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DEPARTMENT OF
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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	)	**IGWA'S SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**
IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B, and 36-07148	)	
Clear Springs, Snake River Farm Delivery Call	)	

COMES NOW Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively "IGWA"), through counsel, and hereby supplement *IGWA's Proposed Findings of Fact and Conclusions of Law* filed previously herein. These *Supplemental Proposed Findings of Fact and Conclusions of Law* incorporate additional findings and conclusions based upon the testimony and evidence presented during the hearing on the above-captioned matters held November 28 through December 13, 2007. Newly-

added findings and conclusions are underlined. For ease of reference, findings and conclusions are separately numbered, with findings labeled "F_" and conclusions labeled "C_".

I. PROCEDURAL HISTORY.

Findings of Fact

F1. On March 22, 2005, the Director received a hand-delivered letter (the "Blue Lakes delivery call") from Gregory Kaslo of Blue Lakes Trout Farm, Inc. ("Blue Lakes") demanding 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."

F2. On May 2,2005, the Director received by email the two Letters from Lany Cope of Clear Springs Foods, Inc. ("Clear Springs") 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 ..." at its Snake River Farm (water rights nos. 36-04013A, 36-04013B, and 36-07148) and at its Crystal Springs Farm (water rights nos. 36-07083 and 36-07568). Blue Lakes and Clear Springs are referred to collectively herein as the "Spring Users."

F3. In response to the Blue Lakes delivery call, the Director issued an Order dated May 19, 2005, for the curtailment ground water rights in Water District 130 (the "Blue Lakes Order").

F4. In response to the Clear Springs delivery call, the Director issued an Order dated July 8, 2005, for the curtailment of ground water rights in Water District 130 (the "Clear Springs Order"). The Blue Lakes Curtailment Order and the Clear Springs Curtailment Order are referred to collectively herein as the "2005 Curtailment Orders."

F5. The 2005 Curtailment Orders were issued on an emergency basis without the benefit and deliberation of a prior hearing.

F6. IGWA objected to the 2005 Curtailment Orders and filed petitions for reconsideration on June 2, 2005, July 19, 2005, and June 18, 2007. Additional petitions for reconsideration were filed by Blue Lakes, Clear Springs, Hidden Valley Dairy Farm, and Long View Dairy.

F7. The 2005 Curtailment Orders have remained in force since their issuance in 2005 despite the lack of a hearing on the legal and factual issues raised in the petitions for reconsideration. On July 5, 2007, the Director issued an *Order Regarding Petitions for Reconsideration (Blue Lakes and Clear Springs Delivery Calls)* finally scheduling a hearing on the petitions for reconsideration. That hearing was held November 28 through December 13, 2007, at the Idaho Department of Water Resources ("IDWR" or the "Department"), the Honorable Gerald

F. Schroeder acting as Hearing Officer.

II. BLUE LAKES WATER RIGHTS.

Findings of Fact

F8. The Blue Lakes delivery call seeks curtailment of junior-priority ground water rights in an attempt to increase the supply of water available at the Blue Lakes fish propagation facility. The Blue Lakes facility consists of three ponds with 35 raceways each for a total of 105 raceways. The Blue Lakes facility is supplied by the following water rights as defined in SRBA partial decrees:

Water Right No.	36-02356A	36-07210	36-07427
Source	Alpheus Creek	Alpheus Creek	Alpheus Creek
Priority Date	May 29,1958	November 17, 1971	December 28,1973
Beneficial Use	Fish Propagation	Fish Propagation	Fish Propagation
Diversion Rate	99.83 cfs	45.00 cfs	52.23 cfs
Period of Use	Jan. 1 - Dec. 31	Jan. 1 - Dec. 31	Jan. 1 -Dec. 31

F9. The cumulative authorized diversion rate for fish propagation at the Blue Lakes facility is 197.06 cfs, which reflects an authorized maximum rate of diversion and not a guaranteed minimum water supply. (November 14, 2007 Order on Summary Judgment at 13).

F10. Natural, pre-development spring flows available to Blue Lakes' above water rights was approximately 80-86 cfs. (*Brendecke Direct* at 23.) The majority of Blue Lakes' appropriations derived from artificially inflated spring discharges resulting from inefficient surface water irrigation practices (see findings 28-32 below).

F11. Blue Lakes' first appropriation in 1958 totaled 183 cfs, which exceeded historic natural spring flows by approximately 100 cfs. (*Brendecke Direct* at 29) Blue Lakes' next appropriation of 45 cfs in 1971 increased to total appropriation to 228 cfs. This exceeds the seasonal low flow of the spring in 1965 which was 178 cfs. (*Brendecke Direct* at 29-30). Blue Lakes' third appropriation in 1973 for 52.23 cfs increased the total appropriation to 286 cfs. (*Brendecke Direct* at 28-29, Exhibits 418, 419, 420). The highest recorded flow of Alpheus Creek since daily record keeping began in 1950 was 256 cfs in 1957. *Id.* Thus, Blue Springs' 1973 appropriation exceeds the highest flow ever recorded by 30 cfs.

F12. At the time of appropriation, Blue Lakes' above water rights did not receive a full supply at all times during the year, but experienced seasonal fluctuations in supply. (Dreher, 12/6/07, 10:07-10:29 a.m.; *Brendecke Direct* at 22, 44, Exhibit 405, 406, 414, 415, 420).

F13. The Blue Lakes Order found a shortage of 35.25 cfs, or 19% of the total right of 197.06 cfs at the Blue Lakes facility in 2004. (Blue Lakes Order at ¶ 61.) Evidence was presented at the hearing that flows have increased since 2004.

F14. The Kay Hardy family operates five separate aquaculture facilities, including the Blue Lakes facility, supplied by water rights in the following quantities:

Blue Lakes:	197 cfs
Rim View:	150 cfs
Clear Lakes:	175 cfs
Fisheries Development Co.	130 cfs
White Springs	39 cfs
Other	24.6 cfs
TOTAL	715.6 cfs

The cumulative Blue Lakes facility water rights of 197 cfs represent 28% of the total 715.6 cfs controlled by the Kay Hardy family for aquaculture purposes. The shortage at Blue Lakes of 35.25 cfs represents a shortage of 4.9% of the total 715.6 cfs controlled by the Kay Hardy family for aquaculture purposes.

Conclusions of Law

C1. The quantity element of Blue Lakes' water rights reflects an authorized maximum rate of diversion and not a guaranteed minimum water supply. An appropriator is entitled to the hydrologic conditions that existed at the time of appropriation; there is no right to demand enhanced hydrologic conditions which may occur subsequent to appropriation. While Blue Lakes is authorized to divert up to the authorized maximum quantity at all times that it is naturally available, Blue Lakes is not entitled to curtail junior-priority ground water diversions unless shortage occurs based on the hydrologic conditions that existed at the time of appropriation. Therefore, determinations of shortage must account for seasonal fluctuations in the water supply that existed at the time of appropriation. (Dreher 12/6/07, 10:09 a.m.)

C2. SRBA partial decrees do not define seasonal variations in the water supply because the quantity element simply defines the upper limit of authorized water use. Determinations of shortage to Blue Lakes' water rights must be made administratively pursuant to the Rules for Conjunctive Management of Surface and Ground Water Sources (the "CM Rules"). "[W]ater rights adjudications neither address, nor answer, the questions presented in delivery calls...." *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 154 P.3d 433, 447 (2007).

C3. Partial Decrees reflect the basic elements of a water right but do not reflect everything relevant necessary for purposes of administration. (Luke, 12/3/07, 2:48 p.m.; Brockway, 12/10/07, 2:47 p.m.) In the administration of water rights, it is relevant to look at historical water use and hydrologic information, including inter- and intra-year fluctuations in the water supply. (Brockway 12 p.m., 12/10/07). Historical information regarding spring flows establishes the amount of water available for beneficial use and may be considered when

administering water rights. (November 14, 2007 Order on Summary Judgment at 8).

III. CLEAR SPRINGS WATER RIGHTS.

Findings of Fact

F15. The Clear Springs delivery call seeks curtailment of junior-priority ground water rights in an attempt to increase the supply of water available to its Snake River Farms fish propagation facility, which was reconstructed in 1988.

F16. The Snake River Farms facility is supplied by the following water rights:

Water Right	36-02703	36-02048	36-04013C	36-04013A	36-04013B	36-07148
Source	Springs[1]	Springs[1]	Springs[1]	Springs[1]	Springs[1]	Springs[1]
Priority Date	11/23-1933	04/11/1938	11/20/1940	09/15/1955	02/04/1964	01/31/1971
Beneficial Use	Fish Prop-agation	Fish Prop-agation	Fish Prop-agation	Fish Prop-agation	Fish Prop-agation	Fish Prop-agation
Diversion Rate	40.00 cfs	20.00 cfs	14.00 cfs	15.00 cfs	27.00 cfs	1.67 cfs
Period of Use	Year round	Year round	Year round	Year round	Year round	Year round

F17. The cumulative authorized diversion rate for fish propagation at the Snake River Farms facility is 117.67 cfs, which reflects an authorized maximum rate of diversion and not a guaranteed minimum water supply. (November 14, 2007 Order on Summary Judgment at 13).

F18. At the time of appropriation, Blue Lakes' above water rights did not receive a full supply at all times during the year, but experienced seasonal fluctuations in supply. (Dreher, 12/6/07, 10:07-10:29 a.m.; *Brendecke Direct* at 22, 44, Exhibit 405, 406, 414, 415, 420).

F19. The Clear Springs Order found a shortage of 24.5 cfs, or 20.8% of the total authorized diversion for Snake River Farms, based upon flow records between 1988 and 2004. Clear Springs failed to provide its expert Dr. Brockway with flow records prior to 1988 for reasons unknown, which information would have been relevant in determining what flows were historically available at the time each of the Snake River Farms rights were developed. (L. Cope; Brockway Cross-Examination.) In addition, evidence was presented at the hearing that spring flows have increased since 2004. Based on Exhibit 28 and testimony of Larry Cope and Dr. Brockway, peak flows available under the Snake River Farms right are approximately 10 cfs short of the authorized maximum rate of diversion. This shortage represents a shortage of approximately 8.5 % of the cumulative water rights that supply the Snake River Farms facility.

F20. Clear Springs operates five separate aquaculture facilities, supplied by water rights in the

[1] Source also known as "Clear Springs."

following quantities:

Box Canyon	300 cfs
Clear Lake Farm	251.5 cfs
Crystal Springs Farm	335.1 cfs
Snake River Farm	117.67 cfs
TOTAL	1,004.27 cfs

Thus, the Snake River Farm facility represents 12% of Clear Springs' fish propagation water rights. A shortage at Snake River Farm of 24.5 cfs represents a shortage of 2.4% of the total 1,004.27 cfs owned by Clear Springs for aquaculture purposes. A shortage at Snake River Farm of 10 cfs represents a shortage of 1% of the total 1004.27 cfs owned by Clear Springs for aquaculture purposes.

Conclusions of Law

C4. The quantity element of Clear Springs' water rights reflects an authorized maximum rate of diversion and not a guaranteed minimum entitlement. An appropriator is entitled to the hydrologic conditions that existed at the time of appropriation; there is no right to demand enhanced hydrologic conditions which may occur subsequent to appropriation. While Clear Springs is authorized to divert up to the authorized maximum quantity at all times that it is naturally available, Clear Springs is not entitled to curtail junior-priority ground water diversions unless shortage occurs based on the hydrologic conditions that existed at the time of appropriation. Therefore, determinations of shortage must account for seasonal fluctuations in the water supply that existed at the time of appropriation. (Dreher 12/6/07, 10:09 a.m.)

C5. SRBA partial decrees do not define seasonal variations in the water supply because the quantity element simply defines the upper limit of authorized water use. Determinations of shortage to Blue Lakes' water rights must be made administratively pursuant to the CM Rules. "[W]ater rights adjudications neither address, nor answer, the questions presented in delivery calls...." *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 154 P.3d 433, 447 (2007).

C6. Partial Decrees reflect the basic elements of a water right but do not reflect everything relevant or necessary for purposes of administration. (Luke, 12/3/07, 2:48 p.m.; Brockway, 12/10/07, 2:47 p.m.) In the administration of water rights, it is relevant to look at historical water use and hydrologic information, including inter- and intra-year fluctuations in the water supply. (Brockway 12 p.m., 12/10/07). Historical information regarding spring flows establishes the amount of water available for beneficial use and may be considered when administering water rights. (November 14, 2007 Order on Summary Judgment at 8).

C7. The record indicates that the estimated shortage of 24.5 cfs incorporated into the Clear Springs Order overstates the seasonal shortage experienced by Clear Springs. A shortage of 10 cfs is supported by substantial evidence in the record.

IV. EAST SNAKE PLAIN AQUIFER.

Findings of Fact

F21. The Spring Users' water rights are supplied by various springs located in the Thousands Springs reach of the Snake River. The springs that supply the Spring Users' water rights derive exclusively from ground water discharged from the Eastern Snake Plain Aquifer ("ESPA"). *Brendecke Direct* at 14.

F22. The ESPA, depicted in Exhibit 401, extends from King Hill on the west to the Teton Mountains on the east and comprises more than 10,800 square miles in southern and southeastern Idaho. Exhibit 429; *Brendecke Direct* at 9-10; *Brockway Direct* at 4; Figure 1. The ESPA is an extraordinary water resource that is estimated to contain approximately one billion acre-feet of water. It is one of the largest and most productive aquifers in the world.

F23. The ESPA is akin to a large, underground bathtub confined to fissures, vesicles, and cavities in a basalt geologic structure. The basalts are solidified remnants of ancient lava flows dating back at least to Pleistocene time, roughly half a million years ago. The lava basalts are discontinuous, periodically inter-laid with sedimentary or Aeolian (wind-borne) materials and riven with fractures, joints and lava tubes. (*Brendecke Direct*, at 10-11, Exhibit 429)

F24. Water slowly travels through the ESPA from areas of higher elevation to areas of lower elevation, and also from areas of higher pressure to areas of lower pressure. Ground water stored in the ESPA is likely under pressure as manifested by the head-dependent spring discharges at various elevations. *Brendecke Direct* at 12-13, Exhibit 429.

F25. Water tends to follow the path of least resistance. Water doesn't discharge at a constant rate throughout the Thousand Springs reach and may discharge at the larger springs because they are large or less resistant. (Dreher, 12/6/07, 4:17 p.m., Brendecke, Wylie)The subterranean locations and characteristics of these pathways are largely unknown. Because of the uncertain nature of these pathways, both the timing and location of the actual impacts on specific well pumping are difficult to predict with any degree of certainty. (*Brendecke Direct*, at 13-14, Exhibits 403, 404; *Brockway Direct*, Figure 2).

F26. Springs in the Thousand Springs region act as an overflow valve for the ESPA, with the result being that the only time the 'over-flow' produces water is when the bath tub is full. *American Falls Reservoir District No. 2, et al. v. The Idaho Department of Water Resources, et al.* ("*AFRD2*"), Gooding County Case No. CV-2005-600, n.21 at 90 (June 2, 2006). Spring flows in the Thousand Springs reach fluctuate congruent with the amount of water stored in the ESPA. *Brendecke Direct* at 11 and 21, Exhibit 429

F27. The volume of water stored in the ESPA derives from natural inputs (precipitation, tributary underflow, river losses) and artificial, irrigation-related inputs (seepage from irrigation canals and farm fields.) Annual aquifer inputs total approximately 8,000,000 acre-feet per year. The primary source of ESPA "recharge" is irrigation (about 60%), underflow from tributary basins (about 18%), seepage from the Snake River and other streams and canals (about 13%), and rain and snow (about 9%). Thus, ESPA recharge is approximately 2/3 irrigation-related inputs and 1/3 natural inputs. (*Brendecke Direct*, at 11, Exhibit 429; *Brockway Direct*, at 9)

F28. Flood irrigation began on the Eastern Snake River Plain shortly after the Civil War, was well under way by the turn of the century, and continued to expand to the 1950s, at which time there were approximately 1.83 million acres under irrigation. (*Carlson Direct*, at 8, exhibits 408, 409, 410; *Brendecke Direct*, Figure 4).

F29 Flood irrigation practices were very inefficient, resulting in millions of acre feet of water being diverted by percolation into the ESPA. (Exhibit 429). For example, North Side Canal Company began diverting surface water through the North Side Canal in 1908, which diverts from the Snake River at Milner Dam and travels across the Snake River Plain north of the Snake River. The North Side Canal delivers surface water to farmland located up-gradient from the springs which supply both Snake River Farms and Blue Lakes. North Side Canal Company diverted 30 acre-feet per acre in 1911, 28 feet per acre in 1914, and about 10 acre-feet per acre in 1918. An estimated 2 acre-feet per acre is consumed by crops. (Brockway 12:28 p.m., 12/10/07). A substantial amount of the water diverted through North Side Canal seeps into the ESPA as "incidental recharge." Evidence indicates that the lands irrigated by the North Side Canal are very leaky and that water percolates to the aquifer relatively quickly. For instance, historical documents show that attempts to build the Jerome Reservoir failed because of the reservoir's inability to store water. Exhibit 469 shows the location of North Side Canal Company's service area and its proximity to the springs in question.

F30. Seepage from surface water irrigation practices beginning in the late 1800s caused an extraordinary increase in water table of the ESPA. Based on water levels and observation wells, levels in the aquifer immediately north of the Thousand Springs Area in the area irrigated by the North Side Canal Company raised approximately 45 feet between 1900 and 1950 as a result of incidental recharge from surface water irrigation.

F31. This great increase in the amount of water stored in the ESPA caused spring discharges into the Thousand Springs area to increase dramatically. (*Carlson Direct*, at 8, 2005 *Curtailment Orders* at Finding of Fact No. 5, Exhibit 429) (*Brendecke Direct*, at 19-21, 23-25, Exhibits 411, 412, 413, 414, 415). Irrigation seepage caused the water table of the ESPA to rise by as much as 200 feet in some areas. Spring discharges in the Thousand Springs area increased congruent with the increased quantity of water stored in the ESPA, from approximately 4,100 cfs in 1902 to 6,700 cfs in 1952—an increase of more than 63%. *Brendecke Direct* at 24; Attachment A to Curtailment Orders; Exhibit 429; Exhibit 407; (Dreher 12/6/07, 9:25 a.m.) It was a natural outcome for the spring discharges to increase and this rising cumulative spring discharge was largely due to incidental recharge. (Dreher 12/6/07 9:29 a.m.)

F32. Discharges from the springs that supply the Spring Users' water rights increased even more dramatically, rising by 89% (Crystal Spring), 188% (Blue Lakes Spring), and 255% (Clear Lakes Spring). *Brendecke Direct* at 25. Blue Lakes' first aquaculture appropriation in 1958 appears to have exceeded the natural discharge from spring. Subsequent appropriations by Blue Lakes relied exclusively on waste water. *Brendecke Direct* at 29. Cumulative Blue Lakes' appropriations significantly exceeded the highest seasonal spring flow ever recorded. *Id.* at 30. Without the application of large amounts of surface water to the lands of North Side Canal Company, much of the water appropriated by Blue Lakes and Clear Springs would have remained in the Snake River and would have flowed down the river and out of Idaho. Instead, however, the water was stored in the aquifer and the spring discharges increased. (Brendecke 2:33 p.m., 12/11/07)

F33. The amount of water stored in the ESPA and discharged at Thousand Springs peaked in the 1950s, and has since declined due to more efficient surface water irrigation practices, ground water pumping, and drought. Conversions from flood to sprinkler irrigation and the termination of winter canal flows are the primary cause of decreased storage in the ESPA and decreased spring discharges. (Brockway 12/10/07 12:06 p.m.) Spring flows declined to the current level of approximately 5,300 cfs primarily as a result of the conversion to sprinkler irrigation and the practice of winter water storage in the reservoirs resulting in a significant reduction in incident recharge of the ESPA from surface water irrigation, and the last six consecutive years of drought. (Finding #17 of 2005 Curtailment Orders, *Brendecke Direct* at , Exhibit 407 and 429).

F34. Beginning in the 1950s, lands being flood irrigated by surface water were converted to more dependable ground water sources. The amount of land being irrigated with ground water rapidly expanded across the East Snake River Plain with the advent of turbine pumps and with the added encouragement of Idaho Power which offered inexpensive power. (*Carlson Direct*, at 9-10, Exhibits 429, 435).

F35. Ground water development and spring-based aquaculture development occurred simultaneously between 1950 and 1980, with water right priorities for ground water pumping interleaved with water right priorities for aquaculture. (*Brendecke Direct* at 40-41). In other words, some ground water rights are senior to spring rights and some spring rights are senior to ground water rights.

F36. There have been very few new ground water appropriations since the 1985 Swan Falls Settlement. (Wylie, 12/3/07, 10:35 a.m.) Further, IDWR issued a moratorium on ground water development in 1992 which has prevented any major new ground water appropriations since that time. Consequently, the effects of ground water irrigation have largely been realized and expressed by now. (Brendecke, 12/12/07, 10:04 a.m.)

F37. Currently data indicates that the ESPA experiences approximately 2.1 million acre-feet of depletion annually from ground water diversions. The average rate of recharge from 1980 to 2002 from precipitation alone was 2.2 million acre-feet, which does not include incidental recharge from surface water irrigation practices. Ground water depletions do not exceed the

amount of precipitation and certainly do not deplete the ESPA in excess of the average rate of withdrawal. Thus, the ESPA is not being mined. (Dreher, 12/7/07, 10:11 a.m.)

F38. IDWR issued a moratorium and stopped issuing permits for ground water pumping in 1992 from the ESPA. (Dreher, 12/6/07, 10:26 a.m.) Exhibit 417 indicates that from the early 1980s until the moratorium in 1992 there were very few new permits issued to allow groundwater pumping in the ESPA. Since the majority of impacts of ground water pumping are realized within 20 years, it is clear that the impacts of pumping have for the most part been fully realized. (Wylie, 12/3/07, 10:45 am). As a result, the aquifer is at or near equilibrium with future changes in aquifer levels caused primarily by changes in precipitation and incidental recharge, not groundwater pumping.

F39. The drought that Idaho has been experiencing in the last seven years is the worst back-to-back sequence on record with a probability of it occurring once in every 500 years. (Dreher, 12/6/07, 9:56 a.m.)

F40. The ESPA is very responsive to wet and dry cycles. The year 2006 experienced significant rain events and was considered a wet year. (Brockway 12:07 p.m., 12/10/07 and Exhibit 154) Dr. Brockway testified that the flows at the Snake River Farms increased in 2007 and have come up since 2004 (Brockway 11:57 a.m., 12/10/07, Exhibit 156). Flows at Blue Lakes also increased. Exhibit 155. Cumulative spring flows for the Thousand Springs reach also increased since 2004 according to the data provided by IDWR employee Tim Luke in Exhibit 154. Given the ESPA's high level of responsiveness to wet and dry cycles, it would be unreasonable to attribute the declines in spring flow solely to ground water pumping.

F41. Contemporary spring discharge levels remain well above historic, baseline levels, averaging approximately 5,300 cfs. *Brendecke Direct* at 17-18, 25-26; Dreher 12/6/07 9:25 a.m.; Exhibit 406, 407, 429; *Carlson Direct* at 9, 11-12; Director's 2005 Curtailment Orders, Findings of Fact Nos. 5 and 6 and Attachment A).

F42. The peak discharge levels of the early 1950s can never be restored, absent the return of pre-1950 conditions which would require the elimination of sprinkler irrigation in favor of flood irrigation and elimination of storage in Palisades Reservoir. (*Brendecke Direct*, at 26).

V. OPTIMUM BENEFICIAL USE AND FULL ECONOMIC DEVELOPMENT OF THE EASTERN SNAKE PLAIN AQUIFER (ESPA).

Findings of Fact

F43. The water rights upon which the Spring Users' delivery calls are based were appropriated at a time when the ESPA was artificially inflated due to incidental recharge from surface water irrigation practices. But for such incidental recharge, spring discharges would not have been adequate to support the appropriation of the subject water rights. (Brendecke 2:33 p.m., 12/11/07). The proposed curtailment will not restore discharges from the springs that supply the Spring Users' water rights to the historic highs that existed when the rights were

appropriated. Consequently, the 2005 Curtailment Orders command a permanent curtailment of ground water pumping.

F44. The development of aquaculture facilities in the Thousand Springs area and the development of ground water pumping for irrigation on the East Snake Plain occurred to a large extent simultaneously between 1950 and 1980, with water right priorities for ground water pumping interleaved with water right priorities for aquaculture. (*Brendecke Direct* at 40-41.) As a result, some ground water rights are senior to some spring rights and some spring rights are senior to some ground water rights. *Id.* at 41. It is not possible to increase ESPA discharges from a specific spring via the curtailment of ground water diversions without also increasing discharges from numerous other springs. *Id.* at 33. Consequently, it is impossible for the curtailment of ground water pumping to increase spring flows available to a senior-priority spring water right without also increasing flows to springs serving junior-priority spring water rights which have no right to increased flows. Under the present circumstances, "Much of any increased flow to the spring complex stemming from general water curtailment would emerge in spring outlets not accessible to [the Spring Users]." *Brendecke Direct* at 30. Instead, the Spring Users' delivery calls "would have the effect of delivering water to junior rights who are not placing a call in an effort to deliver a smaller amount of water to a senior right that is making the call." *Brendecke Direct* at 34.

F45. The Blue Lakes Order commands the permanent curtailment of ground water irrigation of 57,220 equivalent acres. (*Blue Lakes Order* at ¶77.) The Eastern Snake Plain Aquifer Ground Water Model (the "Model") predicts that such curtailment will result in an average of 51 cfs to the Devil's Washbowl to Buhl Gauge reach of the Snake River at steady state conditions. *Id.*

F46. The Model is incapable of predicting the amount of water that will accrue to a specific spring in response to curtailment. (Wylie, 12/3/07, 11:30 a.m., 9:16 a.m.; Dreher, 12/6/07, 9:53 a.m.; Brendecke, Brockway, Harmon, Land). In order to estimate the effect of curtailment on a particular spring, the Director relied upon a linear analysis prepared by Dr. Wylie which essentially apportioned reach gains to various springs.

F47. The Blue Lakes Order predicts that Alpheus Creek receives 19.7% of the reach gains in the Devil's Washbowl to Buhl Gauge reach of the Snake River. (Blue Lakes Order at ¶15; Wylie 12/3/07 9:25 a.m.) Thus, the Blue Lakes Order predicts that the curtailment of acres will increase flows to Blue Lakes by an estimated 10.05 cfs.

F48. At the typical diversion rate of 4 acre-feet per acre, the curtailment of 57,220 acres eliminates ground water diversions of 228,880 acre feet annually. The estimated gain to Blue Lakes of 10.05 cfs amounts to 7,276.0 acre-feet annually, or **3.2% of the total amount curtailed.**

F49. The Clear Springs Order commands the permanent curtailment of ground water irrigation of 52,470 equivalent acres. (*Clear Springs Order* at ¶71.) The Model predicts that such curtailment will result in an average of 38 cfs to the Buhl Gauge to Thousand Springs reach of the Snake River at steady state conditions. *Id.*

F50. The Clear Springs Order predicts that 7% of the reach gains in the Buhl Gauge to Thousand Springs reach of the Snake River will accrue to Snake River Farm diversions. (*Clear Springs Order* at ¶ 72.) Dr. Wylie testified that he calculated Snake River Farm would actually receive 4.2 percent of 38 cfs accruing to the Buhl to Thousand Springs reach. (Wylie, 12/3/07, 9:20-9:30 am, 12/7/07, 1:45-2:00 pm) Based on a 4.2% return, the curtailment of 52,470 acres will increase flows to Snake River Farm by an estimated 1.6 cfs. Based on a 4.2% return, the curtailment of 52,470 acres will increase flows to Snake River Farm by an estimated 2.66 cfs.

F51. At the typical diversion rate of 4 acre-feet per acre, the curtailment of 52,470 acres eliminates ground water diversions of 209,880 acre feet annually. The estimated gain to Snake River Farm of 1.6 cfs amounts to 1,115.5 acre-feet annually, or **0.5% of the total amount curtailed**. Even with a 7% return, the estimated gain to Snake River Farm of 1,935.8 cfs amounts to only **0.8% of the total amount curtailed.**

F52. Exhibits 462 and 463 demonstrate the simulated effect of curtailment without a 10% trim line. (Wylie, 12/3/07, 1:39-1:55 pm). With no trim line and a curtailment date of 1973, approximately 372,000 acres would be curtailed, with projected spring gains of 18 cfs (13,031.6 ac-ft annually) to Blue Lakes and 3.29 cfs (2,381.9 ac-ft annually) to Snake River Farm. Based on an average diversion of 4 acre-feet per acre, the curtailment of 372,000 acres eliminates the diversion of 1,488,000 acre-feet of ground water annually. Thus, Blue Lakes would receive an estimated 0.88% of the amount curtailed and Snake River Farm would receive an estimated 0.16% of the quantity curtailed. The results of the curtailment model as summarized in Exhibits 462 and 463 indicate there would be minimal benefits from curtailing ground water pumpers outside of the 10 percent trim line. In fact, curtailing all ground water pumping from the aquifer, over 1.1 million acres, could still never satisfy the Blue Lake and Snake River Farms calls. (Wylie, 12/3/07).

F53. The above calculations are based on steady state conditions. In reality, full effect of curtailment will take decades to show up at the springs, and only then in varying and small percentages. (*Brendecke Direct* at 42-43; Exhibit 430.)

F54. The aquaculture industry is highly-regulated and highly-competitive. Much of the imported seafood arises at a significantly lower cost than domestic seafood, as international production has cost advantages in the form of less environmental constraints and cheap labor. Various economic factors including market condition and competition affect profitability. In 2001 Clear Springs experienced a 10% decline in aquaculture demand due to market factors. The company reduced production accordingly. (Clear Springs President/CEO L. Cope, Blue Lakes Trout Company VP G. Kaslo)

F55. Clear Springs is employee-owned, currently employs 400 employees, has an annual payroll of $19 million, and has never had a layoff and operates profitably every year. (Clear Springs President/CEO L. Cope, 11/28/07 from 11:00 am to 11:20 am)

F56. Three economic reports—the "Hamilton Study," the "Hazen Report," and the "Snyder-Coupal Study"—were submitted into evidence relating to the economic effect of curtailment of ground water pumping from the ESPA. The Snyder-Coupal Study, commissioned by the Natural Resources Interim Legislative Committee for the State of Idaho, is the only peer-reviewed analysis and appears to be the most reliable of the three reports based on evidence presented at the hearing. *Church Direct* at 5-6. The Study is a reliable study that looked at the long-term negative impact of curtailment. (Church 11:05 a.m. to 11:15 a.m., 12/11/07).

F57. The Snyder-Coupal Study examined three primary sectors that would be affected by the curtailment of ground water rights on the Eastern Snake Plain: (1) ground water users, (2) aquaculture rights/spring users, and (3) surface water users. The Study examined alternatives available to ground water users and did not simply assume that curtailment would leave ground water users without any economic alternatives. The Study included strategies to minimize the economic loss resulting from curtailment. For example, the Study determined that ground water users could convert their crop land to either dry-land crops or pasture. (Church 12/11/07). Even after including economic alternatives, the Study concluded that the economic impact of curtailment would be immediate and dramatic, while the benefits to the spring and surface water users would be relatively small and would occur over time. (Church 9:24 a.m., 12/11/07).

F58. The Snyder-Coupal Analysis excluded economic beneficiaries such as hydro and recreation. Hydropower benefits were not considered because it would be difficult to determine what day the water will occur in the river and that is the key factor in determining the benefit to hydropower. (Church 9:43 a.m., 12/11/07) Benefits from public uses and hydropower uses would be complex to study and would be small, the benefits would be long-term, and the benefits may largely flow out-of-state. (Church 9:40 a.m., 12/11/07).

F59. Economist Dr. Hamilton emphasized that attention should be given to the economic benefits in the form of hydro-electric generation that would result if additional stream flows were created by reason of curtailing ground water pumpers. He also suggested that the economic benefits of additional stream flows to fish, wildlife and recreation should be considered. Dr. Hamilton provided no economic models or analysis to quantify any benefits derived to fish, wildlife and recreation. Furthermore, the Idaho Water Resource Board has established a State Water Plan ratified by the Legislature which includes minimum stream flows which protect fish, wildlife and recreation. Regarding alleged power generation, Dr. Hamilton purportedly calculated lost power generation as if the full river gains resulting from curtailment were immediately available when in fact the amount he utilized was a "steady state" number that will accrue over time and not be fully utilized until more than 100 years. Furthermore, Dr. Hamilton presumed that all flow increases would be fully utilized without spill, and he could not identify the nature or source of the price used to calculate the additional electricity sales. Dr. Hamilton's testimony regarding hydro-electric benefits was not peer-reviewed, was not supported by any standard economic model, was based on speculation, and is not credible.

F60. The residual impacts of curtailment would be extensive and severe. For example, dairies

require water for their cows, for the irrigation of crops to provide feed to their cows, and also to manage their waste management plans which require irrigated crops to absorb nutrients from manure spread upon crop land. The lack of water for any of these functions could result in shutdown of the entire dairy operation. (Brockway, 12/10/07, 11:38 a.m.)

F61. The effect of curtailment pursuant to the Spring Users' delivery calls "would result in an immediate and largely permanent net loss of nearly 3,500 jobs, at least $160 million near term decrease in the area's personal annual income, and a loss 25 of between $4.4 to $7 million in annual local property tax revenues." (*Church Direct* at 6.) The proposed curtailment would "cause the state's economy to lose a present value of close to $8.1 billion in gross output during the next twenty years to gain a present value of $423.5 million." (*Church Direct* at 7.)

F62. Evidence presented at the hearing indicates that it would be practical and reasonable for the Spring Users to install water reuse facilities in order to increase their use of available water supplies. At both the Blue Lakes and Snake River Farm facilities, water flows by gravity through multiple ponds and raceways. At the Snake River Farms facility, water is reused between five and six different times. (L. Cope, R. MacMillan.) Water is re-used three to four times as it flows through different raceways in the Blue Lakes ponds. Thus, the water is essentially re-used from one raceway to the next.

F63. Additionally, water discharged from the Blue Lakes facility is re-used through three separate Pristine Springs aquaculture facilities downstream, apparently through an additional ten raceways. (Exhibit 201, page 6.) The fact that water discharged from the Blue Lakes facility can be re-used an additional ten times through the Pristine Springs facilities to successfully rear rainbow trout indicates that recirculation water year is a practical and feasible means for the Spring Users to reuse a small portion of their right in order to avoid any shortfall.

F64. Evidence presented at the hearing indicates that Snake River Farm could readily obtain additional water it claims to need from nearby spring outlets serving junior-priority spring water rights. In addition, evidence was presented that Clear Springs and other aquaculture facilities have drilled wells and own ground water rights for use at their aquaculture facilities. As with a surface water system, if the channel moves due to natural conditions, you may need to change the point of diversion to go to get the water (Dreher, 12/6/07, 2:07 p.m.). Thus, in cases of the springs, they need to move their point of diversion to include the drilling of wells into the ESPA for the development of their springs in order to gain more water. The springs are akin to shallow wells. A senior appropriator with a shallow well is not entitled to curtail junior-priority water rights if the senior can increase its supply by deepening its well. (Dreher, 12/6/07, 2:08 p.m.)

F65. Normal water pumping systems could be used to provide for reuse of water. Pump-back systems that pump back aquaculture discharge water to the facility intake offers advantages of quick augmentation of supply. Reuse is a simple concept using common equipment with the distance and lift involved relatively small compared to irrigation systems. (B. Patton, 11/30/07, 9:17-9:23 a.m.) Clear Springs' expert witness Brockway confirmed that it is feasible to design a pump system to lift water 3 to 4 feet and move it 200 to 300 feet to the

head of a raceway. You would simply need to provide an alternate energy source. (Brockway 2:10 p.m., 12/10/07). Pumping up to 2 cfs for a fish facility has been done by Brockway Engineering for Clear Springs Foods' Clear Lakes facility to supply water to its holding pond before the fish are processed. (Brockway 11:41 a.m., 12/10/07)

F66. Based upon the 2005 Clear Springs Order at Conclusion 29 (Exhibit 138) and 2005 Blue Lakes Order at Conclusion 27, and Order, page 29(1), Exhibit 133, the relatively small depletions caused by ground water pumping, an average of 2.7 cfs to Clear Springs and 10 cfs to Blue Lakes, could feasibly be replaced by a pump-back system. (B. Patton, 11/30/07, 9:45-9:48 am) One of the advantages of water for reuse is that it will happen immediately and with certainty, either of which happens with curtailment.

Conclusions of Law

C8. The Idaho Constitution and state statutes provide that all waters in the state are the "property of the state," and are dedicated to "public use." I.C. § 42-101 et seq.; Idaho Const., Art. 15, §§ 1, 3 and 7. As such, "[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). The state is charged with the responsibility to control the allocation of water and "in providing for its use shall equally guard all the various interests involved." I.C. § 42-101. Because the water resources of this state are dedicated to public use, the right of appropriation "is not an unrestricted right, but must be exercised with some regard to the rights of the public." *Schodde v. Twin Falls Water Co.*, 224 U.S. 107, 120 (1911).

C9. As between appropriators, priority in time gives superiority in right, except that the right of prior appropriation is tempered by such reasonable limitations as are necessary to achieve "optimum development of water resources in the public interest." *Id.* at §§ 5 and 7; I.C. §§ 42-1734A(1)(b). The Idaho Constitution declares that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Id. Const Art. 15, § 3. Therefore, "It is the policy of the state of Idaho to promote and encourage the optimum development ... of the water resources of this state." I.C. § 42-234; *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911); *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

C10. With respect to Idaho's ground water resources, the law of optimum development of water resources includes a legislative mandate that "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." I.C. § 42-226. The policy of full economic development is grounded in the legislature's constitutional authority to place reasonable limitations on priority of right, and "is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest." *Baker*, 513 P.2d at 636; Idaho Const., Art. 15, § 7. A water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single

individual." *Schodde*, 224 U.S. at 120 (quoting *Basey v. Gallagher*, 87 U.S. 670, 683 (1874)). The Idaho Supreme Court recently confirmed that "the reasonableness of use and full economic development" are essential to the lawful administration of Idaho's water resources. *American Falls Reservoir District No. 2, et al. v. The Idaho Department of Water Resources, et al.* ("*AFRD2*"), ___ Idaho ___, 154 P.3d 433, 447 (2007).

C11. The law of optimum development provides that "[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use...." IDAPA 37.03.11.010.08; *Schodde*, 224 U.S. 118-121. That means an appropriator has "no right to insist the water-table be kept at the existing level in order to permit him to use the underground waters. ... To hold that any land owner has a legal right to have such a water-table remain at a given height would absolutely defeat drainage in any case, and is not required either by the letter or spirit of our constitutional or statutory provision in regard to water rights." *Nampa & Meridian Irrigation District v. Petrie*, 37 Idaho 45, 51, 223 P. 531, 532 (1923). Under Idaho law, a senior appropriator "is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development." *Baker*, 95 Idaho at 584. "[W]hen private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is promotion of the welfare of all our citizens." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).

C12. Idaho law does not guarantee historic levels of artesian pressure or head dependent overflow. Were these values protected absolutely, the law of optimum development of the ESPA would be turned on its head. As applied to artesian water supplies or ground water overflow, the principle of optimum and full economic development was clearly stated by the Oregon Supreme Court: "the method of diversion by way of natural overflow is a privilege only and cannot be insisted upon ... if it interferes with the appropriation by others of the waters for a beneficial use." *Warner Valley Stock Co. v. Lynch*, 215 Ore. 523, 538, 336 P.2d 884, 891 (1959). Such circumstances may have the effect of "compelling a surface user to convert his point of diversion to a ground water source" if necessary to procure a more useful or reliable water supply. *AFRD2*, 154 P.3d at 441.

C13. The law of optimum development proscribes unreasonable waste of Idaho's water resources: "The policy of the law of this state is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960); *Colthrop v. Mountain Home Irrigation District*, 66 Idaho 173, 180 (1945) (citing *State v. Twin Falls Canal Co.*, 21 Idaho 410, 411 (1911) ("... it is the policy of the law of this state to prevent the wasting of water"). In responding to a delivery call, the Director must consider whether the effect of the call will cause unreasonable waste. IDAPA 37.03.11.020.03, 37.03.11.040.03. Idaho law does not permit an appropriation to deprive the public from using a large quantity of water in order to support a fraction of that quantity to which the appropriator is entitled. *Schodde v. Twin Falls Water Co.*, 224 U.S. 107, 120

(1911).

C14. Idaho jurisprudence lacks any finite definition of the point at which the waste of water becomes unreasonable. However, Idaho jurisprudence consistently explains that a water use which results in 90% waste would be so unreasonable as to not be tolerated. The Montana Supreme Court has gone further in stating that "an appropriator has no right to ... cause the loss of two-thirds of a stream simply because he is following the lines of least resistance. Such a method of diversion would not be an economical use of the water...." *State ex rel. Crowley v. District Court*, 108 Mont. 89, 103, 88 P.2d 23, 30 (1939).

C15. The Hearing Officer concludes that the Blue Lakes delivery call unreasonably interferes with optimum beneficial use of the ESPA. As shown in finding 48 above, only 3.2% of the quantity curtailed under the Blue Lakes Order is expected to discharge from the springs that supply the Blue Lakes water rights. Most water generated by curtailment will flow to junior priority water rights or non-calling senior rights or flow to the river unused contrary to the prior appropriation doctrine and principle of maximum beneficial use and least wasteful use of the water resource. *Brendecke Direct* at 46, 51. As a matter of law, such curtailment unreasonably interferes with optimum beneficial use of the ESPA.

C16. The Hearing Officer concludes that the Clear Springs delivery call unreasonably interferes with optimum beneficial use of the ESPA. As shown in finding 51 above, only 0.5-0.8% of the quantity curtailed under the Clear Springs Order is expected to discharge from the springs that supply the Snake River Farm water rights. Most water generated by curtailment will flow to junior priority water rights or non-calling senior rights or flow to the river unused contrary to the prior appropriation doctrine and principle of maximum beneficial use and least wasteful use of the water resource. *Brendecke Direct* at 46, 51. As a matter of law, such curtailment unreasonably interferes with optimum beneficial use of the ESPA.

C17. It would be contrary to the law of optimum beneficial use to require that the ESPA be maintained at peak levels simply to ensure maximum artesian pressure and maximum overflow from the springs that supply the Spring Users' water rights. The resulting permanent curtailment would also have the effect of maintaining a massive surplus of storage water that could not be appropriated contrary to Article 15, Section 3 of the Idaho Constitution. The Spring Users' delivery calls and resulting permanent curtailment of ground water pumping unreasonably interferes with optimum beneficial use of the ESPA.

C18. The policy of optimum beneficial use favors the maximum utilization of the ESPA without "mining" the ESPA. Because the ESPA is at or near equilibrium, the policy of optimum beneficial use supports continuation of current ground water diversions.

C19. The spring users are entitled to utilize spring flows up to the limit of their authorized maximum diversion, but the spring users are not entitled to command that the entirety of the ESPA in an effort to increase the amount of ground water that overflows from the springs that supply the Spring Users' water rights. The Spring Users are entitled modify their diversion facilities and/or re-circulate water to increase their use of available water supplies.

C20. The Hearing Officer concludes that the Spring Users' delivery calls unreasonably interfere with maximum economic development of the ESPA. While the prior appropriation doctrine certainly applies to ground water diversions, Idaho law precludes application of the prior appropriation doctrine in a manner that blocks full economic development. Idaho Code § 42-226. It is noteworthy that the water rights which provide the basis for the delivery calls were appropriated long after the enactment of the Ground Water Act; thus, the policy of full economic development is an inherent condition of the rights. Further, neither Clear Springs nor Blue Lakes protested any new ground water rights appropriated subsequent to the water rights upon which the delivery calls are based. (L.Cope, G. Kaslo)

C21. Merely because a water right is put to beneficial use under its priority date does not mean that it is economically efficient. Economic efficiency means that the resources being used both distributionally and in the method of production. Maximizing the economic development would mean using the resource to produce the greatest amount of output in the economy. In other words, maximum economic development of the ESPA means allocating the resource to achieve the greatest amount of economic output with the least amount of negative economic impact. (Church 12/11/07).

C22. The economic effects of curtailment should be viewed and evaluated in the context of the parties directly affected, meaning the benefits derived by Blue Lakes and Clear Springs from additional water resulting from curtailment, and the detriments to the ground water users and the agricultural economy as described by witness John Church. Fish, wildlife and recreation benefits are provided for and protected under the minimum stream flows established pursuant to the State Water Plan as approved by the Legislature. Power generation benefits resulting from curtailment are remote and speculative and should not be considered.

C23. Because the ESPA is at or near equilibrium, it would be the most economically advantageous to sustain and maintain the existing distribution of water to the existing parties. (Church 11:18 a.m., 12/11/07).

C24. In this case, the law of optimum beneficial use and full economic development mandate that the Spring Users pursue alternate means of diversion or appropriation. Given that various aquaculture facilities have drilled wells and own ground water rights for use at their facilities, the Spring Users should pursue supplemental ground water rights to make up for the small amount of shortage due to ground water diversions. Likewise, the Spring Users may be able to increase their use of available water supplies via re-circulation. Broad curtailment of ground water pumping unreasonably interferes with optimum beneficial use of the ESPA and full economic development of Idaho's underground water resources.

VI. MANAGEMENT OF THE SNAKE RIVER BASIN BASED ON MINIMUM STREAM FLOWS AT THE MURPHY GAUGING STATION.

Findings of Fact

F67. The Idaho Constitution, Article 15, Section 7, entitled "State Water Resource Agency," states:

> "There shall be constituted a State Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to ... formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature." (emphasis added)

F68. The Idaho Constitution, Article 15, Section 5, entitled "Priorities and Limitations on Use," states:

> "Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, ... as among such persons, priority in time shall give superiority in right to the use of such water ...; but whenever the supply of water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and the times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe." (emphasis added)

F69. Idaho Code § 4-1734A, entitled "Comprehensive State Water Plan," states:

> "(1) The board shall ... adopt and implement a comprehensive state water plan for conservation, development, management, and optimum use of all unappropriated water sources and waterways of this state in the public interest.
>
> ...
>
> (b) Optimum economic development in the interest of and for the benefit of the state as a whole shall be achieved by integration and coordination of the use of water ...."

F70. Idaho Code § 42-1734B(4) states: "All state agencies shall exercise their duties in a manner consistent with the comprehensive state water plan."

F71. The 1986 State Water Plan (Exhibit 440) provides for comprehensive management of the upper Snake River Based based upon the maintenance of minimum Snake River flows at the Murphy Gauge of 3,900 cubic feet per second (cfs) from April 1 through October 31 and 5,600 cfs from November 1 to March 31. (Policy 5A). The minimum flows at the Murphy

Gauge in the 1986 State Water Plan reflect an increase from the minimum flows previously established in the 1976 and 1982 State Water Plans, which provided for 3,300 cfs at the Murphy Gauge.

F72. The 1986 State Water Plan maintained a Snake River flow of 0 cfs at Milner Dam located upstream from the Murphy Gauge as established in the 1976 and 1982 Idaho State Water Plans. *It is noteworthy that IDWR recommended to the SRBA Court that the Idaho Water Resource Board have a water right for 0 cfs at Milner Dam with a 1976 priority date.* (Water right number 02-200 and General Provisions for Basin 02.)

F73. Because of the 0 flow at Milner Dam, the primary source of water to meet the minimum flows at Murphy Gauge derives from ground water discharged from the ESPA through various springs located in the Thousand Springs reach of the Snake River.

F74. Management of the Snake River based on the zero flow at Milner Dam and the minimum flows at the Murphy Gauge requires management of the ESPA as necessary to maintain the minimum flows. *Carlson Direct* at 22.

F75. The maintenance of minimum Snake River flows at the Murphy Gauge is a water management constraint that ensures an adequate water supply for hydropower, fish, wildlife, recreation, aquaculture, and other non-consumptive uses. Exhibit 440.

F76. Spring flows in the Thousand Springs region are utilized primarily for aquaculture purposes. Aquaculture is treated by IDWR as a non-consumptive water use. State Water Plans provide that the maintenance of minimum stream flows at the Murphy Gauge ensure an adequate water supply for aquaculture uses. The 1976 and 1982 State Water Plans both state:

> "Aquaculture is encouraged to continue to expand when and where supplies are available and where such uses do not conflict with other public benefits. Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, aquaculture interest may need to construct different water diversion facilities than presently exist." Exhibits 438 and 439.

F77. The 1986 State Water Plan, which increased the minimum Snake River flows at the Murphy Gauge, further explained the effect of the minimum flows on spring water rights in the Thousand Springs region, which are utilized primarily for aquaculture purposes.

> "The minimum flows established for the Murphy Gauging Station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist.
>
> "Aquaculture can expand when and where water supplies are available and

where such uses do not conflict with other beneficial uses. It is recognized, however, that future management and development of the Snake River Plain Aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities. (Emphasis added)

"No specific allocation of water is made for aquaculture uses. Water necessary to process aquaculture products is included as a component of the municipal and industrial water allocation. Aquaculture is encouraged to continue to expand when and where water supplies are available and where such uses do not conflict with other public benefits. Future management and development of the Snake Plain Aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, aquaculture interests may need to construct different water diversion facilities than presently exist." Exhibit 440.

F78. The 1986 State Water Plan as amended was adopted by the Idaho Water Resource Board on December 12, 1986, by the Idaho Senate on March 3, 1987, and by the Idaho House of Representatives on March 12, 1987.

F79. The amendments to the 1986 State Water Plan were made as part of a settlement agreement commonly known as the "Swan Falls Settlement" which resolved litigation between Idaho Power Company, the State of Idaho, and thousands of individual water users across the Eastern Snake River Plain.

F80. The Spring Users or their predecessors in interest were named defendants in that action. Thousands of ground water users were also named defendants to that action. The individual water users were all dismissed from the action in response to the settlement executed by the State on their behalf.

F81. Idaho Power Company brought the lawsuit in an effort to increase the flow of water in the Snake River at Idaho Power Company's hydropower facility located at Swan Falls Dam. The lawsuit threatened to curtail thousands of existing water rights and to effectively block all future development of water rights in the upper Snake River Basin. The State of Idaho entered into the settlement to protect existing water rights and to facilitate future development of water rights in the upper Snake River Basin. *Dunn Direct* at 4-6.

F82. The settlement required action by the State of Idaho, Idaho Power Company, the Idaho Water Resource Board, the Idaho Department of Water Resources, and the Idaho Legislature. The settlement constitutes an integration of multiple documents, including an "Agreement" dated October 25, 1984 (Exhibit 437), a "Contract to Implement" dated October 25, 1984 (Exhibit 444), implementing legislation (particularly I.C. § 42-203B through I.C. § 42-1736), and the 1986 State Water Plan (Exhibit 440). The various enabling documents and actions are referred to collectively herein as the "Swan Falls Settlement."

F83. The efficacy of the Swan Falls Settlement is conditioned upon certain amendments made to the State Water Plan, including increased minimum Snake River flows at the Murphy Gauge. Paragraph 13 of the Agreement dated October 25, 1984, is entitled "Conditions on Effectiveness," and includes "Amendment of the State Water Plan to implement the provisions of Exhibit 6." Exhibit 6 provides that the "minimum flow at the Murphy gauging station should be increased to 3,900 cfs from April 1 through October 31 and to 5,600 cfs from November 1 through March 31." Exhibit 6 also provides that the "minimum daily flow at the Milner gauging station shall remain at zero cfs."

F84. A further amendment was made to the State Water Plan to reflect the effect of the minimum stream flows on aquaculture: "The minimum flows established for the Murphy Gauging Station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist." 1986 State Water Plan Policy 5G. The Water Resource Board affirmed that aquaculture facilities were only protected to the extent minimum flows are maintained at each of a series of public hearings throughout the state to explain the effect of the Swan Falls Settlement.

F85. In addition, the Swan Falls Settlement protected all water rights from curtailment that "beneficially used water prior to October 1, 1984, and who have filed an Application or Claim for said use by June 30, 1985." Thus, the settlement protected nearly all of the ground water rights which the Spring Users seek to curtail.

F86. Revisions to the State Water Plan reflect the deliberate decision by the State Water Board and the Idaho Legislature to manage the upper Snake River Basin based on minimum Snake River flows at Milner Dam and at the Murphy Gauge. Paragraph 11 of the "Agreement" (Exhibit 437) expressly defines "Status of the State Water Plan":

> "State and Company recognize that the resolution of the company's water rights and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed. Thus, the parties acknowledge that this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest. Upon implementation of this agreement, State and Company will present the Idaho State Water Plan and this document to FERC as a comprehensive plan for the management of the Snake River watershed."

F87. The Idaho Water Resource Board held a series of public hearings to explain the Swan Falls . At those hearings the State represented that spring flows in the Thousand Springs region are not protected against subsequent ground water development of the ESPA except to the extent that spring flows will be secured as necessary to maintain minimum Snake River flows at the Murphy Gauge. The State further represented that aquaculture water rights were not entitled to absolute spring discharges, but were required to change their diversion facilities or implement other changes to compensate for diminished spring flows. The State's

representations reflected a generalized understanding that spring flows constituted the same water that supplied Idaho Power's non-consumptive hydropower rights, and that the holders of water rights supplied by such spring flows had no right to curtail junior-priority ground water diversions so long as the minimum Snake River flows were maintained.

F88. IDWR understood that Blue Lakes' and Clear Springs' water rights in this case were subject to availability based on the amount of water discharged from the ESPA. (*Dunn Direct* at 6, *Carlson Direct* at 16-17 Exhibits 438, 439 and 440).

F89. The State Water Plan provides for a zero minimum flow below Milner Dam. Spring flow primarily in the Thousand Springs Area below Milner Dam is the primary source of the river flows which must meet the Murphy Gauge minimum summer flow of 3900 cfs and winter flow of 5600 cfs under the terms of the Swan Falls Settlement. (Dreher, 12/6/07, 2:48 p.m, Carlson, Dunn, Brockway) If the Murphy Gauge minimums are not met, the model can be utilized to reflect river gains to each of the spring reaches that would result from the curtailment of ground water pumping. (Wylie, 12/3/07, 2:16 pm)

F90. Aquaculture rights are non-consumptive in nature and therefore would not be subject to a call if the minimum flow requirements under the Swan Falls Settlement were not met. Rather, junior-priority ground water rights would be subject to curtailment to meet the Swan Falls minimum flows. Consequently, the minimum flows established by the Swan Falls Settlement effectively protect spring flows to Blue Lakes, Clear Springs, and other spring users. (Wylie, 12/3/07).

F91. If the river goes below the minimum stream flow at Swan Falls Dam, then IDWR will initiate curtailment. The continuation of drought could result in a delivery call from Idaho Power Company, yet the State would not wait for a call to initiate curtailment. (Dreher, 12/6/07, 2:58 p.m.) Because the ESPA is the main source of water for the minimum flows in the Swan Falls Settlement, the aquaculture rights diverting water from the Thousand Springs area are protected by the Swan Falls Settlement.

F92. The Curtailment Orders do not mention or otherwise account for the minimum stream flows established in the Swan Falls Settlement and incorporated into the 1986 State Water Plan.

Conclusions of Law

C25. The minimum stream flows defined in the 1976, 1982, and 1986 State Water Plans were lawfully established by the Idaho Water Resource Board pursuant to its authority in Article 15, Section 7 of the Idaho Constitution.

C26. The Legislature's adoption of the 1976, 1982, and 1986 State Water Plans effects the lawful implementation of reasonable limitations on water use pursuant to the Legislature's authority in Article 15, Section 5 of the Idaho Constitution.

C27. The decision by the State of Idaho, the Idaho Water Resource Board, and the Idaho

Legislature to globally manage the Snake River Basin based upon minimum Snake River flows established by the Swan Falls Settlement as incorporated into the 1986 State Water Plan and I.C. §§ 42-203B, and 42-1736B effects a deliberate conclusion that such management achieves optimum economic development of the State's water resources, including maximum economic development of the State's underground water resources.

C28. The Swan Falls Settlement is a valid exercise of the Legislature's constitutional authority to place reasonable limitations on priority of appropriation. Idaho Const., Art. 15, § 5. Further, the Legislature's agreement to manage the upper Snake River Basin based on the minimum stream flows equates to a declaration that such management achieves optimum and full economic development of the State's water resources. I.C. § 42-226 et seq.

C29. IDWR has a legal duty to manage and administer the Snake River Basin based upon the minimum Snake River flows established in the Swan Falls Settlement as incorporated into the 1986 State Water Plan. I.C. § 42-1734B(4). "To the extent these concepts are integrated into a comprehensive plan for administering ground and surface water and result in water being administered in a manner differing from strict priority, the prior appropriation doctrine is not necessarily violated." In Re SRBA, Subcase 91-00005 (Basin-Wide Issue 5) *Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits* at 31 (July 2, 2001).

C30. The 0 cfs flow at Milner Dam divides the Snake River into two reaches. (Dreher, 12/6/07, 2:47 p.m., Carlson.) Water rights above Milner are not administered to fill water rights below Milner. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered. Idaho Code § 42-203B.

C31. Idaho Power Company and holder of water rights supplied by springs in the Thousand Springs region are ensured a water supply sufficient to maintain minimum Snake River flows established by the Swan Falls Settlement and incorporated into the 1986 State Water Plan. Idaho Power Company has no right to make a delivery call to increase Snake River flows above the minimum flows established. Holders of water rights supplied by springs in the Thousand Springs region likewise have no right make a delivery call to increase Snake River flows above the minimum flows.

C32. The Swan Falls Settlement also protected ground water rights with priority dates prior to October 1, 1984, against delivery calls by Idaho Power.

C33. No water supply was guaranteed to the Spring Users for aquaculture purposes and the State determined that the minimum flows at Murphy Gauge were adequate for aquaculture uses. It was further contemplated that aquaculture users may be required to change their diversion facilities, including the construction of wells. (Exhibit 441, Partial Transcript of July 28, 1985 hearings before Idaho Water Resource Board, at 4-5, 10, 12, 13, 14, 16, 17, 27, 28, 29, 32,

52, 60, 64; *Carlson Direct*, at 18-20, Exhibits 438, 439, 440, 441, Ken Dunn).

C34. The spring users are estopped from making a delivery call against the ground water diversions from the ESPA so long as the minimum flows at Murphy Gauge are met. The spring users may pursue alternate points of diversion to try and improve their water supply pursuant to state law, but they were not guaranteed a certain amount of water for aquaculture uses and cannot demand water from the ESPA.

VII. THE CURTAILMENT ORDERS VIOLATE THE STATUTORY REQUIREMENT OF A LOCAL GROUND WATER BOARD.

Findings of Fact

F93. By letter dated March 22, 2005, Blue Lakes Trout Farm, Inc. ("Blue Lakes"), demanded that the Director of IDWR curtail junior-priority ground water diversions in an attempt to increase the supply of surface water available at points of diversion of senior-priority water rights held by Blue Lakes. (The "Blue Lakes delivery call")

F94. By letter dated May 2, 2005, Clear Springs Foods, Inc. ("Clear Springs"), demanded that the Director of IDWR curtail junior-priority ground water diversions in an attempt to increase the supply of surface water available at points of diversion of senior-priority water rights held by Clear Springs and Snake River Farm. (The "Clear Springs delivery call")

F95. Idaho Code § 42-607, entitled "Distribution of Water," states:

> It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply....

F96. Idaho Code § 42-237A, entitled "Powers of the Director of the Department of Water Resources," states:

> 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.

F97. Idaho Code § 42-237B, entitled "Administrative Determination of Adverse Claims," states:

> 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[s] of ground water rights of later priority ... such person ... may make a written statement under oath of such claim to the Director of the Department of Water Resources.
>
> ...Upon receipt of such statement, if the Director of the Department deems the statement sufficient and meets the above requirements, the Director of the Department of Resources shall issue a notice setting the matter for hearing before a local ground water board ...

F98. Idaho Code § 42-237C, entitled "Hearing and Order," states:

> 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.

F99. Idaho Code § 42-237D, entitled "Local Ground Water Boards," states,

> Whenever a written statement of claim as provided in Section 42-237 is filed with the Director then said Director of the Department of Water Resources '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 director of the department of water resources, 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 be more than one, is located.

F10. The Director of the Idaho Department of Water Resources (IDWR) responded to the Blue Lakes and Clear Springs delivery calls by ordering the curtailment of junior-priority ground water rights via orders dated May 19, 2005, and July 8, 2005 (the "Curtailment Orders").

F101. IDWR did not convene a local ground water board prior or subsequent to issuing the Curtailment Orders.

Conclusions of Law

C35. Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D are unambiguous on their face and must be applied "as written." *Lopez v. Idaho*, 136 Idaho 174, 178, 30 P.3d 952, 956 (2001).

C36. Idaho Code §§ 42-237A through D can be read harmoniously with Idaho Code § 42-607. Idaho Code § 42-226 et seq., commonly referred to as the "Ground Water Act," is the more specific statute and governs the process in this case.

C37. Idaho Code §§ 42-237A through D mandate that a local ground water board determine whether the use of a junior-priority ground water right adversely affects a senior-priority water right such that the junior right must be curtailed in order to increase the supply of water available to the senior right.

C38. Local ground water boards shall adhere to the Rules for the Conjunctive Management of Surface and Ground Water Sources (the "Conjunctive Management Rules") where applicable in determining whether junior-priority ground water rights must be curtailed.

C39. The determination and order issued by the local ground water board functions as the determination "that there is not sufficient water in a well to fill a particular ground water right therein by order," as required by 42-237A.

C40. The director is responsible to limit or prohibit ground water withdrawals as ordered by the local ground water board, and to post a copy of said order at the place where such water is withdrawn. I.C. § 42-237A. The director may fulfill this responsibility individually or through the appointed watermaster in the water district. I.C. §§ 42-237A, 42-607.

C41. The initial determination of whether a junior-priority ground water user is adversely affecting a senior-priority water right in violation of the Ground Water Act must be made by a local ground water board. When that hearing is completed, the Director of the Department of Water Resources shall administer the water rights according to the order of the local ground water board pursuant to Title 42 Chapter 6. Until the local ground water board makes a determination of adverse impact, neither the Director nor this hearing officer has the authority to issue a curtailment order in this case.

VIII. THE SPRING USERS' DELIVERY CALLS ARE FUTILE.

F102. Clear Springs' CEO Cope testified a reasonable time for the benefits of ground water curtailment to accrue would be within 30 years. He also testified that a reasonable quantity to arrive from a curtailed ground water pump would be two-thirds of the amount curtailed. (Cope, 11/28/07, 2:35 pm, 3:50 pm)

F103. The Blue Lakes Order commands the permanent curtailment of approximately 228,880 acre-feet of ground water irrigation in an attempt to supply 3.2% of that amount to Blue Lakes' prior rights. (See finding 47 above). The Clear Springs Order commands the permanent curtailment of 209,880 acre-feet of ground water irrigation in an attempt to supply 0.5-0.8% of that amount to Snake River Farm. Without a trim line the curtailment would be exponentially larger and the benefit to the Spring Users significantly smaller (see finding 51 above.) In either case the projected benefit of curtailment to the Spring Users will take decades to accrue, with the full effect not expected to accrue for more than 100 years.

Conclusions of Law

C42. Related to the police of optimum beneficial use of Idaho's water resources is the doctrine of "futile call." A "futile call" is:

> "A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource." IDAPA 37.03.011.010.08 (CM Rule 10.08).

The doctrine of "futile call" prevents the curtailment of a junior right on the same source if curtailment would not provide water to the senior in sufficient quantity to apply to beneficial use. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P2d 1220, 1223 (1976); citing *Albion - Idaho Land Co v. NAF Irrigation Co.*, 97 F. 2d 439, 444 (10th cir. 1938); Neil v. Hyde, 32 Idaho 576, 586, 186 P. 710 (1920); *Jackson v. Cowan*, 33 Idaho 525, 528, 196 P. 216 (1921). To justify curtailment there must be a relationship between the use by the junior water right holder of water and a shortage by the senior water right holder of water that could be put to a beneficial use. (November 14, 2007 Order at 13).

C43. Curtailment of ground water pumping will not provide a reasonable quantity to the Blue Lakes or Snake River Farm fish propagation facilities in response to the broad curtailment of junior-priority ground water rights would not provide a material quantity of water within a reasonable time. (Exhibit 110, Brendecke Direct at 42-43; Exhibit 430.) In this case, the ground water model is not sufficiently accurate to show that the curtailment of junior priority ground water users will result in any usable quantity of water to the senior spring owners. Given the small fraction of the quantity curtailed that is expected to benefit Blue Lakes and Clear Springs, and the substantial delay before the majority of such benefits accrue, the Blue Lakes and Clear Springs delivery calls are deemed futile.

IX. BLUE LAKES AND CLEAR SPRINGS ARE PRECLUDED FROM CURTAILING JUNIOR-PRIORITY GROUND WATER DIVERSIONS UNTIL A REASONABLE PUMPING LEVEL IS REACHED.

Findings of Fact

F104. Ground water in the ESPA is hydraulically connected to the Snake River and tributary spring sources in the Thousand Springs area. The spring sources for Blue Lakes' and Clear Springs' water rights derive exclusively from outflow from the ESPA. (*Brendecke Direct* at 21, *Brockway* direct at 14, *Luke* depo at 137, line 17-24; Exhibit 401, *Brockway Direct* Figure 1, *Harmon Direct* Figures 1 and 6.) From a hydrological standpoint, the springs that supply Blue Lakes' and Clear Springs' water rights are ground water. (Brendecke 3:45 p.m., 12/11/07)

F105. The water rights upon which the Spring Users' delivery calls are based were appropriated at a time when the ESPA was artificially inflated due to incidental recharge from surface water irrigation practices. But for such incidental recharge, spring discharges would not have been adequate to support the appropriation of the subject water rights. (Brendecke 2:33 p.m., 12/11/07).

F106. Though incidental recharge has decreased since 1960, the amount of water stored in the ESPA remains well above historic baseline levels. It is practically impossible to restore peak spring discharges from the ESPA as that would require a reversion to more inefficient irrigation practices and termination of the winter water savings program. The proposed curtailment will not restore discharges from the springs that supply the Spring Users' water rights to the historic highs that existed when the rights were appropriated.

F107. No reasonable pumping level has been established for the Eastern Snake Plain Aquifer.

Conclusions of Law

C44. The Ground Water Act § 42-226, *et seq.* applies to any delivery call or request for administration against ground water users. Section 42-226 states: "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.**" I.C. § 42-226 (emphasis added.) Thus, under Idaho law prior appropriators of underground water are only protected to the extent they maintain a reasonable pumping level as established by the Director of the Department of Water Resources.

C45. The Conjunctive Management Rules ("CM Rules") authorize curtailment of ground water diversions "from any well during any period it is determined that water to fill any water right

is not there available **without causing ground water levels to be drawn below the reasonable ground water pumping level** ...." IDAPA 37.03.011.07.g. Thus, the CM rules do not allow for curtailment of ground water diversions until the senior-water right holder has reached reasonable pumping levels. The Conjunctive Management Rules "apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply." IDAPA 37.03.1 1.020.01. (*Clear Springs Order* at ¶33).

C46. Regardless of the licensed or decreed source of a water right, administration of hydrologically-connected water rights must be based upon hydrogeologic fact. (Dreher, 12/7/07, 10:05 a.m.) The Director of IDWR by statute must be a licensed professional engineer. I.C § 42- 1701(2). The Director has the necessary background to exercise professional judgment about the hydrogeologic facts underlying water administration decisions, and must be given the maximum amount of flexibility to administer interconnected ground water and surface water sources.

C47. In this case, there is no dispute that the springs that supply Blue Lakes' and Clear Springs' water rights are hydrologically connected to the ESPA and share that source with ground water rights that divert from the ESPA. (Brockway, Brendecke 3:45 p.m., 12/11/07, Dreher, Land, Harmon). To the extent the Spring Users demand that the ESPA levels be increased to maintain or increase their spring diversion, they must comply with the CM Rules.

C48. A reasonable pumping level should not be based on an artificially inflated aquifer level. That portion of the water in the aquifer that is enhanced cannot be determined to be depleted until such time as historic levels have been reached. To curtail ground water users in an effort to maintain an artificially enhanced aquifer level in response to the Spring Users' delivery calls would thwart the requirement of a reasonable pumping level contained in the Ground Water Act and would not allow for the full economic development of the ESPA.

C49. Where underground water is supplied from waste water rather than a natural subterranean stream, there is "no right to insist the water table be kept at the existing level in order to permit [an appropriator] to use the underground waters." *Nampa & Meridian Irrigation District v. Petrie*, 37 Idaho 45, 51, 223 P. 531, 532 (1923).

C50. CM Rule 42.01.a requires consideration of the amount of water available in the source; the source of supply establishes the extent to which the water rights are interconnected. Conjunctive Management Rule 42.01.h requires the consideration of alternate means of diversion and can compel the construction of wells.

C51. The partial decrees issued by the SRBA District Court define the source element in general terms but do not define alternate reasonable means of diversion and do not excuse the Spring Users from using reasonable method of appropriation.

X. THE RECORD DOES NOT SUBSTANTIALLY SUPPORT A FINDING THAT THE SPRING USERS ARE SUFFERING MATERIAL INJURY DUE TO GROUND WATER DIVERSIONS.

Findings of Fact

F108. Testimony was presented that Blue Lakes and Clear Springs are capable of diverting additional through their fish propagation facilities. However, no evidence was presented that additional water would result in more, larger, or healthier fish.

F109. Given seasonal fluctuations in water supply, both Blue Lakes and Clear Springs are accustomed to operating their fish propagation facilities with varying water supplies. There is no evidence in the record that the apparent shortage impaired the facilities ability to operate with varying water supplies.

F110. Cindy Yenter, the Water Master responsible for administering water rights in Water Districts 120 and 130, which includes the curtailment are, and also in Water District 37A, which includes Blue Lakes and Snake River Farm. Based on her review of the aquaculture water rights in the Thousand Springs Area shown in Exhibit 337, Yenter indicates that their water rights are being substantially met by current flows. (C. Yenter, 11/30/07, 2:10-2:20 p.m.)

F111. Conflicting evidence was presented at the hearing regarding the drying up of raceways. R. MacMillan testified that Clear Springs dried up five of their 78 raceways at the Snake River Farm facility in 2004, 2005, and 2007. Mr. Kaslo testified that nine of Blue Lakes' 105 were dried up for several months during 2005 and 2006. However, Water Master Cindy Yenter testified that she drove by the facility monthly and never observed any raceways dried up. Water Master Yenter has never seen dry raceways at Blue Lakes or the Clear Lakes Snake River Farms facilities since she began work in the area in 2001. (C. Yenter, 11/30/07, 4:15-4:17 pm)

F112. Evidence was presented that market conditions have caused the Spring Users to reduce fish production at times. Both Greg Kaslo, president of Blue Lakes, and Larry Cope, CEO of Clear Springs, testified that despite competitive fish markets, Blue Lakes and Clear Springs have operated profitably despite the apparent shortage.

F113. Water Master Yenter has never observed a reduction in spring flows when the ground water pumpers turn on, nor is she able to observe any reduction based on a review of flow data. (C. Yenter, 11/30/07, 3:59 p.m.) This indicates there are many factors affecting spring discharges, such as drought and changes irrigation practices. (C. Yenter, 11/30/07, 3:45 pm)

Conclusions of Law

C52. Mere reduction in flow does not automatically constitute material injury to a water user. Under Idaho law, a water right is a usufructuary right and is valid only to the extent of beneficial use. A capability to divert water does not authorize diversion without a

corresponding application to beneficial use. If the beneficial use for which the water right was appropriated is unaffected by reduced flows, the reduction does not constitute material injury.

C53. CM Rule 42.01 identifies multiple factors relevant to determining material injury, including the following:

01.a considers the amount of water available "in the source from which the water is diverted." It is relevant to consider the historic water supply available at the time of appropriation, inter- and intra-year fluctuations in supply, and alternate causes of shortage in supply such as drought or increased efficiencies by other users. (Dreher, 12/7/07, 11:34 a.m., 10:17 a.m.; Brockway, 12/10/07, 2:45 p.m.).

01.b considers the "effort" or "expense" of the water right holder to divert water from the source. In this case, neither Blue Lakes nor Clear Springs have installed wells or put forth other effort to divert from the ESPA; rather, they receive water from the ESPA by way of natural overflow and insist that the ESPA be maintained at artificially inflated levels in order to provide maximum overflow.

01.g considers the extent to which the senior water right could be met by using a reasonable means of diversion, conveyance efficiency, and conservation practices. The 2005 Curtailment Orders find that the collection facilities themselves are a "reasonable means of diversion," but make no thorough determination of the feasibility of recirculation which appears feasible based on the evidence presented at trial.

01.h considers whether the senior water right can be satisfied "using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells." In this case, evidence indicates that the Spring Users could drill wells to supplement spring flows. Requiring the drilling of wells is supported by I.C. 42-226.

C54. There is not substantial evidence in the record to support a finding that the Spring Users have suffered material injury due to junior-priority ground water diversions. While spring flows appear to have diminished from historic highs, evidence indicates that the Spring Users remain fully capable of maintaining the beneficial use of their appropriation at present flow levels. Variations in water availability are an inherent part of aquaculture production, and there is no indication that ground water diversions materially affect the Spring Users' ability to achieve their beneficial use. Further, evidence in the record indicates that the Spring Users can utilize re-circulation to increase use of their water supply. The drilling of wells on- or off-site is also a reasonable alternative to the curtailment ground water pumping. For the foregoing reasons, the Hearing Officer finds that the diminution of spring flows that are above historic levels does not constitute material injury to Blue Lakes' or Clear Springs' water rights.

XI. ESPA GROUND WATER MODEL AND 10% TRIM LINE.

Findings of Fact

F114. The 2005 Curtailment Orders are based upon curtailment simulations generated by the Eastern Snake Plain Ground Water Model (the "Model") Version 1.0. An error was subsequently discovered and the model was corrected to the current Version 1.1. (Wylie, 12/3/07, 10:27 am)

F115. The Model was developed by the Idaho Water Resource Research Institute ("IWRRI") through an incremental collaborative process. Development of the model was described by Wylie. Application of the Model was testified to by Wylie, Dreher, Land, Harmon, Brockway, and Brendecke. There was no dispute from any of these witnesses regarding the assumptions and uncertainties associated the Model simulations described in the following findings of fact.

F116. The Model has primarily been utilized in an attempt to simulate the effects of drought, recharge, and curtailment of ground water pumping from the ESPA. (Wylie, 12/3/07, 9:11 am). Exhibit 461, commonly referred to as the "Curtailment Scenario," was developed to simulate the affects of ground water pumping on the ESPA.

F117. Model uncertainty must be factored into Model simulations when the Model is used as a basis for administration of water rights. Although the model is well-calibrated, its uncertainty has not been rigorously tested or defined. (Dreher, 12/6/07, Brockway 2:23 p.m, 12/10/07, Wylie and Brendecke 12/12/07 10:25 a.m.) The actual uncertainty of the model is unknown but be can be no less than 10%. (Wylie, 12/3/07, 11:38 am) (Dreher, 12/6/07, 11:25 a.m., Dreher, 12/6/07, 2:31 p.m.)

F118. The 2005 Curtailment Orders assume Model uncertainty of 10% and incorporate a 10% "trim line" based upon Model uncertainty of 10%. The trim line subjects ground water rights to curtailment if the Model simulation predicts that at least 10% of the quantity curtailed will arise in the Thousand Springs reach of the Snake River.

F119. Based on the 10% trim line, the Blue Lakes Order commands the curtailment of 57,220 acres irrigated from ground water, and the Clear Springs Order commands the curtailment of 52,470 acres. Were there no trim line, the pool of curtailed junior-priority ground water rights would increase exponentially.

F120. The 10% trim line in the 2005 Curtailment Orders accounted for Model uncertainty attributable only to USGS stream gauge calibration, which is accurate to within 10%. The 2005 Curtailment Orders did not factor uncertainty in the Model simulations resulting from multiple other layers of uncertainty. All witnesses agreed that additional uncertainties should be factored into Model simulations.

F121. Uncertainty related to the physical characteristics of the ESPA should be factored into Model

simulations. The Model relies on a porous media paradigm that does not accurately reflect the geological characteristics of the ESPA. The Model assumes that the impact from each well is isotropic, meaning the same in every direction, when in fact it is anisotropic. (Wylie, 12/3/07, 11:22-11:25) In other words, the Model assumes an idealized, homogenous description of the physical characteristics of the ESPA. However, the ESPA is non-homogenous and the details of the water conducting characteristics of the ESPA are poorly understood. There are also structural uncertainties pertaining to the actual geometry and flow barriers simulated by the Model.

F122. Uncertainty related to measurement error in the gauges used to calibrate the Model should be factored into Model simulations.

F123. Uncertainty related to recharge gains and losses should be factored into Model simulations. There are uncertainties in the data that populates the Model including tributary underflow and precipitation which are not measured. (Brockway 2:20 p.m., 12/10/07)

F124. Uncertainty related to the Model's inability to predict discreet spring discharges should be factored into Model simulations. The Model predicts reach gains to the Snake River resulting from ground water curtailment. The Model is not capable of predicting the effect curtailment of ground water pumping will have upon discharges from a particular spring. (Brockway 2:15 p.m., 12/10/07)

F125. No witness rendered an opinion regarding an appropriate level of uncertainty that should be factored into Model simulations except for Dr. Brendecke. Dr. Brendecke testified that a reasonable level of uncertainty would be 20-30% but not as high as 50%. (Brendecke 10:25 a.m., 12/12/07). He further testified that the level of predictive uncertainty would generally be higher the more localized and specific a prediction is attempted (Brendecke 10:25 a.m., 12/12/07).

F126. The elevation contour map developed and presented by Clear Springs witness Eric Harmon identifies in Figure 1 geographic areas which generally contribute to spring reaches. The geographic area which is the primary contributor to Snake River Farms is approximately two to three miles wide and 20 miles long, located generally north and east of the Snake River Farms facility. The elevation analysis could be used independent of the model to attempt to identify geographic areas that are the primary contributors to certain reaches of the river which include Snake River Farms and Blue Lakes. The geographic areas identified in Figure 1 are considerably smaller than the 10 % trim line utilized in the 2005 Curtailment Orders. (Harmon, 12/4/07, 3:34 pm)

F127. Clear Springs' experts Dr. Harmon and Dr. Brockway present conflicting testimony regarding the use of geographic boundaries to identify the areas that are the primary contributors to spring discharge reaches. Dr. Harmon's Figure 1 advocates the use of geographic boundaries to identify the primary contributing areas to the springs. Dr. Harmon's geographic boundaries are considerably smaller than the 10 percent trim line established by the Director. On the

other hand, Dr. Brockway argues that the Director's 10 percent trim line is arbitrary and capricious, by reason of which he contends no boundary should exist.

F128. Incidental recharge has a larger impact on river reaches below Milner than does the pumping of ground water. The IWRRI "No Changes in Surface Water Practices Scenario" replicated the surface water practices in the 1950s and concluded that the amount of ground water pumping on aquifer levels has less impact on spring discharges than changes in surface water irrigation practices. (Brendecke 10:06 a.m., 12/12/07)

F129. The ESPA is very responsive to drought and this is illustrated in the mass measurement as part of the model development taken by the USGS in 1980 and again in 2001 and 2002. (Brendecke 10:08 a.m., 12/12/07) This finding is further supported by Exhibits 154, 155, and 156 which show that after one wet year in 2006, the amount of water available to spring users rebounded.

Conclusions of Law

C55. Idaho Code § 42-607 authorizes curtailment only where "it is necessary to do so in order to supply the prior of others...." The Model must not be utilized in a manner that does not curtail ground water diversions which have no effect on spring discharges from the springs that supply the Spring Users' water rights. (Dreher, 12/6/07, 2:36 p.m.) Therefore, any curtailment based upon Model simulations must account for uncertainty in the simulation.

C56. The Director's 10% trim line is proper consideration to gauge uncertainties existing in the model calibration process. However, the 10% trim line fails to account for a multitude of other model uncertainties. Accounting for additional Model uncertainties described by Wylie, Brendecke, and Brockway, and upon consideration of the contributing areas identified in Figure 1 to Harmon's testimony, the Hearing Officer finds that an uncertainty level of 30% is a reasonable level of uncertainty to attribute to the results of the Curtailment Scenario. Accordingly, ground water diversions for which the Model predicts a return of 29% or less to the Devil's Washbowl to Buhl or Buhl to Thousand Springs reach are excluded from curtailment in response to delivery calls by Blue Lakes and Clear Springs. A 30% trim line is still less than ½ of the rate of return deemed reasonable by Mr. Cope.

C57. Because the Model is incapable of predicting increased spring discharges at discrete outlets, the Model alone should not define the curtailment to supply the Spring Users' prior rights in this case. (Brendecke 4:37 p.m., 12/11/07; Brockway; Wylie Depo at 165-166; Harmon; Land). Although the model may be the best tool available to determine the impact of curtailment on a regional scale, it doesn't give the correct answer when applied to a specific spring source as required in this case. (Brendecke 4:38 p.m., 12/11/07). Use of the Model to identify those areas that may have an effect on spring reaches in addition to other analytical tools is a more reasonable basis to go forward with than the curtailment of ground water users. Pump tests and monitoring results on the springs including tracer studies and targeted recharge experiments are additional ways to determine the contributing areas to a particular springs. (Brendecke 9:23 a.m., 12/12/07). Targeted recharge is a more effective means of

increasing discharges to a specific spring. (Brockway 2:32 p.m., 12/10/07).

C58. Ground water users cannot be held responsible for the effects of changes in surface water irrigation practices that have a more immediate and direct effect on spring discharges than does ground water pumping. The artificially enhanced levels of the aquifer created by historical incidental recharge cannot be restored. Therefore, calling for water that exists only because of those artificially inflated conditions is impermissible.

XII. THE CURTAILMENT OF GROUND WATER RIGHTS FOR MORE THAN TWO YEARS WITHOUT A HEARING IS A VIOLATION OF DUE PROCESS AND CONSTITUTES A COMPENSABLE TAKING.

Findings of Fact:

F130. The Director issued the 2005 Curtailment Orders without a hearing as an emergency order pursuant to I.C. § 67-5247. (July 8, 2005 Order at 39; May 19, 2005 Order at 31). The Director issued the emergency order in contemplation of the welfare of both the junior and senior water rights, but especially the junior water rights who were subject to curtailment. (Dreher, 12/6/07, 3:52 p.m.)

F131. The 2005 Curtailment Orders require permanent curtailment of ground water pumping unless an adequate mitigation plan is approved by IDWR. (May 19, 2005 Order at 28.) Thus, the Orders effectuated a permanent deprivation of the curtailed ground water rights.

F132. IGWA objected to the 2005 Curtailment Orders and filed petitions for reconsideration on June 2, 2005, July 19, 2005, and June 18, 2007. IGWA raised multiple legitimate affirmative defenses to curtailment which bear on the legality of the Curtailment Order. There was a reasonable likelihood that IGWA would succeed on the merits of one or more of its affirmative defenses.

F133. The 2005 Curtailment Orders remained in force since their issuance in 2005 despite the lack of a hearing on the legal and factual issues raised in the petitions for reconsideration.

F134. IGWA funded mitigation plans in 2005, 2006, and 2007 at great expense to avoid the curtailment and loss of their water rights. (Carlquist, Stevenson Pre-filed Lay Testimony.) Water Master Yenter verified that IGWA's mitigation plans for 2005, 2006, and 2007 were implemented. IGWA purchased and delivered replacement water through the North Side Canal system and dried up acres to meet the mitigation requirements. (C. Yenter, 11/30/07, 4:10-4:13 pm)

Conclusion of Law:

C59. It is well established in Idaho that "individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state."

Nettleton v. Kigginson, 98 Idaho 87, 90 (1977) (citing Idaho Const. Art. 15, § 4; *Anderson v. Cummings*, 81 Idaho 327 (1959); *Follett v. Taylor Brothers*, 77 Idaho 416(1956)). The constitutional guarantee of procedural due process requires a pre-deprivation notice and hearing except in "extraordinary circumstances" where some valid governmental interest justifies the postponement of the notice and hearing. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Nettleton*, 98 Idaho 90. A person must receive notice and "an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations." *Lowder v. Minidoka County Joint Sch. Dist. No. 331*, 132 Idaho 834, 840 (1999) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

C60. In all procedural due process cases, the interest of the individual, the risk of an erroneous deprivation of the individual's interest, and the interest of the government must be balanced. *Lowder*, 132 Idaho 840 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Factors to be considered in determining the adequacy of process are "the importance of the private interest at stake, the risk of an erroneous deprivation of rights given the processes at hand, the probable value, if any, of additional or substitute procedural safeguards and the government's interest and 'including the function involved and the fiscal and administrative burdens that the additional and substitute procedural requirements would entail.'" *In re Snake River Basin Adjudication Case No. 6 LU Ranching Co, v. United States*, 138 Idaho 606, 608 (2003) (citing *Mathew v. Eldridge*, 424 U.S. 3 19,335 (1976)).

C61. Water rights are real property rights, regardless of priority date, and cannot be deprived without due process of law. Due process authorizes pre-hearing deprivation of property in only the most exceptional circumstances.

C62. The Director is authorized to issue emergency orders "in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action." I.C. § 67-5247 (emphasis added).

C63. The shortage of water for the Spring Users issued their delivery calls did not create an "immediate danger to the public health, safety, welfare requiring immediate agency action." The immediate and permanent curtailment of more than 60,000 acres of ground water irrigation was not "necessary to prevent or avoid the immediate danger." I.C. § 67-5247(1). Further, IDWR's enforcement of the 2005 Curtailment Orders for more than two years without a hearing despite multiple petitions for reconsideration violates the statutory requirement that the agency "proceed as quickly as feasible to complete any proceedings that could be required." I.C. § 67-5247(4). For these reasons, the 2005 Curtailment Orders exceeded the Director's authority to issue emergency orders under I.C. § 67-5274.

C64. The water rights subject to curtailment under the 2005 Curtailment Order are owned by the ground water users' and constitute private property rights that cannot be taken or impaired without due process of law. The Department's effective deprivation of water rights without a hearing for more than two years constitutes an unlawful taking of real property without due process of law. Implementation of the Orders constitutes a taking in violation of constitutions of the State of Idaho and of the United States. Curtailment of the ground water users' water

rights in violation of Idaho law constitutes a physical taking of the ground water users' water rights. In the alternative, curtailment of water rights without authority or in violation of Idaho law constitutes a regulatory taking of IGWA's members' water rights. Junior-priority ground water users are entitled to just compensation for their expenses incurred to mitigate for the unlawful deprivation of their water rights.

XIII. IDAHO LAW PERMITS JUNIOR-PRIORITY WATER USERS TO MITIGATE MATERIAL INJURY TO SENIOR-PRIORITY WATER USERS BY PROVIDING REPLACEMENT WATER FROM ALTERNATE SOURCES.

Findings of Fact

F135. Curtailment Orders may place an obligation on IGWA's members to mitigate compensable shortages to spring water rights. Therefore, IGWA requested a declaratory ruling under Idaho Code § 67-5232 and IDAPA 37.01.01.400 that no Idaho law precludes them from utilizing replacement water from alternate sources to mitigate compensable shortages to the Spring Users' water rights.

F136. Water quality and temperature are not elements of a water right in Idaho. (I.C. §§ 42-1409 and 42-1411; Dreher Depo. at 14; Dreher, 12/6/07, 1:42 p.m.) The Department's role is to evaluate water quantity, not quality or temperature. (B. Patton, 11/30/07, 9:15 a.m.) In issuing a license for a water right the Department of Water Resources does not account for temperature and quality, and a water right license does not entitle a water right holder to a certain temperature and quality. (Dreher, 12/6/07, 1:46 p.m.) Likewise, water temperature and quality are not a consideration for water right administration purposes because they are not elements of a water right. (C. Yenter, 11/30/07, 3:56 pm)

F137. Blue Lakes' and Clear Springs' aquaculture facilities are not wholly dependent on the natural characteristics of the spring flows that supply their water rights. For example, in order to meet FDA water quality standards for food processing, Clear Springs was required to drill a well because the spring water did not meet water quality standards. (Brockway 2:07 p.m., 12/10/07) The Pristine Springs facility uses a geothermal or hot water well within their facility. (Brockway 11:47 a.m., 12/10/07) Thus, the aquaculture facilities cannot be wholly dependent on the quality of water coming from a spring or the temperature of water coming from a spring when hot water wells are used in a neighboring facility and the FDA requires a higher quality of water from springs.

Conclusions of Law:

C66. Idaho Code § 67-5232 and IDAPA 37.01.01.400 authorize the Department to make declaratory rulings.

C66. Idaho law authorizes junior-priority water users "to prevent or compensate for material injury to holders of senior water rights caused by the diversion and use of water by the holders of junior priority ground water rights." I.C. § 42-5201. This may be accomplished via a

"mitigation plan" pursuant to the CM Rules. CM Rule 43 permits junior-priority ground water users to mitigate material injury to senior users by providing "replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal ...." CM Rule 43.03.b.

C67. Overarching policies calling for maximum beneficial use and full economic development of Idaho's underground water resources demand that junior-priority ground water users be able to avoid curtailment via providing replacement water to senior users. Thus, Idaho courts have long-supported the authority of appropriator's to "substitute the waters of one stream for those of another .... It can make no difference to the appropriator of water, whether he gets his water from one stream or another . . . so long as it is delivered to him at his headgate at the times and under the priorities to which his location and appropriation entitle him. *In the Matter of the Petition of the Board of Directors of Wilder Irrigation District,* 64 Idaho 538, 551 (1943). The prior appropriation doctrine grants water users a right in the *quantity* and *timeliness* of their appropriation: "The source of the water supply is immaterial . . . so long as the landowners and waterusers receive the quantity of water as of the date of their priorities for beneficial use." *Id.* at 554.

C68. Idaho law is consistent with other western states which likewise permit the substitution of replacement of water from different source. Like Idaho, Colorado and Oregon have adopted statutory provisions authorizing an appropriator "to use stored, surface or ground water from another source in exchange for supplying replacement water in an equal amount to satisfy the prior appropriations from the other source ...." Or. Rev. Stat. 540.5333(1); see also, Colo. Rev. Stat. 37-83-101. The Colorado Supreme Court thoroughly considered a claim "that the delivery of clear water instead of silty water would result in substantial damage to the individual [appropriators]." *A-B Cattle Company v. United States*, 196 Colo. 539, 542, 589 P.2d 57, 59 (1978). In that case the senior appropriator claimed injury resulting from "substituting water of a quality which is not as useful to [the appropriator] as the natural stream water customarily diverted by [the appropriator]." *Id.* at 543, 59. The Court refused to recognize a compensable interest in the chemical make-up of the water source, stating "our constitution makes water-not silt and not silt and water-the property which is subject to appropriation." *Id.* (italics in original). The Court reasoned that to hold otherwise

> would seriously inhibit any subsequent upstream or downstream appropriation. ... Applied in its extreme, an appropriator located on lower reaches of a stream with a very early appropriation date could put a call on the river for the receipt of its natural silt concentration, which would have the practical effect of halting all upstream use and commanding substantially the entire stream flow to satisfy its appropriation.

Id. at 546. The New Mexico Supreme Court likewise held that an appropriator "does not have a right to receive a particular silt content that has existed historically." Similarly, the Utah Supreme Court refused to recognize a compensable interest in the particular salt content of an appropriation. *Deseret Livestock Co. v. State*, 110 Utah 239, 171 P.2d 401 (1946).

C69. An appropriator's right to take water from one source so long as it is replaced by other water from the same or another source is well established. I.C. § 42-105(1). Idaho policies favoring maximum beneficial use of its water resources militate against a constitutionally-protected property right in the precise mineral content that may be suspended or carried by Idaho's water resources. No Idaho law precludes junior priority water users from utilizing replacement water from alternative sources to mitigate compensable shortages to the senior Spring Users water rights.[2]

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By _____
THOMAS J. BUDGE

[2] This declaratory ruling does not address whether an appropriator is protected against the introduction of foreign pollutants into the water source. This ruling decides only that an appropriator is entitled to receive water from one waterway by compensating prior appropriators via a substitution of an equivalent amount of water from another waterway.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2007, the above and foregoing document was served in the following manner:

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