cant such additional information as he, the state reclamation engineer, deems reasonably necessary to enable him to act upon the application.*

SECTION 5. That Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by adding two new sections, numbered 9 and 10 to read as follows:

Section 9. NOTICE OF APPLICATION.—*Within a period of ten days after the filing of any application for permit with the state reclamation engineer, as herein provided, the state reclamation engineer in a critical ground water area, as hereinafter defined in this section, shall issue a notice of such application stating the name of the applicant, the location of the well or wells, the amount of the flow of water proposed to be used, and the description of the premises upon which the water is proposed to be used. Such notice shall also state that all persons having an interest in the critical ground water area desiring to oppose the issuance of a permit pursuant to such application, must within a period of thirty days from the first publication of such notice file in the office of the state reclamation engineer a protest to such application. A copy of the notice shall be furnished to the applicant, who shall cause the same to be published in a newspaper published in the county where the well described in said application is proposed to be located; or if no newspaper is published in such county, then in a newspaper of general circulation in such county. Publication of such notice shall be made two times, once each week for two consecutive weeks, and proof of such publication shall be furnished by the applicant to the state reclamation engineer. "Critical ground water area" means any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands in the basin at the then current rates of withdrawal, as may be determined, from time to time, by the State Reclamation Engineer.*

*In the event the application for permit is made with respect to an area that has not been designated as a critical ground water area the State Reclamation Engineer shall forthwith issue a permit in accordance with the provisions of Section 11 without requiring compliance with the provisions of the preceding paragraph of this section or the provisions of Section 10.*

Section 10. PROTEST AND HEARING.—All persons desiring to be heard in protest of the granting of a permit

pursuant to an application made under this act must file with the state reclamation engineer within thirty days after the first publication of the notice of such application as hereinabove provided, a protest against such application; provided, that for good cause shown, the state reclamation engineer may permit protests to be filed any time prior to the completion of the hearing on such application. After the lapse of thirty days following the first publication as hereinabove provided, the state reclamation engineer shall, if any protests against the application have been filed, fix a time and place for the hearing of such application. The time for holding such hearing shall not be more than fifty days from the first publication of said notice. Notice of the hearing shall be given by registered mail to the applicant and to all protestants.

The hearing shall be conducted before the state reclamation engineer under reasonable rules and regulations of procedure promulgated by him. Technical rules of pleading and evidence need not be applied. The state reclamation engineer may adjourn said hearing from time to time and place to place within the reasonable exercise of his discretion. All parties to the hearing as well as the state reclamation engineer shall have the right to subpoena witnesses, who shall testify under oath at such hearing. The state reclamation engineer shall have authority to administer oath to such witnesses as appear before him to give testimony. A full and complete record of all proceedings had before the state reclamation engineer on any hearing had and all testimony shall be taken down by a reporter appointed by the state reclamation engineer and all parties to the hearing shall be entitled to be heard in person or by attorney.

If no person protests an application within the period of thirty days following the first publication of notice thereof as hereinabove provided, and if the state reclamation engineer has determined from investigation that there probably is ground water subject to appropriation at the location of the proposed well, the state reclamation engineer may issue a permit pursuant to such application forthwith and for an amount of water not to exceed the amount of water determined to be there subject to appropriation; but if the state reclamation engineer, from the investigation made by him on said application as herein provided or from other information that has come officially to his attention has reason to believe that said application is not made in good faith, is made for delay, or that there is not water subject to appropriation at the location of the proposed well in said appli-

cation described, then the state reclamation engineer shall issue a citation to the applicant to appear and show cause, if any there be, why such application should not be denied for any of those reasons. The hearing on said citation shall be fixed, noticed and conducted in the same manner as hearings on protest of application as in this section hereinabove provided.

If, at the conclusion of any hearing held pursuant to this section the state reclamation engineer finds that there is ground water available for appropriation at the location of the proposed well described in the application, and that said application is made in good faith and not for delay, then the state reclamation engineer shall issue a permit pursuant to such application; otherwise, the application shall be denied; provided, however, that if ground water at such location is available in a lesser amount than that applied for, the state reclamation engineer may issue a permit for the use of such water to the extent that such water is available for appropriation.

SECTION 6. That Section 9, Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by changing the section number from 9 to 11, and to read as follows:

Section \* 11. TIME FOR COMPLETION OF WORK  
—PERMIT—CANCELLATION OF PERMIT.—\* \* \*

Whenever the state reclamation engineer determines that a permit shall issue pursuant to an application to appropriate ground water as made in this act, he shall determine the time reasonably required to complete the proposed well and other works and apply such water to such proposed use which time, however, shall not be less than two years nor more than five years from the date of the permit; he shall then issue a permit pursuant to such application. The permit so issued by the state reclamation engineer shall be in a form prescribed by him and shall contain (1) the name and postoffice address of the applicant; (2) the location and description of the proposed well; (3) the amount of flow or water to be diverted and used; (4) a description of the premises on which such water shall be used; and (5) the period of time within which such well shall be completed and such water applied to such use; provided that upon application by the permittee the state reclamation engineer may for good cause shown extend the time for such completion and application to use, but no such extension shall be for a period longer than five years.

If the work is not completed or the water applied to beneficial use as contemplated in the permit, the state reclamation engineer shall, thirty (30) days after the time limited therefor in the permit has expired, give notice by registered mail to the permittee at the address shown on his application, that unless the permittee appears within sixty (60) days after the mailing of such notice and shows the state reclamation engineer good cause why such permit shall not be canceled, then such permit will be canceled. Upon default of the permittee after such notice, or upon failure of the permittee to show good cause in accordance with said notice, the state reclamation engineer shall cancel such permit.

SECTION 7. That Sections 10, 11 and 12 of Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same are hereby amended by changing said section numbers from 10, 11, and 12, to 12, 13, and 14, respectively.

SECTION 8. That Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by adding new sections, numbered 15, 16, 17, 18, 19, 20, and 21 as follows:

*Section 15. POWERS OF THE STATE RECLAMATION ENGINEER.—In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the state reclamation engineer is empowered:*

*a. To require all flowing wells to be so capped or equipped with valves that the flow of water can be completely stopped when the wells are not in use.*

*b. To require both flowing and non-flowing wells to be so constructed and maintained as to prevent the waste of ground waters through leaky wells, casings, pipes, fittings, valves or pumps either above or above or below the land surface.*

*c. To prescribe uniform standard measuring devices for the scientific measurement of water levels in and waters withdrawn from wells.*

*d. To go upon all lands, both public and private, for the purpose of inspecting wells, pumps, casings, pipes, fittings and measuring devices, including wells used or claimed to be used for domestic purposes.*

*e. To order the cessation of use of a well pending the correction of any defect that the state reclamation engineer has ordered corrected.*

*f. To commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears to the state reclamation engineer that the determination of such action or proceeding might result in depletion of the ground water resources of the state contrary to the public policy expressed in this act.*

*g. To supervise and control the exercise and administration of all rights hereafter acquired to the use of ground waters and in the exercise of this power he may by summary order, prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the state reclamation engineer in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.*

*In connection with his supervision and control of the exercise of ground water rights the state reclamation engineer shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined 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; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream in an organized water district, to incorporate such area in a separate water district to be created in the same manner provided for in Section 42-604 of Title 42, Idaho Code. The administration of the water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of Title 42, Idaho*

Code, as the same have been or may hereafter be amended, except that in the administration of ground water rights either the state reclamation engineer or the watermaster in a water district or the state reclamation engineer outside of a water district shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with underground water, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

**Section 16. ADMINISTRATIVE DETERMINATION OF ADVERSE CLAIMS.**—Whenever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user of ground water rights of later priority, or whenever any person owning or having the right to use a ground water right believes that the use of such right is being adversely affected by another's use of any other water right which is of later priority, such person, as claimant, may make a written statement under oath of such claim to the state reclamation engineer.

Such statement shall include: -

1. The name and post office address of the claimant.
2. A description of the water right claimed by the claimant, with amount of water, date of priority, mode of acquisition, and place of use of said right. If said right is for irrigation, a legal description of the lands to which such right is appurtenant.
3. A similar description of the respondent's water right so far as is known to the claimant.
4. A detailed statement in concise language of the facts upon which the claimant founds his belief that the use of his right is being adversely affected.

Upon receipt of such statement, if the state reclamation engineer deems the statement sufficient and meets the above requirements, the state reclamation engineer shall issue a notice setting the matter for hearing before a local ground water board, constituted and formed as in this act provided. The person or persons against whom such claim is directed and who are asserted to be interfering with the claimant's rights shall in such proceedings be known as respondents.

The notice shall be returned to the claimant who shall cause the same to be served upon the respondent together with a copy of the statement. Such service shall be made at least five days before the time fixed for hearing and in the same manner that service of summons is made in a civil action. Proof of service of notice shall be made to the state reclamation engineer by the claimant at least two days before the hearing.

**Section 17. HEARING AND ORDER.**—Hearing on the statement and any answer filed by the respondent shall be had in the county for which such local ground water board was appointed. The hearing shall be conducted before the board under reasonable rules and regulations of procedure prescribed by the state reclamation engineer. All parties to the hearing as well as the board itself shall have the right to subpoena witnesses who shall be sworn by the board and testify under oath at the hearing. All parties to the hearing shall be entitled to be heard in person or by attorney. Upon such hearing the board shall have authority to determine the existence and nature of the respective water rights claimed by the parties and whether the use of the junior right affects, contrary to the declared policy of this act, the use of the senior right. If the board finds that the use of any junior right or rights so affect the use of senior rights, it may order the holders of the junior right or rights to cease using their right during such period or periods as the board may determine and may provide such cessation shall be either in whole or in part or under such conditions for the repayment of water to senior right holders as the board may determine. Any person violating such an order made hereunder shall be guilty of a misdemeanor.

**Section 18. LOCAL GROUND WATER BOARDS.**—Whenever a written statement of claim as provided in Section 16 hereof is filed with the state reclamation engineer, if the statement of the claimant is deemed sufficient by the state reclamation engineer and meets the requirements of Section 16 of this act, the said state reclamation engineer shall forthwith proceed to form a local ground water board for the purpose of hearing such claim. The said local ground water board shall consist of the state reclamation engineer, and a person who is a qualified engineer or geologist, appointed by the District Judge of the judicial district which includes the county in which the well of respondent, or one of the respondents if there be more than one, is located, and a third member to be appointed by the other two, who shall be a resident irrigation farmer of the county in which the well of respondent, or one of the respondents if there



more than one, is located. None of such members shall be persons owning or claiming water right which may be affected by such claim, nor members of the board of directors of any irrigation district or canal company owning or claiming water rights affected by such claims. No employee of the state of Idaho other than said state reclamation engineer is eligible for appointment to a ground water board. Members of the board shall hold office until the board has finally disposed of the claim which it was appointed to hear. Such members shall serve without pay except that members other than the state reclamation engineer shall receive per diem of \$25.00 together with reimbursement of expenses actually incurred during the time actually spent in the performance of official duties, such per diem and expenses to be paid from the ground water administration fund hereinafter created. Whenever such a local ground water board is needed to be formed in any county, the state reclamation engineer shall give notice of that fact to the District Judge of the judicial district which includes the county in which the well of respondents, or one of the respondents if there be more than one, is located, and thereupon such judge shall appoint a person to be a member of such board. Upon qualification by such member, the third member shall be selected. The state reclamation engineer shall be the chairman of the board and custodian of all its records. He may be represented at any board meeting by a duly appointed, qualified and acting deputy state reclamation engineer.

**Section 19. APPEALS FROM ACTIONS OF THE STATE RECLAMATION ENGINEER.**—Any person dissatisfied with any decision, determination, order or action of the state reclamation engineer, water master, or of any local ground water board made pursuant to this act may within sixty (60) days notice thereof take an appeal therefrom to the District Court for any county in which the ground water concerned therein may be situated. Appeal shall be taken by serving a notice of appeal upon the state reclamation engineer, together with a statement describing the decision, determination, order or action appealed from and setting forth the reasons why the same was erroneous. An appeal as referred to in this section stays the execution of, or any proceeding to enforce, the order, decision, determination, or action of the state reclamation engineer, water master, or local ground water board. Whenever the decision, determination, order or action of the state reclamation engineer appealed from was made pursuant to a hearing before the state reclamation engineer to which the appellant was a party or at which the appellant had a right to be

heard, the state reclamation engineer shall, upon receipt of service of notice of appeal, transmit to the District Court a certified transcript of the proceedings and the evidence received at such hearing and the evidence taken at such hearing may be considered by the District Court. The District Court shall try the same anew at the hearing on the appeal. Appeal to the Supreme Court from the final judgment rendered by the District Court pursuant to this Section may be taken within the same time and in the same manner as appeals from final judgments in cases commenced in the District Court are taken to the Supreme Court.

**Section 20. ADJUDICATION OF WATER RIGHT.**—The provisions of Chapter 14 of Title 42, Idaho Code, relative to adjudication of water rights shall be applicable to all water rights acquired under this Act.

**Section 21. PENALTIES.**—Any person violating any provision of this act shall be guilty of a misdemeanor and any continuing violation shall constitute a separate offense for each day during which such violation occurs, but nothing in this section or in the pendency or completion of any criminal action for enforcement hereof shall be construed to prevent the institution of any civil action for injunctive or other relief for the enforcement of this act or the protection of rights to the lawful use of water.

**SECTION 9.** That Section 13 of Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by changing the section number from 13 to 22 and to read as follows:

**Section \* 22. LOGS OF WELL DRILLERS.**—The business and activity of opening and excavating wells is hereby declared to be a business and activity affecting the public interest in the ground water resources of the state, and in order to enable a survey of the extent thereof every well driller is hereby required to keep a log of each well that may hereafter be excavated or opened by him in Idaho including wells excepted under Sections 42-227 and 42-228, Idaho Code, and to furnish a copy of such log, duly \* \* \* signed, to the state reclamation engineer within thirty days following the completion of such well. Said logs shall become a permanent record in the office of the state reclamation engineer for geological analysis and research and be there available for public inspection. Said logs shall be upon forms furnished by the state reclamation engineer and shall show:

(a) The location of a well with reference to legal subdivisions;

(b) The kind and nature of material in each stratum penetrated, and each change of formation with at least one entry for each ten foot vertical interval, and the time required to penetrate such interval;

(c) The name and address of the well driller and date of commencing drilling and date completed;

(d) The size and depth of the well and location of water bearing aquifers;

(e) The size and type of casing and where placed in the well including number and location of perforations;

(f) The flow in cubic feet per second or gallons per minute in flowing well, and the shut in pressure in pounds per square inch;

(g) The static water level with reference to the land surface, and the drawdown with respect to the amount of water pumped per minute, when a pump test is made;

(h) The temperature of waters encountered, and other information as may be requested by the state reclamation engineer \*;

(i) As a part of said log the well driller upon request of the state reclamation engineer shall furnish samples of each change of formation below the surface, and containers and cartage therefor shall be furnished by said state reclamation engineer.

*Every well driller before lawful drilling of a well for development of water, shall, from and after July 1, 1953, under penalty of misdemeanor for failure to so comply obtain a license from the state reclamation engineer which shall be issued by and in the form prescribed by the said state reclamation engineer upon payment of \$10.00 license fee, which license expires each year on June 30th, and is renewable by payment of a \$5.00 renewal fee. Said licenses are not transferrable and may be revoked or renewal refused by said state reclamation engineer if it appears that the requirements of this section have not been complied with. Revocation or refusal to renew a well driller's license shall be determined by said state reclamation engineer only after fifteen days' notice setting forth reasons therefor, has been sent by registered mail to the licensed well driller.*

SECTION 10. That Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by adding a new section numbered 23 and to read as follows:

*Section 23. GROUND WATER ADMINISTRATION FUND.—There is hereby created in the State Treasury a special fund known as the Ground Water Administration Fund. All fees collected by the state reclamation engineer pursuant to Sections 7 and 22 of this act shall be placed in said special fund. All moneys received by said special fund are hereby appropriated for the purpose of the administration of this Act, and no moneys received in said special fund shall be disbursed by the State Treasurer unless the voucher for such disbursement contains the certificate of the state reclamation engineer that such voucher is for an expense incurred in the administration of this Act.*

SECTION 11. That Sections 14, 15, and 16 of Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same are hereby amended by changing the section numbers from 14, 15, and 16 to 24, 25, and 26, respectively.

SECTION 12. That Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by adding a new section numbered 27 to read as follows:

*Section 27. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water may be so commenced and such rights may be acquired and perfected under Chapter 2 of Title 42, Idaho Code, unaffected by this act or by Chapter 200, Laws of 1951.*

Approved March 12, 1953.

## CHAPTER 183

(S. B. No. 157)

### AN ACT

DECLARING IDAHO POLICY TO PROTECT ITS LANDS, STREAMS AND WATER COURSES; DEFINING DREDGE MINING; REQUIRING THE GROUND DISTURBED BY DREDGE MINING BE LEVELLED OVER AND WATER COURSES RESTORED; REQUIRING THAT SETTLING PONDS BE CONSTRUCTED; PROVIDING FOR THE INSPECTOR OF MINES FOR THE STATE OF IDAHO AS THE ADMINIS-

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