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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); & TO WATER RIGHTS NOS. 36-07083 & 36-07568 (CRYSTAL SPRINGS FARM)

Clear Springs, Snake River Farm Delivery Call

SPRING USERS' PRE-HEARING MEMORANDUM

COMES NOW, Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs") (collectively referred to as the "Spring Users"), by and through counsel of record, and hereby submits this *Pre-Hearing Memorandum*, pursuant to the August 1, 2007, *Order Approving Stipulation & Joint Motion for Rescheduled Hearing.*

INTRODUCTION

Blue Lakes and Clear Springs filed water delivery calls in the 2005, seeking administration of hydraulically connected junior priority ground water rights. The Director responded with orders dated May 19, 2005 ("*Blue Lakes or BL Order*") and July 8, 2005 ("*Clear Springs or CS Order*"). The Director subsequently issued various implementation orders from 2005 to 2007 approving IGWA's "replacement water plans". At no time during this period did the Director administer, or curtail, an out-of-priority diversion by a junior ground water right.

For clarification, prior to the appointment of the Hearing Officer, the Director bifurcated the issues in the *Clear Springs Order* and consolidated the petition on the Snake River Farms call with the *Blue Lakes Order*. Clear Springs' petition on the Crystal Springs call and that aspect of the *Clear Springs Order* will be addressed at a separate proceeding.

ISSUE PRESENTED FOR HEARING

The following issues are presented for hearing. As identified below, and as will be demonstrated at hearing, the Director failed to recognize and honor the decreed elements of the Spring Users' senior water rights for purposes of conjunctive administration. The failure to properly distribute water to Blue Lakes' and Clear Springs' decreed senior surface water rights resulted in orders that are contrary to Idaho's prior appropriation doctrine and that must be modified.

Issue #1: **Out-of-Priority Diversions by Hydraulically Connected Junior Priority Ground Water Rights Injure Blue Lakes' and Clear Springs' Senior Surface Water Rights.**

BL Order (May 19, 2005)	**CS Order (July 8, 2005)**
Findings of Fact ¶¶ 18, 19, 37, 38, 50, 51 & 67	Findings of Fact ¶¶ 21, 22, 42, 43, 55, 56 & 66
Conclusions of Law ¶¶ 17, 23, 31 & 33	Conclusions of Law ¶¶ 17, 24, 30 & 31

Hydraulically connected junior ground water rights materially injure Blue Lakes' and Clear Springs' decreed senior surface water rights when they divert water out-of-priority and reduce the amount of water available for beneficial use by Blue Lakes and Clear Springs. The Director's orders fail to recognize this basic premise of Idaho's prior appropriation doctrine. Absent a finding of waste or forfeiture, which has not been made by the Director and is not disputed in this proceeding, the Spring Users are entitled to administration of hydraulically connected junior groundwater rights to satisfy their senior water rights.

Issue #2: **The Director Cannot Limit the Diversion Rates for Blue Lakes' and Clear Springs' Decreed Water Rights According to "Seasonal Variations" or "Seasonal Highs" for the Benefit of Junior Priority Ground Water Rights**

BL Order (May 19, 2005)	**CS Order (July 8, 2005)**
Findings of Fact ¶¶ 49, 50, 64 & 65	Findings of Fact ¶¶ 54, 55, 61 & 62
Conclusions of Law ¶¶ 25 & 31	Conclusions of Law ¶¶ 24 & 33

Seasonal variations in spring flows do not justify out-of-priority diversions under junior ground water rights. That notwithstanding, the Director has determined water rights 36-7210 (Blue Lakes) and 36-4013A (Clear Springs) were not materially injured since they were satisfied during the temporary "seasonal high." None of the Spring Users' decreed water rights contain "seasonal variation" conditions or limitations. Accordingly, even if those rights may be satisfied temporarily during the year, that does not excuse injury caused by junior priority ground water rights the rest of the year. Since hydraulically connected junior priority ground water rights reduce the surface water supplies that can be diverted and used by Blue Lakes and Clear Springs under water rights 36-07210 and 36-4013A, the Director is required to administer those junior ground water rights as well.

Issue #3: **Director Arbitrarily Assigned a "10% Uncertainty" Confidence Limit to the Ground Water Model and Erroneously Used that Condition to Exempt Certain Junior Priority Ground Water Rights from Administration.**

BL Order (May 19, 2005)	**CS Order (July 8, 2005)**
Findings of Fact ¶¶ 16, 67 & 76	Findings of Fact ¶¶ 17, 66 & 71
Conclusions of Law ¶ 26	Conclusions of Law ¶ 28

The Ground Water Model was calibrated according to measured ground water levels and spring discharges, calculated reach gains and losses to the Snake River, and other stream flow measurements for the period from 1980 to 2002. The confidence levels for the model's output are influenced by the accuracy of individual data utilized in calibrating and developing the model as well as internal algorithm structures in the model code. No specific accuracy or "confidence level" on the model has been defined or evaluated. *Brockway Expert Report* ("*Brockway Direct*") at 12. Accordingly, the Director's use of a 10% accuracy level, based solely on the implied accuracy of USGS stream gages, is not justified and is further without support in any statute or rule. Moreover, even though those same gages are used for surface water right administration in Water District 01 and no "10% uncertainty" is used for the benefit of either junior or senior surface water right holders. The same principle should apply in this matter.

The Director's 10% uncertainty condition is arbitrary, not supported by any statistical or technical analysis, and erroneously prevents priority administration of junior ground water rights which are, whether alone or cumulatively with other junior groundwater rights, to be materially injuring the Spring Users' senior water rights.

Issue #4: **Neither "Optimum Use" nor "Full Economic Development of Ground Water" Condition or Limit Administration Necessary to Satisfy Senior Surface Water Rights.**

BL Order (May 19, 2005)
Conclusions of Law ¶¶ 4 & 6-7

CS Order (July 8, 2005)
Conclusions of Law ¶¶ 4 & 6-7

Certain Conclusions of Law, contained in the Director's orders, suggest that Idaho's prior appropriation doctrine is subject to undefined "economic" considerations and that the concept of "reasonable use" justifies out-of-priority ground water diversions. Such statements, if used to support any of the Director's findings or conditions that limited administration of junior ground water rights (as was done in the July 5, 2007 implementation orders), are erroneous and should be set aside. Idaho water law does not provide the Director or the watermaster with the discretion to determine who makes the "best" or most "economic" use of the water and distribute water on that basis rather than according to the decreed water rights.

Issue #5: **The Director's "Replacement Water Plan" Process Violates the Conjunctive Management Rules and the Implementation Orders Unlawfully Authorized Out-of-Priority Diversions Under Junior Ground Water Rights in 2005, 2006, and 2007.**

BL Order (May 19, 2005)
Findings of Fact ¶ 31
Conclusions of Law ¶¶ 37-38

CS Order (July 8, 2005)
Findings of Fact ¶¶ 76 & 77
Conclusions of Law ¶¶ 28-30

The Director, through his orders, created a new process coined "a replacement water plan" that is without any statutory or regulatory authority. Rather than comply with the mitigation plan requirements of Rule 43, of the Conjunctive Management Rules, the Director has approved "replacement water plans" without any notice or process provided to senior water right holders. This unilateral approval of actions by junior ground water users has prevented curtailment for the last three years. The Director's use of this process amounts to unlawful rulemaking and it should be set aside. The Director's approval of these plans, through the

"implementation orders" in 2005, 2006, and 2007 are also in error as they relate to the *Blue Lakes Order* and *Clear Springs Order*.

SUMMARY OF ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On November 14 2007, the Hearing Officer issued his *Order Granting in Part & Denying in Part Joint Motion for Summary Judgment & Motion for Partial Summary Judgment* ("November 14 Order). In that decision, the Hearing Officer made the following determinations:

1. "The partial decrees that were entered in this case meet the standards of issue preclusion." November 14 Order at 5. Accordingly, "the Director cannot go behind the partial decrees on those matters decided in the decrees." *Id.* at 6. While this does not prevent the Director from considering the factors listed in CMR 42 dealing with material injury, *id.*, the Director is still limited by the elements decided in the decrees.

2. "The points of diversion [for the Spring Users' water rights] are locations after the water has left the ground. Treating the decreed water rights as ground water rights would be contrary to statute and would constitute a collateral attack on the partial decree." *Id.* at 7-8. Accordingly, the requirements of the ground water act do not apply to the Spring Users' water rights.

3. The Director may draw "inferences ... from historical data as to water use and need." *Id.* at 8. However, "This does not impair the use of the maximum amounts decreed when available without curtailment, assuming it can be put to a beneficial use." *Id.* Whether or not the Director "property utilized the historical information" is a question of fact for the hearing. *Id.* at 9.

4. The Director cannot impose a condition on the Spring Users water rights based on alleged "seasonal conditions." *Id.* "Attaching a seasonal limitation as such is contrary to the adjudicated water rights." *Id.*

5. "Water in the aquifer is subject to conjunctive management regardless of its source, so long as hydraulically connected." *Id.* "[O]nce water enters the aquifer and river channels of the Eastern Snake River Plain from whatever source it is subject to administration by priority. That is the essence of conjunctive management." *Id.* at 10.

6. "The legal underpinnings of [the 10% uncertainty rule] are not clear." *Id.* Accordingly, the matter was reserved for hearing.

7. "On its face, the Director's decision [regarding phased-in curtailment] seems to run contrary to statutory and case law once material injury to a senior water users is established." *Id.* However, the factual question of futile call will be addressed at hearing. *Id.* at 11. In addition, the extent to which the Director may consider the economic impact of administration is a question of law, requiring further development of a record. *Id.*

8. "Regardless of historical belief and understandings of many concerned interests, the Spring Users were not parties to the Swan Falls Agreement, and nothing in this record indicates that they agreed to the understandings." *Id.* No evidence regarding the development of the Swan Falls Agreement is relevant in this hearing.

9. "The provisions for mandatory use of a local ground water board have been superseded so far as resolution of this dispute is concerned." *Id.*, at 13.

10. "The partial decrees define the [maximum] amount of water that a water user is entitled to when available and can be applied to a beneficial use." *Id.* This is not a guaranteed

amount. "To justify curtailment there must be a relationship between the use by the junior water right holder of the water and a shortage by the senior water right holder." *Id.*

11. As to the matters that were resolved by the Hearing Officer's November 14, Order, there are no issues of fact to determine at hearing. Accordingly, the Spring Users object to any exhibits and witnesses proffered by IGWA to introduce evidence or arguments on these points. IGWA refused to allow depositions of its lay witnesses, and no information was provided regarding their proposed testimony. The Spring Users are unaware of the extent of their proposed testimony and reserve the right to object at hearing.

BACKGROUND

I. Blue Lakes & Clear Springs

Clear Springs Foods, Inc.

1. Clear Springs Foods, Inc., an Idaho general business corporation, is a vertically integrated, employee-owned food company headquartered in Buhl, Idaho.[1] Founded in 1966, Clear Springs prepares a variety of fresh and frozen seafood for human consumption, for sale in fine restaurants and in seafood sections of major supermarkets throughout the United States and Canada. A timeline history of aquaculture in general and in Idaho (including Clear Springs' development) is presented at **Exhibit A**. Clear Springs is the world's largest producer of aquacultured rainbow trout but also manufactures salmon, mahi mahi, and other premier value added seafood products. A general overview and description of the global seafood market and aquaculture, including the role of facilities in the State of Idaho, is presented at **Exhibit B**.

Vertical Integration

2. Clear Springs is vertically integrated with its own rainbow trout brood stock and

[1] The testimony of Clear Springs' witnesses Larry Cope and Dr. Randy MacMillan will cover information presented in this section and will focus on Clear Springs' operations, structures, and water rights, and in particular the operations of the Snake River Farm facility.

egg production, feed manufacturing, farm operations, processing and value adding plants, and distribution system with its own modern fleet of refrigerated tractor/trailer combinations. Its sales force is located throughout the United States. Clear Springs also operates a leading edge research facility whose mission is to develop tools that enhance fish production at Clear Springs' production facilities. Vertical integration begins with Clear Springs' own pedigreed rainbow trout brood stock. These fish have been selectively bred for over 20 years successfully increasing growth rate by nearly 50%. Brood stock spawning is scientifically regulated by photoperiod control to produce a year round supply of pedigreed eggs. This helps provide their market with a continuous supply of product at stable prices and consistent quality. Feed is manufactured at Clear Springs' modern feed mill in Buhl. Ingredients are imported from local, regional, and national suppliers. The diet has been scientifically formulated to maximize fish growth and feed conversion efficiency while minimizing environmental pollutants.

3. Eggs are hatched in bio-secure nurseries where they are husbanded up to a critical size prior to stocking. At stocking, fish are immunized against common trout pathogens using Clear Springs Foods vaccines developed and manufactured at its Research and Development facility. Fish are reared at one of four owned (Box Canyon, Clear Lake, Crystal Springs and Snake River) or two leased (Briggs West and Briggs East) farms. Fish inventory is closely controlled and tracked to harvest at 12-16 months. The harvesting is staggered throughout the year to take advantage of market opportunities. Fish are fed using an advanced, patented feeding system that helps standardize fish size at harvest. Fish are harvested live for transport to a Clear Springs' cutting plant. Processing occurs in a state-of-the art seafood processing facility. Proprietary de-boning equipment and advanced robotics are used to ensure consistent final products of superior quality are efficiently manufactured. Additional value adding occurs at the

cutting plant or at Clear Springs' Specialty Products plant located in Buhl. A variety of crusted, breaded, smoked and minced products are produced at the Specialty Products facility. New product development also occurs at this facility. A fleet of ten (10) refrigerated tractor/trailer trucks delivers fresh and frozen product throughout the United States and Canada 365 days per year.

Employee-Owned

4. Clear Springs is owned by its 400 employee families. From 1966-2000 the company was closely held by 97 stockholders most of who were investors early in Clear Springs' history. In 2000, an employee ownership plan and trust (ESOP) was established to purchase 100% of the company from its previous owners. Approximately 40% of the employee owners live in the Buhl area, 20% live in the Wendell area and the remaining families living in other areas throughout the Magic Valley (e.g. Jerome, Twin Falls, Castleford, Kimberly, Filer). Clear Springs is the largest year round employer in the Magic Valley west end. Clear Springs' annual payroll is $19 million.

Clear Springs' Snake River Farm Facility

5. Rebuilt in 1981-1987, the Snake River Farm is a modern technologically advanced flow-through aquaculture facility. The farm utilizes extant topographical differences in elevation to serially reuse (by gravity flow) spring water 5 or 6 times depending on whether water is first used at the Snake River Brood facility or directly delivered to the farm. The farm is equipped with an advanced feeding system developed by Clear Springs and an efficient waste management system. The Snake River Farm currently produces about 15% of the total fish production at Clear Springs' owned farms.

6. Snake River Farm (which includes the farm, Snake River Brood facility, Research

and Development Facility, and Visitor Center) has water rights totaling 117.67 cfs. The Snake River Basin Adjudication (SRBA) Court decreed these rights in April 2000. The earliest right was for 40 cfs issued in 1933 (36-02703), followed by a 1938 right for 20 cfs (36-02048), a 1940 right for 14 cfs (36-04013C), a 1955 right for 15 cfs (36-04013A), a 1964 right for 27 cfs (36-0401B) and a 1971 right for 1.67 cfs (36-07148).

7. An overview and description of water collection and water distribution at the Snake River Farm is presented at **Exhibit C**. Briefly, three separate water users (Clear Springs Foods, Clear Lake Ranch PUD and Clear Lake Country Club) divert from the springs at the point of diversion for Snake River Farm or immediately prior to discharge to the Snake River Farm. Clear Lake Ranch PUD diverts through a pipe at the furthest west collector box. Clear Springs Foods also diverts from the collector box but diversion enters a collection system (spring pool) that receives additional spring flow from other springs emanating from the canyon wall. This occurs over approximately a 300 ft length of the canyon wall. The springs discharge at different elevations in the canyon but because of thick talus slopes an accurate determination of their location is not feasible. The springs are believed to emanate at different elevations because of significant differences in nitrate-nitrite nitrogen concentrations between major collection points. **Exhibit E**. Water from all of these sources is collected by Clear Springs Foods into a central conveyance for initial distribution to either the Snake River Farm as first use water (freshwater) or after use at the Snake River Brood and Research facilities (re-use water). In November 2007, approximately 55.34 cfs delivered to Snake River Farm was freshwater and 38.86 cfs was re-use water. These water flows are delivered via underground pipes. Some additional minor diversion from the Clear Springs Foods collection system occurs. A Visitor's Center Pond uses about 0.6 cfs when in operation. An additional 0.23 cfs is diverted to the Research Facility Specific

Pathogen Infected laboratory. None of this water or Visitor Center water is used at the fish farm because of concern for fish contamination.

8. Clear Springs' water flows are measured at several locations and totalized for required IDWR reporting. All Clear Springs' water flows are measured weekly. Water flow is primarily used for fish production at the Snake River Farm. Flow is measured with a flow-meter at two delivery pipes to the farm. Water flow diverted to the Specific Pathogen Infected Laboratory and Visitor Center water are measured by the "crest depth over a weir" method. Diversions are under control of the Watermaster for Water District 130.

9. All water entering Clear Springs' fish production farms originates from surface springs emanating from the Eastern Snake Plain Aquifer (ESPA). This water is chemically and biologically ideal for rainbow trout production. A general overview of the importance of water quality for aquaculture, as well as Clear Springs' review of alternatives to flow-through culture is presented at **Exhibit D**. In this regard the water supply is unique for its purity, constant volume and gravity delivery. This permits efficient, cost-effective and maximal rainbow trout production essential to compete in today's global seafood economy. All water entering Clear Springs' farms has a water temperature of 15° Celsius, is saturated with oxygen and has sufficient water alkalinity and hardness to buffer changes in pH associated with release of carbon dioxide from fish respiration. The purity of this water also ensures Clear Springs' fish are not contaminated by pesticides or metals that can occur in other waters. These water characteristics are similar for other aquaculture facilities in the Thousand Springs reach of the Snake River.

10. Other aquaculture facilities owned by Clear Springs include Box Canyon (300 cfs water right), Clear Lake Farm (251.55 cfs water rights), and Crystal Springs Farm (335.1 cfs water right). The Box Canyon farm has received 300 cfs of water without seasonal or annual

variation since the farm was built in 1973. Clear Lake Farm has received 200 cfs of the total 251.55 cfs since initially requesting administration in Water District 130 in 2002. Crystal Springs Farm does not receive its full water right. *CS Order* at 19, ¶ 81.

Blue Lakes Trout Farm

11. The Director's May 19, 2005 Order in response to Blue Lakes' water delivery call provides a generally accurate overview of Blue Lakes' water rights and water diversion and conveyance facilities. *BL Order,* p. 11-12, ¶¶ 52-55. Blue lakes raises trout for commercial production. The flow of Alpheus Creek is diverted through concrete headworks into a pipeline, and conveyed to Blue Lakes concrete raceways and hatchery building. These facilities were constructed or reconstructed in 1999-2000. A portion of the diverted water, 25.3 cfs, is conveyed directly to Pristine Springs, Inc. to fill its prior water right.

12. Blue Lakes' water diversion and conveyance system, and its fish rearing facilities, have sufficient capacity to utilize its water rights for commercial fish production. Alpheus Creek water flows are currently insufficient to supply Blue Lakes' water rights and to operate the Blue Lakes' facility to full capacity. Additional water will provide the additional physical environment and oxygen content necessary for Blue Lakes' to increase fish production by increasing stocking densities (numbers of fish).

13. Blue Lakes water use is consumptive. Pristine Springs utilizes Blue Lakes' discharge for fish rearing, irrigation and hydropower. Pristine Springs' use is also largely non-consumptive, so that the majority of the water is discharged to the Snake River.

II. Ground Water Use and the Eastern Snake Plain Aquifer (ESPA)

14. Ground water development on the ESPA, including consumptive uses for irrigation, dramatically increased beginning in the 1950s. *BL Order* at 2 ¶ 6; *CS Order*, at 2 ¶ 6.

15. Pumping under ground water rights depletes the ESPA by approximately 2.0 million acre-feet per year through consumptive use. *BL Order* at 2 ¶ 4; *CS Order* at 2 ¶ 4.

III. Foundations of Conjunctive Administration

16. The SRBA commenced in 1987 to adjudicate water rights in the Snake River Basin. Idaho Code § 42-1406A (uncodified).

17. In 1993 Alvin Musser made a water delivery call against junior priority ground water rights and requested the Director to distribute water to his senior surface water rights. *Musser v. Higginson*, 125 Idaho 392 (1995). The district issued a writ of mandate against the Director and determined that the failure to adopt rules and regulations enabling him to respond to Musser's call was a breach of his "mandatory, ministerial duty". 125 Idaho at 394. The Idaho Supreme Court upheld the writ of mandate and acknowledged the Director has a "clear legal duty" to distribute water pursuant to Idaho Code § 42-602.

18. In response to the Musser call and the Idaho Supreme Court's decision, in 1994, the Department promulgated *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) ("CMRs"). The CMRs contain specific provision for the conjunctive administration of junior priority ground water rights diverting from the Eastern Snake Plain Aquifer ("ESPA"). Rule 50.

19. In 1994, the Interim Legislative Committee issued a report on matters related to the SRBA. The report stated that "[c]onjunctive management of ground water and surface water rights is one of the main reasons for the commencement" of the SRBA. *A&B Irrigation Distr. v. Idaho Conservation League*, 131 Idaho 411, 422 (1998); *Steenson Aff.*, Ex. E, p. 36-37.

20. In 2002, the SRBA Court issued its *Memorandum Decision and Order of Partial Decree* approving the language for the "connected sources" general provision which resolved the

Basin-Wide 5 proceedings. *Steenson Aff.*, Ex. G. Unless proven otherwise by an individual ground water right holder, the "connected sources" general provision was included on all decreed groundwater rights in the ESPA.

21. In 2001, the Director issued an order designation the Thousand Springs Ground Water Management Area pursuant to Idaho Code § 42-233b. *Steenson Second Aff*, Ex. L. The Director determined that "[b]ased upon the depletionary effects of ground water withdrawals on the flow of water from springs tributary to the Snake River in the Thousand Springs area and the inadequate water supply expected to be available for senior surface water rights, that portion of the ESPA in the Thousand Springs area may be approaching the conditions of a critical ground water area". *Id.* at 2-3.

22. In the fall of 2001, in response to the Director's proposed curtailment of ground water rights the following year in 2002 under the GWMA orders, senior surface water right holders and junior ground water right holders executed an *Interim Stipulated Agreement* to temporarily resolve the pending curtailment. *Steenson Second Aff.*, Ex. N. Parties to the agreement agreed not to oppose the State of Idaho's motion to the SRBA Court to seek authority to perform interim administration as provided by Idaho Code § 42-1417.

23. In 2002, the SRBA Court issued its order authorizing the State to perform interim administration and distribute water pursuant to Chapter 6, Title 41, Idaho Code in accordance with the Director's Reports and partial decrees. *Steenson Aff.*, Ex. J, p. 2.

24. In response to the Court's order, the Director issued a final order establishing Water District 130. *Steenson Aff.*, Ex. K.

25. On June 7, 2002, Clear Springs submitted the first water delivery call in Water District 130, seeking curtailment of the diversion of spring water by Clear Lakes Trout Company

to deliver water to a Clear Springs' facility that is not involved in this proceeding. *Steenson Second Aff.*, Ex. U. Pursuant to the Director's instructions, the Water District 130 Watermaster verified that Clear Springs would put the water it sought to beneficial use by speaking with the facility manager and confirming that there was sufficient capacity in the Clear Springs' facility to receive the additional water. Shortly thereafter, the Water District 130 Watermaster curtailed Clear Lakes Trout Company's diversion, and has since that time continued to administer the diversion to deliver the full decreed quantity of Clear Springs' prior water right for the facility at all times. *Id.*, Exs. W & X. In this first administrative curtailment within the Water District, there has been no consideration of Clear Springs' historic diversions or water flows, seasonal variations in flows, or the economic consequences of the curtailment. Curtailment was not phased-in, and the Director provided no mitigation alternatives to Clear Lakes.

WATER SUPPLY

26. The ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying decrees. One 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.

27. Springs and streams that are hydraulically connected to the ESPA in the Thousand Springs area exhibit predictable seasonal flow patterns, reaching seasonal highs in the late fall, declining from those highs during the winter and spring to seasonal lows in the summer, and then increasing to again reach seasonal highs in the late fall. *BL Order*, Att. C., *CS Order*, Att. C.

28. Since the 1950's, aquifer levels and hydraulically-connected spring discharges have declined. In addition to Blue Lakes' and Clear Springs' water delivery calls, there have been other calls for priority administration by senior water right holders (both surface and ground

water rights) throughout Water Districts 120 and 130, including[2]:

a. Rangen, Inc.; September 23, 2003 and January 17, 2007

b. Lynclif Farms; December 22, 2003

c. Pristine Springs, Inc., SeaPac of Idaho, Inc., and Willian D. Jones, Jr.; January 12, 2004

d. Surface Water Coalition; January 14, 2005

e. Billingsley Creek Ranch; March 16, 2005

f. John W. Jones; May 10, 2005

g. Clear Lakes Trout Company, January 19, 2007

h. A&B Irrigation District; March 19, 2007 (original call filed in 1994)

29. The Director recognized that senior surface water rights in the Thousand Springs area were not being satisfied in the 2001 GWMA Order where he determined that "[b]ased upon the depletionary effects of ground water withdrawals on the flow of water from springs tributary to the Snake River in the Thousand Springs are and the inadequate water supply expected to be available for senior surface water rights". *Steenson Aff*, Ex. L. at 2-3.

30. The State of Idaho further recognized that senior surface water rights were not being satisfied in 2001 in its *Motion for Order Authorizing Interim Administration* filed with the SRBA Court: "the water supplies available for use under senior priority surface water rights relying on spring sources in the American Falls and Thousand Springs areas have diminished and are expected to continue to diminish in the coming year . . . Thus, interim administration of water rights in all or portions of Basins 35, 36, 41, and 43 is reasonably necessary because the available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights". *Steenson Aff.*,

[2] Information on the calls can be found at IDWR's website: http://www.idwr.idaho.gov/Calls/Priority_Calls.htm.

Ex. I.

31. As early as 2001 the Department was aware that senior surface water rights in the Thousand Springs reach were not being satisfied, and that administration of hydraulically connected junior priority ground water rights was necessary to satisfy senior surface water rights.

32. The following facts are not in dispute:

a. Spring discharges are dependent on aquifer levels. *See Direct Testimony of Charles M. Brendecke* ("*Brendecke Direct*") at p.21, lns.5-8.

b. As aquifer levels decline, the discharge from springs declines as well. *Brendecke Direct* at p.37, lns. 20-21. Factors affected aquifer levels and spring discharges include ground water pumping, incidental recharge and precipitation levels.

c. Groundwater diversions from the ESPA have reduced aquifer levels causing reductions in hydraulically-connected spring discharges. *Brendecke Direct* at p. 38, lns.13-15; *BL Order* at 5, ¶ 18; *CS Order* at 6, ¶ 21.

d. All groundwater depletions from the ESPA cause reductions in flows in the Snake River and spring discharges equal in quantity to the ground water depletions over time. *BL Order* at 3, ¶ 11; *CS Order* at 3, ¶ 11; IGWA Ex. 400A, p.8.

e. When water is pumped from a well in the ESPA, a conically-shaped zone of depression is created which distributes the impacts of the pumping radially from the well. IGWA Ex. 400A, p.22; *BL Order* at 3, ¶ 9, *CS Order* at 3, ¶ 9.

f. The Department uses the ESPA groundwater model to determine impact of pumping from pumping a single well and selected groups of wells under junior priority ground water rights on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. IGWA Ex. 400A, p.8; *BL Order* at 3, ¶ 12; *CS Order* at 4, ¶ 12.

THE CONJUNCTIVE MANAGEMENT RULES

33. Rule 40 of the Conjunctive Management Rules governs calls for priority administration by senior water users against the holders of junior-priority groundwater rights within organized water districts.

34. A delivery call is commenced when a senior water users alleges that its water rights are being materially injured due to the out-of-priority diversion and use of water by junior-priority groundwater rights. Rule 40.01.

35. Once a call is made, the Director must make a determination as to whether or not the senior water user is being material injured, as provided in Rule 42. Rule 40.01.

36. Upon making a determination that the senior water users is being materially injured by out-of-priority junior-priority groundwater diversions, the director will "regulate the diversion and use of water in accordance with the priorities of rights." Rule 40.01.a.

37. The Director may also allow out-of-priority diversions to continue by junior-priority groundwater users so long as a "Mitigation Plan" has been approved by the Director, and is effectively operating, pursuant to Rule 43. Rule 40.01.b.

38. The Director may also "lessen the economic impact of immediate and complete curtailment" by implementing a phased-in curtailment procedure, whereby the curtailment of junior-priority groundwater diversions is phased-in over no more than 5-years, so long as mitigation is provided to compensate for the reduction in curtailment in each of those 5-years. Rule 40.01.

39. Phased-in curtailment, to the extent additional mitigation is required to make the senior whole for the injury being suffered at the time of the call, allows for the Director to address the economic impact of complete and immediate curtailment, by allowing the junior-

priority groundwater users to spread the effects and impacts of curtailment over a five-year period, while, at the same time, providing mitigation to compensate for the material injury caused by the out-of-priority diversion. Under the Rules, the amount of mitigation is to equal the amount of curtailment. Excerpts of Karl. J. Dreher Deposition, pp. 289-290. **Exhibit F.**

40. Rule 20 provides general statements of purpose and policies for conjunctive management including the statement that the "rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use ... The policy of reasonable use includes the concepts of priority in time ... optimum development ... and full economic development." Rule 20.03. These statements are merely "hortatory statements of general policy and purpose and impose not such standards or requirements on their own. *See Spring Users' Response to IGWA's Motion for Partial Summary Judgment* at 16-17 (citing IDWR's interpretation of Rule 20).

THE ESPA GROUND WATER MODEL

I. Development of the Model

41. The first ground water model of the ESPA was developed by Jos deSonneville in the late 1970s as a master's thesis project with the University of Idaho, funded by IDWR. *Brockway Direct* at 9-10. Dr. Charles E. Brockway, a professor with the University of Idaho at the time, supervised the research. *See id.*

42. The first model was used by IDWR in evaluations of the ESPA for development of the State Water Plan and by the Idaho Technical Committee on Hydrology for evaluating planning options for the Upper Snake. *Brockway Direct* at 10. This model was periodically upgraded by the University of Idaho and IDWR.

43. IDWR later contracted with the University of Idaho's Idaho Water Resources Research Institute (IWRRI) to develop a new or enhanced model. *Brockway Direct* at 10. The model was reformulated in collaboration with the U.S. Bureau of Reclamation, USGS, Idaho Power Company, and consultants representing various entities in 2004. *BL Order* at 4, ¶ 13. This effort was funded in part by the Idaho Legislature and included significant data collection and model calibration intended to reduce uncertainty in the results from model simulations. *See id.* A technical committee, which included Dr. Brockway and Dr. Brendecke, was established and provided guidance on the model enhancement.

44. The new Enhanced Ground Water Model (ESPAM) ("Ground Water Model") was calibrated to a 22 year data set (1980-2002). *Brockway Direct* at 10, *BL Order* at 5, ¶ 16. The calibration targets consist of measured ground water levels, reach gains/losses, and discharges from springs. *BL Order* at 5, ¶ 16. The calibration targets have inherent uncertainty resulting from limitations on the accuracy of the measurements. *See id.* However, a thorough evaluation of the confidence limits on model simulation results has not been performed. *Brockway Direct* at 12. Although the confidence limits or "accuracy" of the Model has not been evaluated or defined, the Model can still be used for planning and administration purposes within its defined limits. *See id.*

45. The Ground Water Model uses a 1-mile square grid with 6 month stress periods which means that input data is specific to each grid square and aggregated into 6 month periods. *Brockway Direct* at 11.

46. The Ground Water Model represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. *BL Order* at 5, ¶ 20; *Brockway Direct*

at 10, 12. At the June 5, 2006 hearing on the adequacy of the ground water districts' 2005 "replacement water plan" Dr. Brendecke, IGWA's expert witness, agreed: "I would say that the groundwater model is the best tool we have right now for evaluating these impacts. . . . given the resources and the effort that went into it, it's as good as we've got right now." *June 5, 2006 Hearing Transcript*, p. 213, lns. 11-12, 18-20 (Exhibit A to *Clear Springs Foods, Inc.'s Response to IGWA's Post-Hearing Memorandum* filed on June 26, 2006 in this matter).

47. The Model simulation results are suitable for making factual determinations on which to base conjunctive administration of surface water rights diverted from the Snake River and its tributaries and ground water rights diverted from the ESPA. *BL Order* at 5, ¶ 19. Simulations using the Model show that ground water withdrawals from certain portions of the ESPA for irrigation and other consumptive purposes cause depletions in the flow of springs discharging in the spring reaches in the Thousand Springs area. *BL Order* at 5, ¶ 18. The Ground Water Model is also currently used to evaluate water right transfers on the ESPA, managed recharge proposals, irrigation conversions from ground water to surface water, and voluntary or involuntary curtailment of ground water irrigation. *Brockway Direct* at 11.

48. The resolution of the Ground Water Model is adequate to quantify the effects of ground water pumping on hydraulically-connected reaches of the Snake River and its tributaries. *Brockway Direct* at 11, *HRS Consultants Report* at 6; *Land Report* at 4.

II. Director's Use of Ground Water Model in the Spring Users' Orders

49. The Director used the Ground Water Model to simulate the effects of curtailment of certain ground water rights junior to Blue Lakes' water right (36-07427, December 28, 1973) and Clear Springs' water right (36-0413B, February 4, 1964). *BL Order* at 17, ¶ 76, *CS Order* at 16, ¶ 71. In applying the "10% uncertainty" condition, the Director reduced the number of

ground water rights that were included in the Model simulation. *See id.* Therefore, the Blue Lakes' simulation evaluated the curtailment of 57,220 acres under junior priority ground water rights whereas the Clear Springs' simulation evaluated the effects of 52,470 acres. *BL Order* at 17, ¶ 77; *CS Order* at 16, ¶ 71. Although the Clear Springs' simulation involved a more senior water right (1964) as compared to Blue Lakes (1973), the "10% uncertainty" condition resulted in fewer junior priority ground water rights (and irrigated acres) being affected by the curtailment simulation for Clear Springs' call.

50. The Blue Lakes' simulation showed that curtailment of those identified junior priority ground water rights would increase spring discharges in Devil's Washbowl to Buhl spring reach, which includes the source for Alpheus Creek from which Blue Lakes diverts surface water, by an average of 51 cfs at steady state conditions. *BL Order* at 17, ¶ 77.

51. The Clear Springs' simulation showed that curtailment of those identified junior priority ground water rights would increase spring discharges in the Buhl to Thousand Springs spring reach, which includes the springs from which Clear Springs diverts surface water for its Snake River Farm, 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. *CS Order* at 17, ¶ 71.

SPRING USERS' WATER RIGHTS & DELIVERY CALLS

I. 2005 Delivery Calls

52. On March 22, 2005, Blue Lakes submitted a letter to the Director requesting that the Director "direct the Watermaster for Water District 130 to administer water rights in the Water District as required by Idaho Code § 42-607 in order to supply Blue Lakes' prior rights" (water right nos. 36-2356A, 36-7210 and 36-7427).

53. On May 2, 2005, Clear Springs submitted a letter to the Director requesting water

rights administration in Water District 130 pursuant to Idaho Code § 42-607 in order to effectuate the distribution of water to water rights held by Clear Springs for the diversion and use of water at its Snake River Farm (water right nos. 36-4013A, 36-4013B and 36-7148) and Crystal Springs Farm (water right nos. 36-7083 and 36-7568).

II. Spring Users' Water Rights & Shortages

54. Blue Lakes owns the following water rights, each of which has been partially decree by the Snake River Basin Adjudication ("SRBA") District Court:

Water Right No.	36-2356A	36-7210	36-7427
Priority Date	May 29, 1958	November 17, 1971	December 28, 1973
Quantity	99.83 cfs 72,147.1 afy	45 cfs, 32,521.5 afy	52.23 cfs, 37,746.6 afy
Purpose of Use	Fish Propagation	Fish Propagation	Fish Propagation
Period of Use	01-01 to 12-31	01-01 to 12-31	01-01 to 12-31
Source	Alpheus Creek	Alpheus Creek	Alpheus Creek
Partial Decree Date	June 14, 2000	April 10, 2000	April 10, 2000

55. As decreed, each of Blue Lakes' rights authorizes the diversion of water at the specified rate, 365 days per year. The aggregate quantity of these water rights is 197.06 cfs (rate in cubic feet per second), 142,415.2 afy (volume in acre-feet per year).

56. Blue Lakes diverts the entire flow of Alpheus Creek. Blue Lakes' diversion, conveyance, and trout rearing facilities have sufficient capacity to divert and use the full aggregate quantity of Blue Lakes' water rights.

57. Recorded measurements show that the flow of Alpheus Creek has declined over time, and is insufficient to supply the decreed quantities of Blue Lakes' 1971 and 1973 priority water rights. *BL Order* at 13-14, ¶¶60-61.

58. Blue Lakes is able to beneficially use additional water that may become available through administration of junior ground water rights, up to the full aggregate quantity of its decreed water rights.

59. Clear Springs owns the following water rights for diversion and use at its Snake River Farm, each of which has been partially decreed by the SRBA District Court:

Water Right No.	36-02703	36-02048	36-04013C
Priority Date	November 23, 1933	April 11, 1938	November 20, 1940
Quantity	40 cfs	20 cfs	14 cfs
Purpose of Use	Fish Propagation	Fish Propagation	Fish Propagation
Period of Use	01-01 to 12-31	01-01 to 12-31	01-01 to 12-31
Source	Springs	Springs	Springs
Partial Decree Date	April 10, 2000	April 10, 2000	April 10, 2000

Water Right No.	36-4013A	36-4013B	36-7148
Priority Date	September 15, 1955	February 4, 1969	January 31, 1971
Quantity	15 cfs	27 cfs	1.67 cfs
Purpose of Use	Fish Propagation	Fish Propagation	Fish Propagation
Period of Use	01-01 to 12-31	01-01 to 12-31	01-01 to 12-31
Source	Springs	Springs	Springs
Partial Decree Date	April 10, 2000	April 10, 2000	April 10, 2000

60. Spring discharges for the springs supplying water to Clear Springs' Snake River Farm water rights have depleted by as much as 21 percent since 1972. Current flows are insufficient to fill water right numbers 36-4013A, 36-4013B and 36-7148. CS Order, ¶¶58-60.

61. As decreed, each of Clear Springs' rights authorizes the diversion of water at the specified rate, 365 days per year.

62. Clear Springs' diversion, conveyance, and trout rearing facilities have sufficient capacity to divert and use the full aggregate quantity of Clear Springs' water rights.

63. Clear Springs is able to beneficially use additional water that may become available through administration of junior ground water rights, up to the full aggregate quantity of its decreed water rights.

64. Clear Springs is an employee-owned and growing seafood company dependent upon the maximization of its assets to maximize profitability. As such, Clear Springs has always

attempted to maximize fish production at each of its fish farms. Maximization is based on five scientifically established principles of flowing water aquaculture: 1) the maximum permissible weight of fish that can be supported in a rearing unit is determined by the quantity of oxygen available and the accumulation of metabolic waste; 2) oxygen consumption and metabolite production progress in proportion to the amount of food fed; 3) at constant temperature, fish growth is linear over-time until sexual maturity; 4) growth rate of fish is proportional to temperature; and 5) feeding rates can be rationally calculated based on estimated food conversion, fish metabolic characteristics, and the anticipated growth rate.

65. Since rainbow trout can only get their oxygen from the water, water quantity fundamentally determines the quantity of oxygen possibly available to fish and hence fundamentally determines the production capacity of a farm or rearing unit. Clear Springs knows the maximum amount of oxygen that a unit of water (e.g. cfs) can contain and knows the maximum amount of fish that can be produced from that unit of water. For each cfs of water decline, Clear Springs' maximal fish production capacity will decline. For each additional cfs of water received, Clear Springs can increase its maximal fish production in step. For example suppose 32,000 lbs of fish are produced per cfs per year at a farm. A 10 cfs decline in water flow will decrease fish production 320,000 lbs. Conversely, an increase of 10 cfs would allow 320,000 lbs more fish to be produced.

DIRECTOR'S ORDERS

I. ESPA & Department's Ground Water Model (*BL Order* at 1-5; *CS Order at* 1-6)

66. The Director's general descriptions of the ESPA, the ESPA ground water model and the relationships between ground water pumping, incidental recharge and drought on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries are not in

dispute. However, this section of the Orders overstates the magnitude and significance of the impacts of changes in irrigation practices on the ESPA and hydraulically-connected surface water sources, and fails to adequately describe for the impacts of ground water pumping on those water sources. For example, it is estimated that the maximum decline in incidental recharge from the 1950s to the 2000s to be about 2 to 3 MAF, while annual depletions from the ESPA from the consumptive use associated from ground water pumping averages 2.2 MAF/yr and is as high as 3 MAF/yr for individual years. *Land Report*, p. 5.

67. The priority of the Spring Users' water rights applies to all hydraulically connected water sources. "[O]nce water enters the aquifer and river channels of the [ESPA] from whatever source it is subject to administration by priority." November 14 Order. Therefore, "the effect of irrigation practices on the ESPA and hydraulically-connected surface water supplies does not alter or limit priority administration of water rights diverting from those water sources under Idaho law and the CMRs."

II. Creation & Operation of Water Districts 120 & 130 (*BL Order*, p. 6-8; *CS Order* p. 7-9)

68. The Director's general references to the process before the SRBA Court regarding interim administration, the creation of Water Districts 120 and 130, and to the promulgation of the CMRs is not disputed. As discussed herein, there are additional judicial and administrative activities that have provided the foundation for conjunctive administration of the ESPA and hydraulically-connected surface water sources.

III. Spring Users' Water Delivery Calls (*BL Order* p. 8-10; *CS Order* p. 9-12)

69. The Director's descriptions of the Spring Users' water delivery call letters and their water rights, and his treatment of those letters as water delivery calls under the CMRs, are

not disputed, with the caveat that Blue Lakes did not contend that it was not receiving its first priority water right or that priority administration was necessary to deliver that right.

70. The Director's general references to the requirements for administration of junior ground water rights pursuant to Rule 30 and 41 is not relevant for this proceeding.

71. The Director's statement that Rule 40 of the CMRs is not applicable to a delivery call between surface water rights fails to recognize that Rule 40.02.a directs the watermaster to "shut the headgates of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water sources." To the extent the Director's statement provides for disparate schemes of administration for surface water rights compared to ground water rights, it is disputed and unconstitutional.

IV. The Director's Analysis of Blue Lakes' and Clear Springs' Authorized Diversion Rates (*BL Order* p. 10-14; *CS Order* p. 10-11)

A. The Director Imputed "Seasonal Variation" to the Spring Users' Rights

72. Under the heading "Authorized Diversion Rate for [the Spring Users' Water Rights]" the Director inferred that "seasonal" or "intra-year" variations in the sources of the Spring Users' water rights "existed when appropriations for these rights were initiated [in the 1950s, 1960s and 1970s]." *BL Order*, p. 11, ¶ 49; *CS Order*, p. 12, ¶ 54. The Director opined that the Spring Users are "not entitled to a water supply that is enhanced beyond the conditions that existed at the time such rights were established." *BL Order*, p. 11, ¶ 50; *CS Order*, p. 13, ¶ 55. Based on the inferred seasonal variations in spring flows at the time of appropriation, the Director concluded that Blue Lakes' 1971 priority water right and Clear Springs' 1955 priority water right are satisfied by "seasonal high" flows, despite the fact that the water supplies are insufficient to deliver the decreed quantities the majority of the year. The Director denied the

Spring Users' calls for delivery of water to these water rights on this basis. There are several errors of law, logic and fact in this aspect of the Director's orders.

73. First, the Hearing Officer concluded that the Director may consider historical information to determine "whether the water will be put to a beneficial use or whether there will be a waste of water." November 14 Order. "Inferences may be drawn from historical data as to water use and need." *Order* at 8-9. "To the extent that the Director's Orders import a seasonal condition [to the decrees] they are in error." *Id.* at 9. In his deposition testimony, former Director Karl J. Dreher, the author of the orders, made it clear that his analysis of the authorized diversion rates of the Spring Users' water rights, and his consideration of historical flow and diversion data, and of seasonal variations in water flows, do not pertain to the Spring Users' water needs or whether they will put the water to beneficial use without waste if it is delivered. *See* excerpts of Deposition of Karl J. Dreher, p. 183, lns. 9-17; p. 186, lns. 1-6. **Exhibit F**. Mr. Dreher explained that he was "doing an analysis of what the quantity element means" and "interpreting a quantity for purposes of administering junior-priority ground water rights." *Id.,* p. 182, ln. 25- p. 183, ln. 1;; p. 186, lns. 7-15; p 190, lns. 13-15; p. 393, ln. 24 – p. 394, ln. 8.

74. Second, seasonal variation is a common characteristic of water supplies in Idaho. Water rights are required to be administered in accordance with priority as water supplies fluctuate.

75. Third, it is not possible to enhance conditions beyond those that existed at the time of appropriation, by curtailing junior ground water diversions that did not exist at that time, particularly when spring flows have declined since that time. *Id.*, p. 391, lns. 12-17.

76. Fourth, the Director states that there is insufficient data to determine the seasonal variations in the Spring Users' water supplies that existed at the time of appropriation. *BL Order*

at 11, ¶ 49; *CS Order* at 12, ¶ 54. Therefore, the Director has no rational basis to infer seasonal water flows at the time of appropriation that were inadequate to fill Blue Lakes' 1971 and Clear Springs' 1955 water rights.

77. Fifth, the only logical interpretation of the available flow data is that seasonal water supplies for these water rights were substantially greater at the time of appropriation, than they are today, in 2004, or in 1995. *Id.*, p. 235, ln. 21 – p. 236, ln. 17.

78. As previously discussed, spring discharges follow a predictable seasonal ("intra-year") pattern of highs in the late fall, and lows during the spring or summer Former Director Dreher acknowledges that the pattern and magnitude of seasonal variations in the water supplies for the Spring Users' water rights at the time of appropriation was "probably not too much unlike what exists today. *Id.*, p. 245, ln. 15 – p. 246, ln. 9; p. 394, lns. 13-16. With such a seasonal flow pattern, the logical inference is that there were sufficient, year-round water supplies for Blue Lakes' 1971 priority water right and Clear Springs' 1955 priority water right at the times of apporopriation.

79. Sixth, the Director's identification of factors that likely cause seasonal variations in spring discharges, including "variations in timing of ground water withdrawals and depletion in close proximity to individual springs" (*BL Order*, p. 10, ¶ 47) is not disputed. It is reasonable to infer that ground water pumping, which generally begins in the spring and continues through the early fall, is a significant factor causing or contributing to the annual decline in spring discharges.

C. The Director Reduced the Quantity of Blue Lakes' Water Rights For Purposes of Priority Administration

80. The Director reduced the aggregate quantity of Blue Lakes' water rights that he would recognize for purposes of administration from 197.06 cfs to 184.7 cfs based on a pre-

decree water measurement and an assumption about how water was being diverted at that time. This reduction was not based on a determination of Blue Lakes' water need, or whether Blue Lakes is able to put the full decreed amount to beneficial use. This determination is erroneous as a matter of law as explained in the Hearing Officer's November 14 Order.

81. The Director further reduced the quantity of Blue Lakes' water rights that he would recognize for purposes of administration based an alleged agreement by Blue Lakes not to seek curtailment of a portion of the water rights held by Blue Lakes Country Club. *BL Order*, p. 16, ¶ 73, p. 25, ¶ 21, p. 2, ¶ 31. The Director's position is that this agreement results in a subordination of a portion of Blue Lakes' water rights to all junior water right holders. This position is not supported by Idaho law.

V. Director's Determinations of Material Injury, Reasonableness of Diversion, & the Effects of Junior Rights (*BL Order* at 11-15; *CS Order* at 13-16)

82. Blue Lakes and Clear Springs do not dispute the Director's findings that spring flows are insufficient to fill Blue Lakes' senior water right (36-07427) and Clear Springs' senior water rights (36-04013B and 36-07148). *BL Order* at 14, ¶ 65; *CS Order* at 14, ¶ 62. As described above, absent the "seasonal variation" condition imposed by the Director, the facts will further show that spring flows are not sufficient to fill other senior water rights held by Blue Lakes and Clear Springs.

83. Blue Lakes and Clear Springs do not dispute the Director's findings that they are expending reasonable efforts to diver water from the surface water sources, and are employing reasonable diversion, conveyance efficiency, and conservation practices. *BL Order* at 15, ¶¶ 66, 69-70; *CS Order* at 15, ¶ 64, at 16, ¶ 69.

84. Blue Lakes and Clear Springs do not dispute the Director's findings that there are no alternate reasonable means of diversion or alternate points of diversion should be required to

be implemented. *BL Order* at 15, 16, ¶¶ 70-71; *CS Order* at 16, ¶ 70. These findings are supported by the field examinations conducted by Water District 130 Watermaster Cindy Yenter and Brian Patton (Registered Engineer for IDWR). *See Blue Lakes Record* at 646-48; *Snake River Farm Record* at 702-708.

VI. Effects of Curtailing Junior Priority Ground Water Rights (*BL Order* at 17-18; *CS Order* at 16-18)

85. Blue Lakes and Clear Springs dispute the Director's use of a "10% uncertainty" condition to exempt certain hydraulically connected junior priority ground water rights in Water District 130 and all water rights in Water District 120 from administration.

86. Blue Lakes and Clear Springs do not dispute the Director's use of the Ground Water Model to simulate the effects of curtailment of junior priority ground water rights to demonstrate a modeled increase in spring discharges.

87. The Director's use of the Model to simulate the effects of conversions, 18% incidental recharge, and voluntary curtailments proposed by the ground water districts is not disputed. The Director used the Model to approve "replacement water plans" so that junior priority ground water rights could avoid curtailment in 2005. Since the ground water districts believe the Model is adequate for evaluating their "replacement water plan" proposals to avoid curtailment, it is likewise adequate for simulating the effects of curtailment for purposes of administration.

VII. Conclusions of Law (*BL Order* at 18-27, *CS Order* at 25-36)

88. The Director's citations to the various statutes and CMRs is not disputed.

89. The Director's orders contain conclusions of law that suggest Idaho's prior appropriation doctrine is subject to undefined "economic" considerations and that the concept of "reasonable use" justifies out-of-priority ground water diversions to the injury of senior surface

water rights. The statements suggest that use under a senior surface water right is not "optimum" or would be a "waste" of the water resource. The Spring Users dispute these statements, particularly if they used to support any of the Director's findings or conditions that limited administration of junior priority ground water rights.

90. Idaho's prior appropriation doctrine prohibits the Director and watermasters from employing "optimum use" or "economic" considerations in distributing water to water rights. The Idaho Supreme Court's decision in *Martiny v. Wells*, 91 Idaho 215 (1966) squarely addressed this issue and held: "the [district] court's conclusion that the best use of the water was made of it by defendant [junior appropriator], is immaterial and lends no support to the judgment. The policy of the law against waste or irrigation water cannot be misconstrued or misapplied in such manner as to permit a junior appropriator to take away the water right of a prior appropriator." 91 Idaho at 219.

91. Water is not distributed according to who makes the "best" or most "economic" use of the water in the Director's or watermaster's subjective opinion, instead it is distributed by water rights. The reference to "optimum use" of water in the Idaho Constitution refers to the Idaho Water Resource Board's authority to "formulate and implement a state water plan for optimum development of water resources in the public interest". IDAHO CONST. art. XV, § 7. The Board's statutory authority is limited to formulating and implementing a comprehensive state water plan for "conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest." I.C. § 42-1734A. Administration of vested water rights does not concern "unappropriated water". Accordingly, the reference to "optimum use" of water in the constitution and statutes does not provide authority to the Director and watermasters to decide whether or not to administer junior

priority ground water rights under the auspices that distribution to a senior surface water right would not represent the "optimum use" of the water.

92. Blue Lakes and Clear Springs further dispute the Director's reference to the Ground Water Act and the provision relating to "full economic development of underground water resources". The provision does not provide authority for limiting or refusing to administer junior priority ground water rights that are injuring senior surface water rights. Surface water rights, such as those held by Blue Lakes and Clear Springs, are not subject to the Ground Water Act's "full economic development" provision that applies as between ground water rights after 1951. Rule 10.07 of the CMRs confirms this interpretation.

93. Blue Lakes and Clear Springs dispute the Director's reference that "reductions in the quantity of water discharging from springs in the Thousand Springs are attributable to depletions to the ESPA from the diversion and use of ground water in Water District No. 130 do not automatically constitute material injury to surface water rights diverting from springs or dependent on sources from by springs." Junior priority ground water diversions that deplete the water available for diversion and use under senior surface water rights constitutes material injury. Although the Director considers factors in Rule 42 of the CMRs, the reduction in water supply available to the senior, caused by junior ground water rights, is an injury to the senior water right.

94. Blue Lakes and Clear Springs dispute the Director's use of a "10% uncertainty" condition to exempt certain junior priority ground water rights in Water District 130 and all water rights in Water District 120 from administration.

95. Blue Lakes and Clear Springs dispute the Director's determination that no material injury is occurring to certain rights because spring flows are sufficient to fill Blue

Lakes' water right 36-07210 (November 17, 1971) and Clear Springs' water right 36-04013A (September 15, 1955) at "seasonal highs". If reductions to those rights during any time of the year is caused by diversions under junior priority ground water rights, those senior surface water rights are injured. The Director unlawfully determined that Blue Lakes' (36-07210) and Clear Springs' (36-04013A) senior water rights are not injured by junior priority ground water rights as long as those senior rights are satisfied at a temporary "seasonal high". Stated another way, if the quantities for Blue Lakes' and Clear Springs' decreed senior water rights are met at a "seasonal high", but not the rest of the year, no injury was found, even if the reduction suffered during the rest of the year was caused by out-of-priority ground water right diversions.

96. Although spring discharges may vary both during the year and from year-to-year dependent upon factors such as incidental recharge and climatic conditions, such variation does not justify out-of-priority diversions under junior ground water rights. None of Blue Lakes' or Clear Springs' decreed water rights contain "seasonal variation" conditions or limitations to their rates of diversion. The "seasonal variation" findings are therefore not supported in fact or law and contrary to the decrees for these water rights that were issued by the SRBA Court. The Director has a clear legal duty to administer junior priority ground water rights that are injuring Blue Lakes' and Clear Springs' senior surface water rights.

97. Although the timing of depletions caused by junior priority ground water rights may vary depending upon location and pumping amounts, Blue Lakes and Clear Springs were suffering injury as of the time of their water delivery calls in 2005. Therefore, injury is being suffered in the present, and not just "delayed and long range" as suggested by the Director's statement.

98. Blue Lakes and Clear Springs dispute the Director's statement that "material injury will cease" when the total amount of water available under the referenced water rights reaches the authorized diversion rates at the "average monthly seasonal maximum" or the "seasonal maximum spring discharge". *BL Order* at 27, ¶ 31; *CS Order* at 34, ¶ 33. Material injury will not cease if Blue Lakes' and Clear Springs' water rights are only satisfied at a temporary "seasonal maximum" but are then reduced the rest of the year by reason of junior priority ground water right diversions. While spring flows are not constant, a variation in flow does not excuse of justify injury by junior priority ground water rights, for any part of the year.

VIII. Ordered Relief

99. Blue Lakes and Clear Springs do not dispute the Director's order to curtail junior priority ground water rights that are injuring their senior water rights. Blue Lakes and Clear Springs dispute the level of injury determined by the Director, due to the lack of injury finding for Blue Lakes' water right 36-07210 and Clear Springs' water right 36-04013A.

100. The Director's Orders provide for administration of ground water rights that are junior in priority to Blue Lakes' 1973 priority water right and to Clear Springs' 1964 priority water right. *BL Order*, p. 28; *CS Order*, p. 37. The extent of administration is based upon the previously-discussed erroneous findings that Blue Lakes' 1971 priority water right, and Clear Springs' 1955 priority water right are being filled. All hydraulically-connected ground water rights that are junior to these earlier priority water rights should be subject to administration.

101. The Director's Orders provide for curtailment to be phased-in over five years to lessen the economic impact as allowed by CMR 40.01.a. Phased-in mitigation has allowed junior ground water right holders to continue to divert water, while the Spring Users' continue to experience material injury. Phased-in curtailment and mitigation are the two methods by which

the CMRs address the economic impact of administration. Otherwise, the CMRs require priority administration.

IX. Administration by Mitigation: Plan & Orders (2005 through 2007)

102. The Director's Orders provide junior ground water right holders subject to curtailment three mitigation alternatives: (1) to offset the entirety of their depletions (i.e. consumptive use) to the ESPA (i.e. replace the quantity(ies) of water they remove from the aquifer; (2) to deliver water of suitable water quality water directly to the Spring Users which the Director determined would be delivered through curtailment; and (3) to take actions to increase gains to the spring reaches in which the Clear Springs' and Blue Lakes' facilities are located, equal to the quantities which the Director determined would be delivered to the reaches through curtailment (i.e. mitigate to the reach).

103. The Orders provide for mitigation to the reaches to be phased in over five years, with specified increasing targets to be met in each year, until the full quantities required by the orders would be provided (51 cfs to the Devils Washbowl to Buhl Gage reach pursuant to the Blue Lakes Order, and 38 cfs to the Buhl Gage to Thousand Springs reach for the Clear Springs Order). The Director would use the ESPA model to determine whether the proposed mitigation actions in each year would meet the required targets. To the extent a plan in any given year fell short, the Director would order curtailment to make up the difference. An accounting would be performed after each year to determine the whether the mitigation actions were performed and met the prior year's target. Shortfalls or "credits" would be carried over into the next year and increase or decrease the additional mitigation to be provided in the subsequent year, as the case may be.

104. The Director's standard in fashioning these mitigation alternatives, in reviewing mitigation plans, and in post-year accounting was that mitigation had to be "just as real as" or equivalent to curtailment. Curtailment conclusively addresses the effect of junior ground water diversions on the ESPA and hydraulically-connected surface water supplies. Administration by mitigation introduces a host of uncertainties that are not present with curtailment. These uncertainties include, but are not limited to: whether the chosen mitigation alternative really is equivalent to curtailment; whether the plan for a given year will meet the required target; whether a plan can be submitted reviewed, approved, and performed in a timely fashion; whether the ground water users can perform the mitigation activities (by, for example, acquiring alternative water supplies), and whether those activities can be accurately monitored and evaluated for post-year accounting.

105. IGWA has chosen the third mitigation alternative, submitting plans to mitigate to the reach in 2005, 2006, and 2007. Issues have arisen in each phase of the mitigation process (plan submission and approval, timeliness, approval, monitoring, performance verification, and post-year accounting).

106. The Director approved IGWA's 2005 plan past the midway point in the 2005 irrigation season after several supplemental submissions. IGWA contested the Director's post-year accounting of the 2005 mitigation activities, seeking more "credit" than the Director would allow. A hearing was held during the summer of 2006, and a decision remains pending.

107. IGWA submitted a plan to meet the mitigation requirement for 2006 (20 cfs for Blue Lakes, 16 cfs for Clear Springs). The plan relied on obtaining water supplies through leases, conversion of ground water irrigation to surface water irrigation, and incidental recharge into the ESPA from the conveyance of leased water through Northside Canal. IDWR staff raised

several questions about the plan, seeking, among other things, verification of IGWA's predicted losses from the Northside Canal. These issues were never resolved and IGWA's 2006 plan was never approved. While IDWR was evaluating IGWA's mitigation plan, the district court issued its summary judgment decision in the AFRD #2 v. IDWR case. IDWR sought a stay of the litigation to avoid having to curtail ground water use. IDWR's motions were denied by the district court and the Supreme Court. Later in irrigation the season, IGWA advised IDWR to use the water it had committed to be used for mitigation to Blue Lakes and Clear Springs, to provide mitigation to the Surface Water Coalition (the 120 proceeding).

108. In 2007, IGWA resubmitted its 2007 mitigation plan for IDWR approval, knowing that it was insufficient to meet the 2007 mitigation requirements (30 cfs for Blue Lakes, 23 cfs for Clear Springs). After the Supreme Court issued its decision in AFRD #2 v. IDWR, the Director issued a curtailment order, finding, for example, that the aggregate shortfall in ground water mitigation required by the Blue Lakes' Order was 7.1 cfs, ad ordering curtailment to make up the difference as required by the Blue Lakes Order. IGWA then submitted a supplemental mitigation plan to convey an additional 10,000 af through the Northside Canal after the irrigation season. The Director evaluated the plan with the additional mitigation and found a shortfall of 6.6 cfs. Inexplicably, however, the Director approved the supplemented mitigation plan providing an additional .5 cfs to the Devils Washbowl to Buhl Gage Reach, and determined that curtailment of ground water pumping to make up the shortfall would be "futile" in providing additional water to the reach during the remaining half of the irrigation season (rather than evaluating the total, "steady-state" impacts of pumping as had been done in all prior orders.

109. This record demonstrates the multi-layered complications, issues, and attenuated and untimely procedures in administration by mitigation. At a minimum, IGWA should be required to make up its mitigation shortfalls for 2006 and 2007.

110. In addition, in the June 7, 2005 *Order Regarding IGWA Replacement Water Plan*, the Director interchanged the terms "a replacement water plan or mitigation plan". *June 7, 2005 Order* at 4, ¶ 14. As explained, a "mitigation plan" is a defined plan with specific procedures provided by Rule 43. No mitigation plan has ever been approved in this matter. Instead, the Director created a new process (i.e. "replacement water plans"), where he could approve IGWA's proposed replacement water plans without following the procedures specific to Rule 43. This decision was in error.

111. In reviewing IGWA's 2005 "replacement water plan" the Director recognized there was "significant evidence from power consumption records that ground water continues to be delivered to the conversion acres." *June 7, 2005 Order* at 10, ¶ 43. Despite this recognition of continuing ground water use on the "conversion acres", the DIrecotr "did not reduce the conversion acreage" and assumed "full conversion for ground water irrigation to surface water irrigation". *Id.* In other words, despite the evidence to the contrary, the Director gave IGWA full credit for conversions even though "significant evidence" suggested that ground water was still being pumped and used on those acres in 2005. This decision was in error.

112. The Director recognized that IGWA's 2005 "replacement water plan" was insufficient and did not provide the full 10 cfs required for 2005. *June 7, 2005 Order* at 14-15. Nonetheless, the Director did not order curtailment of junior priority ground water rights but instead provided IGWA another week to provide additional "replacement water". The decision resulted in untimely administration and was in error.

113. The Director issued a decision on April 29, 2006 approving IGWA's 2005 "replacement water plan" to avoid curtailment in 2005. *April 29, 2006 Order.* The Director identified a number of problems with IGWA's plan as compared to the actual actions taken. *See April 29, 2006 Order* at 8, ¶ 18. The Director's use of the "10% uncertainty" condition to reduce the credit for IGWA's "replacement water" actions was appropriate provided the condition is determined acceptable by the Hearing Officer. Whereas the Director used the condition to exempt certain junior priority ground water rights from administration he similarly used it to refuse to acknowledge "replacement water" credit for voluntary curtailment of acres under those same set of ground water rights. Although the Spring Users dispute the "10% uncertainty" condition, IGWA cannot have it both ways and use for protection from administration and as a benefit for "replacement water" actions.

114. Blue Lakes and Clear Springs filed briefing regarding the June 5, 2006 hearing on IGWA's petition challenging the Director's approval of the 2005 substitute curtailment or "replacement water plans". The Spring Users incorporate those points as set forth herein and as Attached hereto as **Exhibits L & M.**

JUNIOR PRIORITY GROUND WATER RIGHTS SUBJECT TO OTHER SENIOR WATER DELIVERY CALLS ON THE ESPA

115. Junior priority ground water rights that are subject to curtailment pursuant to Blue Lakes' and Clear Springs' water delivery calls are also subject to curtailment pursuant to other delivery calls by senior surface and ground water right holders.

116. Attached hereto as **Exhibit G** is a map of the area of the ESPA affected by the Spring Users' water delivery calls. Attached hereto as **Exhibit H** is a map of the area of the ESPA affected by the Surface Water Coalition water delivery call. These maps were attached to letters sent by the Director on October 17, 2007, notifying affected junior priority ground water

right holders of potential curtailment in 2008. As evident by the maps, the Surface Water Coalition water delivery call affects much of the same area in Water District 130 as do the Blue Lakes' and Clear Springs' calls. In other words, the Director determined, through use of the Ground Water Model, that curtailment of a junior priority ground water right in this area will benefit both the Surface Water Coalition as well as Blue Lakes and Clear Springs.

117. Attached hereto as **Exhibit I** is a map created by Brockway Engineering that overlays the areas of the ESPA affected by the outstanding delivery calls of Blue Lakes, Clear Springs, the Surface Water Coalition, and A&B Irrigation District pursuant to its delivery call for its senior ground water right. The depiction assumes the Director's "10% uncertainty condition" would apply and shows the areas of the ESPA that would be excluded from any call under that condition. As shown on this map, the area of curtailment covered by the Blue Lakes' and Clear Springs' calls also overlaps with the area covered by A&B's groundwater call. Therefore, curtailment of a junior priority ground water right in this area will also benefit A&B's senior ground water right.

118. Attached hereto as **Exhibit K** is the *Affidavit of Linda Lemmon* and the *Affidavit of Wayne J. Courtney* submitted to the Gooding District Court and Idaho Supreme Court in the *AFRD #2 v. IDWR* case. Ms. Lemmon is the executive director of the Thousand Springs Water Users Association and Mr. Courtney is the Executive Vice-President of Rangen, Inc. Ms. Lemmon's affidavit contains a table of senior surface water right holders in the Thousand Springs area. The listed water users hold senior surface water rights for irrigation, fish propagation, and other uses. The table documents the declines in spring flows serving the various water rights and demonstrates that senior surface water rights across the Thousand

Springs reach are not being fulfilled as of 2006. Mr. Courtney's affidavit documents Rangen's decreed water rights and flow measurements at its facility from 2003 to 2006.

PROPOSED MODIFICATIONS TO THE DIRECTOR'S ORDERS

I. *Blue Lakes Order* (*May* 19, 2005) and *Clear Springs Order* (July 8, 2005)

1. The Blue Lakes and Clear Springs' Orders should be modified to the extent that the Orders fail to administer hydraulically connected junior groundwater rights. The Orders make a finding that junior groundwater diversions are materially injuring the Spring Users water rights. Accordingly, the Spring Users, as senior water users, are entitled to administration of these junior water rights. The Orders should be modified to require the administration of water rights in order to mitigate for the material injuries caused by diversions under junior priority groundwater rights.

2. The Blue Lakes and Clear Springs' Orders should be modified to recognize the Spring Users' water rights as decreed by the SRBA Court. The Hearing Officer's November 14 Order made clear that the Director's use of any pre-adjudication information is limited to a determination of "water use and need." *November 14 Order* at 8. One instance where the Director has improperly utilized historical information in such a way as to impair the Spring Users' decreed rights is with his "Seasonal Variations" and "Seasonal High" determinations. *Id.* at 9. The Orders should be modified, or clarified as necessary, to remove any limitation on administration of the Spring Users decreed rights based on "Seasonal Variations" and "Seasonal Highs."

3. The Blue Lakes and Clear Springs' Orders should be modified to remove any limitations on administration based on the Director's 10% uncertainty calculation. The ESPA Ground Water Model represents the best science and the most complete tool for measuring the

impacts of ground water diversions on spring discharges. No specific accuracy or confidence level has been defined or evaluated for the Ground Water Model. The Orders, however, attempt to set a 10% uncertainty level for the Model without any supporting justification. As such, the Orders should be modified to remove any reference and limitation based on the Director's 10% uncertainty limit and should order administration of all ground water rights in Water Districts 120 and 130 which are materially injuring the Spring Users water rights.

4. The Blue Lakes and Clear Springs' Orders should be modified to remove any implication that administration is limited by "economic" considerations and that "reasonable use" would justify out-of-priority diversions by junior ground water users. While it is not readily apparent how these considerations may have been utilized by the Director, any determination of who puts the water to the "best" or most "economic" use is not supported in Idaho law. Furthermore, Idaho law guarantees that, in times of shortage, a senior water user may seek administration of every water right found to be materially injuring the senior's water rights. This right is not somehow impaired or impeded merely because the cumulative financial impact on junior water users, each of whom developed their water rights with the knowledge that their rights may be curtailed in times of shortage, may be greater than the financial impact on the senior water user. Any such finding contradicts Idaho's prior appropriation doctrine and would usurp administration based upon water rights. As such, any indicated in the Conclusions of Law which attempt to incorporate an "economic" or "reasonable use" limitation on administration should be removed.

Alternatively, the Orders could reflect that any economic consideration from conjunctive administration is already expressly addressed through the CMRs, i.e. "phased-in curtailment" and "mitigation plan" provisions under Rule 43.

5. The Blue Lakes and Clear Springs' Orders should be modified to require timely curtailment or mitigation to correct the material injury, found by the Director to be occurring. Rather than requiring timely administration, the Director has created a "phased-in curtailment" regimen, whereby junior groundwater users are permitted to continue their diversions notwithstanding the ongoing material injury experience by the Spring Users. "On its face, the Director's decision seems to run contrary to statutory and case law once material injury to a senior water user is established." November 14 Order at 10. The Orders should be modified to require timely and sufficient mitigation to compensate for the material injury created by the junior groundwater users. To the extent phased-in curtailment is authorized, completed mitigation must be ordered as well to ensure that Blue Lakes' and Clear Springs' injuries are fully mitigated.

6. IGWA should be required to make up its mitigation shortfalls for 2006 and 2007.

Dated this 15th day of November, 2007.

RINGERT CLARK, CHTD.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2007, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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