

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

IN THE MATTER OF DISTRIBUTION OF	)	
WATER TO WATER RIGHTS NOS. 36-	)	
0413A, 36-04013B, AND 36-07148.	)	CASE NO. CV-2008-444
	)	
(Clear Springs Delivery Call)	)	
	)	
IN THE MATTER OF DISTRIBUTION OF	)	
WATER TO WATER RIGHT NOS. 36-	)	
02356A, 36-07210, AND 36-07427.	)	
	)	
(Blue Lakes Delivery Call)	)	
	)	
_____	)	

**PETITIONER CLEAR SPRINGS FOODS, INC.'S OPENING BRIEF**

On Appeal from the Idaho Department of Water Resources

---

Honorable John M. Melanson, Presiding

---

John K. Simpson, ISB #4242  
Travis L. Thompson, ISB #6168  
Paul L. Arrington, ISB 7198  
**BARKER ROSHOLT & SIMPSON LLP**  
P.O. Box 485  
Twin Falls, Idaho 83303-485  
Telephone: (208) 733-0700  
Facsimile: (208) 735-2444

*Attorneys for Clear Springs Foods, Inc.*

Phillip J. Rassier  
Chris M. Bromley  
Idaho Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0098  
Telephone: (208) 287-4800  
Facsimile: (208) 287-6700

*Attorneys for Idaho Department of  
Water Resources & David R.  
Tuthill, in his capacity as  
Director of the Idaho  
Department of Water Resources*

(See Service Page for Remaining Counsel)

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE.....	1
ISSUES PRESENTED ON APPEAL.....	4
STATEMENT OF FACTS .....	6
I.    The Eastern Snake Plain Aquifer and Ground Water Depletions.....	6
A.    Water Quality .....	6
B.    Ground Water Depletions .....	8
C.    The Eastern Snake Plain Aquifer Model (ESPAM) .....	9
II.    Clear Springs Operations & the Snake River Farm Facility.....	10
III.    Clear Springs’ Water Rights, Shortages and 2005 Delivery Call.....	12
IV.    The Director’s Orders in Response to Clear Springs’ Request.....	13
A.    Use of Pre-Decree Information.....	14
B.    Model Simulations & the 10% “Trim Line” .....	16
C.    Phased-in Curtailment, the “Replacement Water Plan” Concept, and Failed Administration .....	18
V.    Administrative Hearing and the <i>Final Order</i> .....	22
STANDARD OF REVIEW .....	22
ARGUMENT .....	23
I.    The Director’s Use of Pre-Decree Information was “Arbitrary and Capricious” and Violated Long Standing Idaho Water Law. ....	23
A.    The Director’s “Seasonal Variation” Limitation is Not Supported by Substantial Evidence, Instead the Evidence Confirms that Clear Springs’ 1955 Water Right #36- 4013A Is Being Materially Injured. ....	24
B.    The Seasonal Variation Condition Violates Idaho Law. ....	27

II. The Director Erroneously Excluded Certain Hydraulically Connected Junior Priority Ground Water Rights From Administration Based Upon the “10% Trim Line”, or Claimed Model Uncertainty.....	29
A. The Use of a “10% Trim Line” was Arbitrary and Capricious.....	29
B. Assuming the “10%” Model Uncertainty Was Appropriate, the Director Should Not Have Applied it to the Benefit or Detriment of Any Water Right Holder – Senior or Junior.....	32
C. The 10% Trim Line Violates the SRBA Court’s “Connected Sources” General Provision. ....	33
D. The Director’s Use of a “10% Trim Line” Violates CMRs.....	33
III. The Director’s Use of a Percentage of Reach Gains to the Snake River to Reduce the Quantity of Water Required as Mitigation in Lieu of Curtailment Was Erroneous. ....	34
IV. The Director’s “Replacement Water Plan Scheme” is Not Authorized by the Law and The Director Failed to Properly Account for and Require Junior Ground Water Right Holders to Perform Outstanding Mitigation Obligations.....	37
A. No Regulations or Statutes Authorize a “Replacement Water Plan.” .....	37
B. The Failings of the Replacement Water Plans are Illustrated by the Director’s Failure to Properly Account for and Require Junior Ground Water Right Holders to Perform Their Mitigation Obligations. ....	39
(a) The Department Recognized that the 2005 and 2006 Plans Failed; yet, the Director still refused to curtail junior ground water rights. ....	40
(b) As in Prior Years, The 2007 “Replacement Water Plan” Was Inadequate. ....	41
V. Phased-in Curtailment is Contrary to the Prior Appropriation Doctrine. ....	42
VI. An Undefined “Public Interest” Criteria Does Not Limit or Preclude Administration of Water Rights Pursuant to the Prior Appropriation Doctrine.....	46
CONCLUSION.....	51
CERTIFICATE OF SERVICE .....	53

## TABLE OF AUTHORITIES

### CASES

<i>AFRD #2 v. IDWR</i> , 154 P.3d 443 (2007).....	23, 24, 44
<i>American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.</i> , 142 Idaho 544 (2006).....	23
<i>Bradbury v. Idaho Judicial Council</i> , 28 P.3d 1006 (Idaho 2001).....	38
<i>Bradshaw v. Milner Low Lift Irr. Dist.</i> , 85 Idaho 528 (1963) .....	49
<i>Chisolm v. IDWR</i> , 142 Idaho 159 (2005).....	22, 23
<i>Crow v. Carlson</i> , 107 Idaho 461 (1984) .....	23
<i>Hard v. Boise City Irrigation &amp; Land Co.</i> , 9 Idaho 589 (1904) .....	49
<i>Hayes v. Kingston</i> , 140 Idaho 551 (2004).....	50
<i>Jenkins v. State Dept. of Water Resources</i> , 103 Idaho 384 (1982).....	28, 32
<i>Kirk v. Bartholomew</i> , 3 Idaho 367 (1892) .....	45
<i>McClelland v. Andrus</i> , 606 F.2d 1278 (D.C. Cir. 1979).....	38
<i>Mellen v. Great Western Sugar Beet Co.</i> , 21 Idaho 353 (1912) .....	50
<i>Mercy Medical Center v. Ada Cty.</i> , 146 Idaho 226 (2008).....	23
<i>Musser v. Higginson</i> , 125 Idaho 392 (1994).....	42
<i>Nettleton v. Higginson</i> , 558 P.2d 1048 (Idaho 1977) .....	38, 45
<i>Sagewillow, Inc. v. IDWR</i> , 138 Idaho 831, 835 (2003) .....	22
<i>State v. Nelson</i> , 131 Idaho 12 (1997).....	28, 29
<i>Withrow v. Larkin</i> , 42 U.S. 35 (1975).....	38

### CONSTITUTIONAL & STATUTORY MATERIALS

Idaho Code 42-203A(5)(e).....	47
Idaho Code § 42-1420(1) .....	23
Idaho Code § 42-202B(3) .....	47
Idaho Code § 42-222(1) .....	47

Idaho Code § 42-607.....	28, 43
Idaho Code § 42-904.....	49
Idaho Code § 67-5279(3).....	23
IDAHO CONST., art XV, § 7 .....	51
IDAHO CONST., art. XV, § 5 .....	49

## **REGULATORY & ADMINISTRATIVE MATERIALS**

CM Rule 20.03.....	46, 48, 50
CM Rule 40.01 .....	18, 41, 43, 48
CM Rule 40.01.a .....	18, 37, 43
CM Rule 40.01.b.....	37
CM Rule 43.....	19, 37, 39
CM Rule 43.02.....	47
CM Rule 43.03.j.....	47
<i>Rules for Conjunctive Management of Surface &amp; Ground Water Resources</i>	
IDAPA 37.03.11, <i>et seq.</i> .....	2

## **EXHIBITS**

- Exhibit A:     *Rules for Conjunctive Management of Surface & Ground Water Resources*  
                     (IDAPA 37.03.11, *et seq.*)
- Exhibit B:     *Order Dismissing Application for Temporary Restraining Order, Complaint for*  
                     *Declaratory Relief, Writ of Prohibition & Preliminary Injunction*, issued on June  
                     12, 2007 in *IGWA, et. al. v. IDWR, et al.*, (5<sup>th</sup> Jud. Dist., Case No. CV 2007-526)

## STATEMENT OF THE CASE

This case involves a challenge to the Director of the Idaho Department of Water Resources' ("IDWR" or "Department") *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* ("Final Order") ([R. Vol. 16 at 3950](#)), dated July 11, 2008. In the *Final Order*, the Director determined that junior ground water diversions were injuring Clear Springs' senior water rights. Yet, the Director then disregarded the law and overwhelming evidence and created a new administrative scheme that has forced Clear Springs to continue suffering material injury (nearly four years later), while depletions to the water source continue unabated.

As ground water diversions from the Eastern Snake Plain Aquifer ("ESPA") have increased steadily over time, discharges from hydraulically connected springs in the Thousand Springs area have decreased, injuring senior surface water rights to those springs. Clear Springs diverts water for aquaculture use from springs in this area. Springs that historically satisfied Clear Springs' water rights year-round, now fail to fill all of Clear Springs' rights, and for some rights provide adequate flows only part of the year – in some cases, for only 2 months. Consequently, Clear Springs has been forced to suffer continued injury to its water rights and reduce operations – even shutting down raceways – while junior ground water users continue to divert their full water rights and deplete the aquifer and spring flows.

Seeking to protect its water rights from further injury, Clear Springs sought priority administration in the spring of 2005. The Director responded and recognized that junior priority ground water rights were materially injuring Clear Springs' senior surface water rights. The Director issued an order on July 8, 2005, requiring curtailment or alternative actions to mitigate for the material injury caused by the junior ground water users. However, in making that decision, the Director made several errors in applying the law and facts. Moreover, he later

failed to implement the order requiring curtailment or mitigation, forcing Clear Springs, the senior water right holder, to suffer continued injury in the interim. The Director's orders, and the implementation of those orders (or lack thereof) have clearly violated Idaho's constitution, water distribution statutes, and the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CMR" or "Rules") (IDAPA 37.03.11, *et seq.*).<sup>1</sup>

For example, the Director ignored Clear Springs' partial decrees which were issued by the Snake River Basin Adjudication (SRBA) District Court in 2000. Instead of accepting the decrees and distributing water to Clear Springs, the Director created a *new* condition for the decreed quantity element of the water rights. Namely, the Director surmised that since seasonal flow fluctuations must have existed at the time of appropriation of the water rights, those "seasonal variations" would limit Clear Springs' ability to seek administration of junior priority ground water rights. Although this condition is not included on any of Clear Springs' decrees, and has never been used by the Department or watermaster in administration of any of Clear Springs water rights, the Director unilaterally imposed the condition and denied delivery of water to Clear Springs' senior water right #36-4013A for that reason.

Amazingly, the Director created this new condition even after admitting that he had insufficient information to support it. The Hearing Officer in this case, former Supreme Court Justice Gerald F. Schroeder, thoroughly reviewed the facts and law and concluded that water right #36-4013A was being injured by junior priority ground water rights. Still, the Director disregarded the evidence and the Hearing Officer's recommendation and refused to recognize any injury to water right #36-4013A. This decision violates Idaho law.

---

<sup>1</sup> For the Court's convenience, a copy of the CMR's is attached hereto as Exhibit A.

In addition, the Director disregarded Clear Springs' senior water rights and the SRBA Court's "connected sources" general provision for all hydraulically connected water rights in the ESPA by creating a "10% trim line" for the benefit of a certain class of junior ground water rights. In particular, the Director determined that a claimed "margin of error" for the Eastern Snake Plain Aquifer Model ("ESPAM" or "Model") should be applied to reduce, or even eliminate, the curtailment or mitigation obligations of certain junior ground water rights. This is the case, even though the Director found that those water users were adding to the material injury suffered by Clear Springs. As recognized at hearing, there was no basis for this alleged "margin of error", and even if there was, the Director was not justified in applying it to the benefit of certain junior ground water rights and to the detriment of Clear Springs.

Next, the Director created a new "replacement water plan" concept to avoid curtailment – a scheme that is not provided for in any applicable law. This scheme allowed junior ground water users to continue depleting the aquifer and connected spring sources without any due process or adequate mitigation provided to Clear Springs. At no time did the Director use the CM Rule 43 "mitigation plan" process which requires notice and hearing of any submitted mitigation plan. Instead, the Director approved the so-called "replacement water plans" unilaterally for the benefit of affected junior ground water right holders. The Director was the sole arbiter of those plans without any input from or process provided to Clear Springs.

Plans were submitted in 2005, 2006 and 2007. Although the plans were deemed deficient, they were nonetheless approved and administration was evaded. In fact, the 2007 plan was submitted with the understanding that it was deficient. However, the Director failed to issue a final accounting for any of the plans or to impose outstanding obligations on the ground water users to compensate for prior mitigation shortfalls. Even though the Director adopted the



Hearing Officer's recommendation on this point, he failed to carry over the outstanding mitigation requirements that had not been met in prior years. The Director's newly created "replacement water plan" scheme, and the implementation (or lack thereof) of the 2005-2007 plans, violated Idaho law, was made upon unlawful procedure and was arbitrary and capricious.

The Director ignored the law and overwhelming evidence and continues to administer water rights in a manner that fails to provide Clear Springs the legal protections afforded a senior priority water right. The Idaho Constitution, water distribution statutes and CMRs provide Clear Springs with a clear right to mitigation whenever its senior water rights are materially injured by out-of-priority diversions. These same laws obligate junior ground water users to either curtail or provide sufficient mitigation through an approved CM Rule 43 mitigation plan. The Director's creation of new conditions for Clear Springs' decreed water rights, his failure to administer to Clear Spring's 1955 priority water right, his use of a "10% trim line" to exclude certain rights from administration and his creation of a "replacement water plan" scheme fail to comport with Idaho law and constitute an unlawful application of the CMRs. Consequently, those portions of the Director's *Final Order*, and others identified separately below, should be declared unlawful and set aside.

### **ISSUES PRESENTED ON APPEAL**

Clear Springs presents the following issues on appeal:

A. Whether the Director's reevaluation of the extent of beneficial use of Clear Springs' water rights using a "seasonal variation", derived from pre-decree assumptions and data, was arbitrary, capricious and in violation of the law.

B. Whether the Director's creation and use of a "seasonal variation" to determine that water right 36-4013A has not been materially injured was contrary to the substantial evidence in the record.

C. Whether the Director's implementation of a 10% "trim line" to exclude certain junior priority ground water rights from administration, even though the Director determined they were materially injuring Clear Springs' senior water rights, exceeded the Director's statutory authority, was arbitrary, capricious or in violation of the law.

D. Whether the Director's usage of a percentage of reach gains to the Snake River to reduce the quantity required for mitigation in lieu of curtailment was arbitrary, capricious and in violation of the law.

E. Whether the Director exceeded his statutory authority through the unilateral implementation of a "replacement water plan" process not provided by any statute or administrative rule.

F. Whether the Director's acceptance of IGWA's "replacement water plans" in 2005, 2006, and 2007, even though they failed to comply with the mitigation requirements established in the Director's orders, violated statutory or constitutional provisions, exceeded the Director's statutory authority or was arbitrary, capricious or an abuse of discretion.

G. Whether the Director's failure to properly account for and require junior priority ground water right holders to perform their outstanding mitigation obligations in 2005, 2006 and 2007 was arbitrary, capricious and in violation of the law.

H. Whether the use of phased-in curtailment or mitigation obligations of junior priority ground water rights was contrary to law.

I. Whether the Director violated the law in considering an undefined “public interest” criteria to limit or preclude administration.

## **STATEMENT OF FACTS**

This matter is on appeal of the Director’s *Final Order* issued on July 11, 2008. [R. Vol. 16 at 3950](#). In that order the Director confirmed that diversions under junior priority ground water rights were materially injuring senior water rights held by Clear Springs and Blue Lakes Trout Company (“Blue Lakes”).

### **I. The Eastern Snake Plain Aquifer and Ground Water Depletions**

The ESPA is the aquifer underlying a portion of the Eastern Snake River Plain, and provides a source of water for thousands of water users. [R. Vol. 3 at 487-88, ¶¶ 1-5](#). The ESPA is hydraulically connected to the Snake River and its tributaries at varying degrees. [R. Vol. 3 at 488, ¶ 7](#).<sup>2</sup> In the Thousand Springs area, the hydraulic connectivity of the ESPA to surface water sources is evident in the form of springs, where water flows to the surface and, is diverted by water users throughout the area, including Clear Springs, for aquaculture purposes. The direct hydraulic connectivity of the aquifer to the springs in the Thousand Springs area creates a situation where any depletion to the aquifer, such as those that result from diversions under junior priority ground water rights, impacts the ability of Clear Springs to divert water pursuant to its decreed senior surface water rights.

#### **A. Water Quality**

One critical benefit of the spring water is that it provides water of a particular quality that is necessary for successful operations of an aquaculture facility. This water is chemically and biologically ideal for fish production. *See* [R. Vol. 14 at 3330-32](#). Spring water entering Clear

---

<sup>2</sup> “Hydraulically-connected ground water sources and surface water sources are sources that within which, ground water can become surface water, or surface water can become ground water, and the amount that becomes one or the other is largely dependent on ground water elevations.” [R. Vol. 3 at 488-89, ¶ 8](#).

Springs’ facilities has a water temperature of 15° Celsius, is saturated with oxygen and has sufficient water alkalinity and hardness to buffer changes in pH associated with release of carbon dioxide from fish respiration.<sup>3</sup> See R. Vol. 14 at 3274, 3331-32.

The quality of water is a necessary component to satisfy the purpose of use of Clear Springs’ water rights, as well as other aquaculture water rights that have been developed in the area. In the *Order in the Matter of Distribution of Water to Water Rights Nos. 36-02356A, 36-07210 & 36-07427* (the “Blue Lakes Order”) (R. Vol. 1 at 45), the Director recognized a junior appropriator’s obligation to provide replacement water of “suitable water quality.” R. Vol. 1 at 71, ¶ 31.<sup>4</sup> Importantly, the Hearing Officer found that the “temperature, purity and oxygen content of the water from the springs makes it desirable for trout farming.” *Opinion Constituting Findings of Fact, Conclusions of Law & Recommendation* (“Recommended Order”), R. Vol. 16 at 3694, ¶ 5.

In considering alternate proposals to provide water in a manner different from the practices in place when the rights were licensed and ultimately decreed, the quality of the water may be considered ... ***Any alternative to curtailment must accomplish the same result as curtailment. Otherwise the purpose of the water right is defeated.***”

*Id.* at 3711, ¶ 1 (emphasis added).<sup>5</sup>

---

<sup>3</sup> Water quantity fundamentally determines the quantity of oxygen possibly available to fish and hence determines the production capacity of a farm or rearing unit. R. Vol. 14 at 3288, ¶ 65. Clear Springs knows the maximum amount of oxygen that a unit of water (e.g. cfs) can contain and knows the maximum amount of fish that can be produced from that unit of water. *Id.*

<sup>4</sup> The Director concluded by ordering that junior water users “causing material injury ... must submit a plan or plans to the Director to provide mitigation by offsetting the entirety of the depletion to the ESPA under such rights or to provide Blue Lakes Trout with a replacement water supply of ***suitable water quality*** of 10 cfs”. R. Vol. 1 at 72, ¶ 1 (emphasis added). The requirement that “replacement water supply of ***suitable water quality***” be provided was added to the *Order in the Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B & 36-07148 (Snake River Farm); and to Water Rights Nos. 36-07083 & 36-07568 (Crystal Springs Farm)* (the “Clear Springs Order”) (R. Vol. 3 at 487) through the Director’s *Final Order*, R. Vol. 16 at 3952-53, ¶ 10.

<sup>5</sup> Importantly, the Director affirmed this finding. See *Final Order*, R. Vol. 16 at 3951, ¶ 6-7 (stating that, unless specifically addressed in the *Final Order*, the “Findings of Fact entered previously by the Director and recommendations of the hearing officer govern”).

## B. Ground Water Depletions

Beginning in the 1950s, consumptive ground water development on the ESPA dramatically increased. [R. Vol. 3 at 488, ¶ 6](#). Ground water pumping depletes the ESPA by approximately 2.0 million acre-feet per year. [R. Vol. 3 at 488, ¶ 4](#). According to USGS records, 95% of these depletions are for agricultural purposes. [R. Vol. 16 at 3696 ¶ 3](#).

Corresponding with the dramatic increase in ground water development, aquifer levels and hydraulically-connected spring discharges have declined. [R. Vol. 3 at 488, ¶ 6](#).<sup>6</sup> As a result, spring flows have declined and prevented Clear Springs' senior surface water rights from being fulfilled. [R. 2<sup>nd</sup> Supp. Vol. 1 at 5688](#). In addition, there have been several other calls for priority administration throughout the ESPA in Water Districts 120 and 130 in order to protect other senior water rights.<sup>7</sup>

As early as 2001, the Department was aware that senior surface water rights in the Thousand Springs reach were not being satisfied – necessitating administration of hydraulically connected water rights. In 2001, the Director issued an order designating the “Thousand Springs Ground Water Management Area,” pursuant to Idaho Code § 42-233b. [Ex. 220](#). In that order, the Director determined that “the depletionary effects of ground water withdrawals on the flow of water from springs tributary to the Snake River in the Thousand Springs area” prevented senior water rights from being filled. [Id. at 2-3](#).

---

<sup>6</sup> Another impact on the aquifer level and spring discharge is the reduction in incidental recharge. Beginning in the late 1800's, and continuing until the mid-1950's, surface water users irrigated their lands using flood/furrow irrigation. [R. Vol. 3 at 488, ¶¶ 5-6](#). This caused the levels of the aquifer to rise. [Id.](#) Since that time, a great number of surface water users have converted to sprinkler irrigation, which has reduced the amount of incidental recharge. [Id.](#) The Hearing Officer recognized that the ground water users cannot use this decline in incidental recharge as a shield against the requirement to mitigate for the material injury they have caused. [R. Vol. 16 at 3697, ¶ 5](#). The Hearing Officer held that Clear Springs is “entitled to curtailment to the extent that the junior ground water users interfere with the water.” [Id.](#)

<sup>7</sup> These calls include Rangen, Inc. (Sept. 23, 2003 & Jan. 17, 2007), Lynclif Farms (Dec. 22, 2003), Pristine Springs, Inc., SeaPac of Idaho, Inc., and William D. Jones, Jr. (Jan. 12, 2004), Surface Water Coalition (Jan. 14, 2005), Billingsley Creek Ranch (March 16, 2005), John W. Jones (May 10, 2005), Clear Lakes Trout Company (Jan. 19, 2007), and A&B Irr. Dist. (March 19, 2007, original call filed in 1994). See [Ex. 338](#).

In 2001, the State of Idaho sought authority from the SRBA Court for interim administration of water rights in Basins 35, 36, 41 and 43. [R. Vol. 13 at 3065-77](#). According to the State,

[T]he water supplies available for use under senior priority surface water rights relying on spring sources in the American Falls and Thousand Springs areas have diminished and are expected to continue to diminish in the coming year . . . Thus, interim administration of water rights in all or portions of Basins 35, 36, 41, and 43 is reasonably necessary because the available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights.

[Id. at 3073](#).<sup>8</sup>

Spring discharges are dependent upon aquifer levels. [R. Supp. Vol. 3 at 4427, Ins. 5-8](#). As aquifer levels decline, the discharge from springs declines as well. [Id. at 4443, Ins. 20-21](#). Factors affecting aquifer levels and spring discharges include ground water pumping, incidental recharge and precipitation levels. Groundwater diversions from the ESPA have reduced aquifer levels causing reductions in hydraulically-connected spring discharges. [Id. at 4444, Ins. 13-15](#); *see also* [R. Vol. 3 at 491, ¶ 21](#). All groundwater depletions from the ESPA cause reductions in flows in the Snake River and spring discharges equal in quantity to the ground water depletions over time. [R. Vol. 3 at 489-90, ¶ 11](#).

### **C. The Eastern Snake Plain Aquifer Model (ESPAM)**

The Department uses the ESPA groundwater model to determine the impact of pumping from a single well and selected groups of wells under junior priority ground water rights on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries – including the Thousand Springs area.<sup>9</sup> [R. Vol. 3 at 490, ¶ 12](#).

---

<sup>8</sup> The SRBA Court issued its order authorizing interim administration, pursuant to Chapter 6, Title 42, Idaho Code, in accordance with the Director's Reports and partial decrees. [R. Vol. 13 at 3080](#). The Director then issued a final order establishing Water District 130. [Id. at 3083-3090](#).

This Eastern Snake Plain Aquifer Model (“ESPAM” or “Model”) has evolved over time from its first incarnation in the late 1970’s, [R. Supp. Vol. 7 at 4879-80](#), to the current model, which was calibrated to a 22-year data set (1980-2002), [id. at 4880](#); *see also* [R. Vol. 3 at 491, ¶ 17](#). As recognized by the Director, the model represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. [R. Vol. 3 at 492, ¶ 23](#); *also*, [R. Supp. Vol. 7 at 4880 & 4882](#).<sup>10</sup> Indeed, the Hearing Officer recognized that “there is no better science available.” [R. Vol. 16 at 3703, ¶ 3](#).

According to the Director, ESPAM simulation results are suitable for making factual determinations on which to base conjunctive administration of surface water rights diverted from the Snake River and its tributaries and ground water rights diverted from the ESPA. [R. Vol. 3 at 492, ¶ 22](#). ESPAM simulations show that ground water withdrawals from certain portions of the ESPA for irrigation and other consumptive purposes cause depletions in the flow of springs discharging in the spring reaches in the Thousand Springs area. [R. Vol. 3 at 492, ¶ 21](#).<sup>11</sup>

## **II. Clear Springs Operations & the Snake River Farm Facility**

Clear Springs, an Idaho general business corporation, is an employee-owned food company headquartered in Buhl, Idaho. [Tr. P. at 92, lns. 12-20](#). Founded in 1966, Clear Springs prepares a variety of fresh and frozen seafood for human consumption, for sale in fine restaurants and in seafood sections of major supermarkets throughout the United States and Canada. *See* [Tr.](#)

---

<sup>9</sup> The Ground Water Model is also currently used to evaluate water right transfers on the ESPA, managed recharge proposals, irrigation conversions from ground water to surface water, and voluntary or involuntary curtailment of ground water irrigation. [R. Supp. Vol. 7 at 4881](#).

<sup>10</sup> IGWA’s expert, Dr. Brendecke, concurred: “I would say that the groundwater model is the best tool we have right now for evaluating these impacts. . . . given the resources and the effort that went into it, it’s as good as we’ve got right now.” [R. Vol. 6 at 1113, lns. 11-12, 18-20](#).

<sup>11</sup> The resolution of the model is adequate to quantify the effects of ground water pumping on hydraulically-connected reaches of the Snake River and its tributaries. [R. Supp. Vol. 7 at 4881](#); [Ex. 314 at 6](#).

P. at 64, *Ins.* 8-24; R. Vol. 14 at 3310-15. Clear Springs is the world’s largest producer of aquaculture rainbow trout but also manufactures salmon, mahi mahi, and other premier value added seafood products. *See Id.* at 3316-18.

Clear Springs is vertically integrated<sup>12</sup> with its own rainbow trout brood stock and egg production, feed manufacturing, farm operations, processing and value adding plants, and distribution system, including a fleet of refrigerated tractor/trailer combinations. *Tr. P.* at 68-69. Clear Springs also operates a leading edge research facility whose mission is to develop tools that enhance fish production at Clear Springs’ facilities. Feed is manufactured at Clear Springs’ feed mill in Buhl. *Tr. P.* at 69, *Ins.* 22-23. Ingredients are imported from local, regional, and national suppliers. R. Vol. 14 at 3270-72, ¶¶ 1-3.<sup>13</sup>

Clear Springs’ Snake River Farm<sup>14</sup> is a modern technologically advanced flow-through aquaculture facility and produces about 15% of the total fish production at Clear Springs’ owned farms. The farm utilizes extant topographical differences in elevation to serially reuse (by gravity flow) spring water 5 or 6 times. The farm is equipped with an advanced feeding system developed by Clear Springs and an efficient waste management system. R. Vol. 14 at 3272-75, ¶¶ 5-10.

Clear Springs diverts surface water for its Snake River Farm from a collection box that enters a collection system (“spring pool”) that receives spring flow emanating from approximately a 300 ft length of the canyon wall. *Tr. P.* at 208, *Ins.* 6-13. Water is collected into

---

<sup>12</sup> Vertical integration begins with Clear Springs’ own pedigreed rainbow trout brood stock – selectively bred for over 20 years with a 50% increase in growth rate. R. Vol. 14 at 3271, ¶ 2. This provides Clear Springs’ market with a continuous supply of product at stable prices and consistent quality. *See also Id.* at ¶ 3 (discussing breeding and harvesting process), *Tr. P.* at 67-69.

<sup>13</sup> The diet has been scientifically formulated to maximize fish growth and feed conversion efficiency while minimizing environmental pollutants. R. Vol. 14 at 3271, ¶ 2.

<sup>14</sup> Other aquaculture facilities owned by Clear Springs include Box Canyon, Clear Lake Farm and Crystal Springs Farm. *Tr. P.* at 67-68.



a central conveyance for distribution.<sup>15</sup> Clear Springs measures flow weekly using a flow-meter at two delivery pipes to the farm. [Tr. P. at 85, lns. 7-11.](#)

### **III. Clear Springs' Water Rights, Shortages and 2005 Delivery Call.**

Snake River Farm has water rights totaling 117.67 cfs for fish propagation, each of which were partially decreed by the SRBA Court in April 2000. [Exs. 301-306.](#) These rights were decreed as follows:

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

<b>Water Right No.</b>	36-4013A	36-4013B	36-7148
<b>Priority Date</b>	September 15, 1955	February 4, 1964	January 31, 1971
<b>Quantity</b>	15 cfs	27 cfs	1.67 cfs
<b>Purpose of Use</b>	Fish Propagation	Fish Propagation	Fish Propagation
<b>Period of Use</b>	01-01 to 12-31	01-01 to 12-31	01-01 to 12-31
<b>Source</b>	Springs	Springs	Springs
<b>Partial Decree Date</b>	April 10, 2000	April 10, 2000	April 10, 2000

As decreed, these water rights authorize the diversion of water at the specified rate, 365 days per year. [Id.](#) Clear Springs' diversion, conveyance, and trout rearing facilities have sufficient capacity to divert and use the full aggregate quantity of the decreed water rights. [Tr. P. at 218, lns. 1-10.](#)

Spring discharges supplying water to Clear Springs' Snake River Farm water rights have depleted by as much as 21 percent since 1972. [R. Vol. 3 at 500, ¶¶ 58-60.](#) Current flows are

---

<sup>15</sup> Some additional minor diversion from the Clear Springs Foods collection system occurs. A Visitor's Center Pond uses about 0.6 cfs when in operation. An additional 0.23 cfs is diverted to the Research Facility Specific Pathogen Infected laboratory. None of this water or Visitor Center water is used at the fish farm because of concern for fish contamination. *See* R. Vol. 14 at 3273-74.

insufficient to fill water rights #36-4013A, #36-4013B and #36-7148. *Id.* This reduction in water supply has impacted and impaired Clear Springs’ ability to maximize its fish production capabilities.

Recognizing that it has a vested right to beneficially use its decreed quantities of water and that junior ground water diversions had depleted its waters supplies, Clear Springs sought priority administration through the Department. On May 2, 2005, Clear Springs submitted two letters to the Department 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.” *Exs. 124 & 126; see also R. Vol. 3 at 487.* Clear Springs requested administration of hydraulically connected junior priority ground water rights to deliver water to is senior surface water rights at the Snake River Farm (water rights #36-4013A, #36-4013B and #36-7148) and Crystal Springs Farm (water rights #36-7083 and #36-7568) facilities. *Id.*

#### **IV. The Director’s Orders in Response to Clear Springs’ Request**

On July 8, 2005, the Director issued an *Order* in response to Clear Springs’ request (the “*Clear Springs Order*”). *R. Vol. 3 at 487.* In the *Clear Springs Order*, the Director made a number of legal and factual errors – resulting in a challenge to the *Clear Springs Order* by Clear Springs and others. Since that time, the Director has administered Clear Springs senior water rights based on the legally and factually flawed determinations in the *Order* and subsequent interim determinations. *See R. Vol. 3 at 441; R. Vol. 5 at 801 & 814; R. Vol. 9 at 1903.* These actions have further impaired Clear Springs’ senior water rights and have unlawfully authorized ground water users to continue to divert their full water rights out-of-priority.

In the *Clear Springs Order*, the Director recognized that junior ground water diversions were materially injuring Clear Springs’ senior water rights. *R. Vol. 3 at 523-24; see also R. Vol.*

16 at 3695-96, ¶ 2 (“Ground water pumping for agriculture is a consumptive use and must have an effect upon the amount of water in the aquifer that will continue to the Thousand Springs area”). However, the Director’s analysis significantly impaired Clear Springs’ senior water rights and limited the mitigation obligations of those causing the material injury.

#### **A. Use of Pre-Decree Information**

In making the material injury determination, the Director ignored the binding effect of the SRBA Court’s partial decrees and wrongly relied upon pre-decree information to limit the ability of Clear Springs to receive its decreed diversion rate. For example, the Director imposed a “seasonal” or “intra-year” variation condition on the quantity element by claiming that variations in the sources of water “existed when appropriations for these rights were initiated” in the 1950’s, 1960’s and 1970’s. *R. Vol. 3 at 498, ¶¶ 50-54*. Based on this determination, the Director imposed a new limitation or condition on Clear Springs’ water rights and concluded that Clear Springs’ 1955 priority water right (#36-4013A) is satisfied by “seasonal high” flows. *R. Vol. 3 at 500, ¶ 61*. This is the case, regardless of the fact that spring depletions have rendered the water supplies insufficient to deliver the decreed quantities the majority of the year. Clear Springs’ delivery call for its 1955 water right (#36-4013A) was denied on this basis. *Id.*

Essentially, the Director determined that, so long as the decreed quantities are met at a certain undetermined and undefined “seasonal high,” then no injury can be found, even when, as here, the depletions are caused, at least in part, by out-of-priority ground water diversions. The Director made this finding despite having no historical data to support his theory.

The law and evidence presented does not support the Director’s theory. The Hearing Officer recognized that the use of this pre-decree “seasonal” variation was “in error.” *See R. Vol. 14 at 3238* (“To the extent that the Director’s Orders import a seasonal condition [to the

decrees] *they are in error*”) (emphasis added).<sup>16</sup>

In addition, there is no factual support for the Director’s “new” theory. Even the Director specifically recognized that there is insufficient data to determine the seasonal variations in Clear Springs’ water supplies that existed at the time of appropriation. *See R. Vol. 3 at 498-99, ¶ 54.*<sup>17</sup> Despite the lack of historical data, the Director used the “seasonal variation” condition to limit Clear Springs’ decreed water rights and refused to find injury to water right #36-4013A.

The Hearing Officer rejected the Director’s no-injury finding for Clear Springs’ 1955 water right. In reviewing the substantial evidence that was presented, the Hearing Officer determined:

In this case, the evidence indicates that the Blue Lakes 1971 right and the Clear Springs 1955 right were filled throughout the year at the decreed levels at the times of appropriation. In the recent past, they have been filled for only a portion of the years ... A portion of the declines is attributable to ground water pumping. Consequently, there should be a finding of injury to those water rights.

*R. Vol. 16 at 3846-47.*

Despite this finding, and the substantial evidence to support it, the Director determined that “[i]nsufficient credible evidence was presented at hearing to support a finding that” these water rights were “injured.” *R. Vol. 16 at 3954-55, ¶¶ 16-17.*

---

<sup>16</sup> In his deposition testimony, former Director Karl J. Dreher, the author of the orders, made it clear that his analysis of the authorized diversion rates of the Spring Users’ water rights, and his consideration of historical flow and diversion data, and of seasonal variations in water flows, do not pertain to the Spring Users’ water needs or whether they will put the water to beneficial use without waste if it is delivered. *See R. Vol. 14 at 3335-3349* (excerpts of *Deposition of Karl J. Dreher*, p. 183, lns. 9-17; p. 186, lns. 1-6). Mr. Dreher explained that he was “doing an analysis of what the quantity element means” and “interpreting a quantity for purposes of administering junior-priority ground water rights.” *Id.* (*Dreher Deposition* at 182, ln. 25- p. 183, ln. 1; p. 186, lns. 7-15; p. 190, lns. 13-15; p. 393, ln. 24 – p. 394, ln. 8).

<sup>17</sup> As the former Director stated, the pattern and magnitude of seasonal variations in the water supplies for the Spring Users’ water rights at the time of appropriation was “probably not too much unlike what exists today”. *See R. Vol. 14 at 33343-44, 3349* (*Dreher Deposition* at 245, ln. 15 – p. 246, ln. 9; p. 394, lns. 13-16).

Even assuming the former Director’s criteria for finding “injury” was appropriate, it is clear that the standard had been satisfied for Clear Springs’ 1955 water right. At hearing, former Director Karl Dreher explained the standard that he applied in the *July 8, 2005 Order*:

Seasonal variability has always been there. But again, it only enters consideration when the rights, the senior – relatively senior priority surface water rights are seeking curtailment of junior priority rights, ***when the quantity of water may not have ever been available on a year round basis to fill those surface water rights.***

Tr. P. at 1151, lns. 10-16 (emphasis added).

As demonstrated at the hearing and explained below, water was available to fill Clear Springs’ 1955 water right on a year round basis from at least 1988-2001. Given the history of spring flows in the Thousand Springs area there is no question that spring flows were higher in the 1950s, consequently, that right was filled on a year round basis at the time of appropriation.

Therefore, using the Director’s own standard, Clear Springs’ 1955 water right is injured because it is not filled on a year round basis as it was historically. Stated another way, the Director has no evidence to show the water was not available to fill that right on a year round basis, or the condition he applied to find “no-injury” to Clear Springs’ water right #36-4013A.

### **B. Model Simulations & the 10% “Trim Line”**

The Director used the model to simulate the effects of curtailment of certain ground water rights junior to Clear Springs’ water right #36-0413B (priority date of February 4, 1964). [R. Vol. 3 at 502-03, ¶ 71](#). These model simulations demonstrated that curtailment of junior priority ground water rights would result in increased spring discharges in the Buhl to Thousand Springs spring reach<sup>18</sup> by an average of 38 cfs. *Id.*

---

<sup>18</sup> This reach includes the springs from which Clear Springs diverts surface water for its Snake River Farm.

While running model simulations in response to Clear Springs' call, the Director imposed a "10% uncertainty" condition (i.e. the "10% trim line"). [R. Vol. 3 at 502-03, ¶ 71](#). This condition reduced the number of ground water rights that were included in the Model simulation based on the perceived impact of the junior ground water rights on the senior surface water rights. *See Id.* The simulations used a percentage of reach gains to the Snake River (10%) to reduce the quantity of water that junior priority ground water holders were required to provide as mitigation for material injury. *Id.* at 501, ¶ 66, 502-03, ¶ 71, 504, ¶ 77, 508-09, ¶¶ 96 & 100, 510, ¶ 103, 519, ¶ 28 & 521, ¶ 36. In other words, the Director removed any mitigation obligation from any junior ground water users whose impact on the reach gains were less than 10% of their diversion rate, even though the depletions reduced spring flows to the detriment of Clear Springs' senior water rights. The so-called "10% trim line" is based on the margin of error assigned to one input to the model, stream gages on the Snake River. *Id.*, *see also Id.* at 491, ¶ 17.

The use of this 10% trim line resulted in the discriminatory treatment of Clear Springs' senior water rights. In relation to the Blue Lakes' call, simulations evaluated the curtailment of 57,220 acres under junior priority ground water rights. [R. Vol. 1 at 60, ¶ 17](#). However, in the Clear Springs' call, simulation evaluated the effects of 52,470 acres. [R. Vol. 3 at 502-03, ¶ 71](#). Ironically, even though the Clear Springs' simulation involved a more senior water right (1964) as compared to Blue Lakes (1973), ***the "10% uncertainty" condition resulted in fewer junior priority ground water rights*** (and irrigated acres) being affected by the curtailment simulation for Clear Springs' call. The Director has never provided an explanation for these inconsistent results.

### C. Phased-in Curtailment, the “Replacement Water Plan” Concept, and Failed Administration

The Director’s *Clear Springs Order* provides for administration of ground water rights that are junior in priority to Clear Springs’ 1964 priority water right (#36-4013B). [R. Vol. 3 at 522-23](#). Relying on CM Rule 40.01.a, the Director allowed for curtailment to be phased-in over five years to “lessen the economic impact”.<sup>19</sup> *Id.* According to the *Clear Springs Order*, water was to be provided to Clear Springs’ senior water rights either through “involuntary or substitute curtailment ... in 2005, 2006, 2007, 2008 and 2009, such that ... phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach.” *Id.* According to the Director, those actions would result in an increase of “steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively.”<sup>20</sup> *Id.* This plan, however, has exacerbated the injury suffered by Clear Springs, by allowing junior ground water right holders to continue to divert their full water rights without providing sufficient mitigation to Clear Springs.

Junior ground water right holders were provided with three mitigation alternatives: (1) offset depletions by replacing quantities of water removed from the aquifer; (2) direct water delivery to the spring through curtailment; and (3) increase gains to the spring reaches in which the Clear Springs’ points of diversion are located (i.e. “mitigate to the reach”). [R. Vol. 3 at 523-24](#).

In fashioning these alternatives, the Director explained that mitigation actions and results had to be “in kind, in time, and in place” just as what would have resulted from curtailment. [Tr. P. at](#)

---

<sup>19</sup> Phased-in curtailment and mitigation are the two methods by which the CMRs address the economic impact of administration. Otherwise, the CM Rules require priority administration. CM Rule 40.01.

<sup>20</sup> The Director would continue to use the model to determine whether the annual targets are met. [Tr. P. at 1257-59](#). Any shortfall or exceedence, i.e. “credit,” would be carried over into the next year and increase or decrease the mitigation to be provided in the subsequent year. *Id.*

P. at 1178, *ins.* 12-15.<sup>21</sup> Despite the requirements set forth by the Director, the orders were never carried out to provide the required mitigation.

In Clear Springs’ case, affected junior ground water right holders (i.e. “IGWA”) chose to mitigate to the reach (the third alternative) and submitted “replacement water plans” in each of 2005, 2006 and 2007. *See* R. Vol. 1 at 111; R. Vol. 5 at 881; R. Vol. 7 at 1375; R. Vol. 9 at 1853. It is important to note that the Department’s CMRs do not provide for a “replacement water plan”. Nor do they provide a process whereby the Director unilaterally approves “mitigation” without due process afforded to the senior water right holder. Rather, the Rules provide for “mitigation plans” that have specific procedures to be followed for approval. *See* CM Rule 43 (IDAPA 37.03.01.043). No Rule 43 mitigation plan was ever approved by the Director in this matter. Instead, the Director utilized the newly-created “replacement water plan” scheme to evade the obligations and due process afforded senior water right holders in Rule 43.

Furthermore, attempted implementation of these “replacement water plans” has proven ineffective in addressing Clear Springs’ material injury. For example, IGWA’s 2005 replacement water plan for Blue Lakes’ call (which was later applied to Clear Springs as well, R. Vol. 3 at 523-24, failed to meet the requirements established by the Director. R. Vol. 2 at 309-10. Rather than perform his legal duty and order curtailment, as required by the *Order*, the Director partially approved the plan and provided additional time for IGWA to come up with “appropriate” mitigation. *Id.* In the interim, despite not complying with the *Order*, affected junior ground water right holders were authorized to divert water out-of-priority for the entire

---

<sup>21</sup> Administration by mitigation introduces a host of uncertainties that are not present with curtailment. These uncertainties include, but are not limited to: whether the chosen mitigation alternative really is equivalent to curtailment; whether the plan for a given year will meet the required target; whether a plan can be submitted reviewed, approved, and performed in a timely fashion; whether the ground water users can perform the mitigation activities (by, for example, acquiring alternative water supplies), and whether those activities can be accurately monitored and evaluated for post-year accounting.



irrigation season. The “substitute curtailment plan” was later approved on July 6, 2005. [R. Vol. 3 at 441](#). IGWA then contested the Director’s post-year accounting. [R. Vol. 3 at 547](#). However, to date, the Director has failed to issue any decision on this protest.

IGWA’s 2006 mitigation plan also failed. *See* [R. Vol. 5 at 951-53](#); [R. Vol. 6 at 1155-56](#). IGWA submitted a plan to meet the mitigation requirement for 2006 that relied on obtaining water supplies through leases, conversion of ground water irrigation to surface water irrigation, and incidental recharge into the ESPA from the conveyance of leased water through the Northside Canal. *See* [R. Vol. 5 at 881](#). IDWR staff raised several questions about the plan, seeking, among other things, verification of IGWA’s predicted losses from the Northside Canal. [R. Vol. 5 at 951](#). *These issues were never resolved and IGWA’s 2006 plan was never approved*. Nonetheless, junior priority ground water right holders were allowed to divert their full water rights for the entire 2006 irrigation season. In the interim, Clear Springs’ senior water rights were injured.

IGWA’s 2007 mitigation plan was especially troublesome. Amazingly, IGWA submitted its 2007 mitigation plan knowing that the 2007 plan was inadequate on its face! [R. Vol. 7 at 1375](#). The Director issued a *Notice of Potential Curtailment of Ground Water Rights in the Thousand Springs Area* (the “Notice”), notifying groundwater users that they would be curtailed unless they amended their 2007 replacement water plan to comply with the *Clear Springs Order*. [R. Vol. 7 at 1357](#). Rather than comply with the order, IGWA attempted to evade its obligations by filing a challenge in the Jerome County District Court. *See IGWA et al. v. IDWR et al.*, (5<sup>th</sup> Jud. Dist., Case No. CV-2007-526). The lawsuit was dismissed by the District Court. *See* Exhibit B (attached hereto).

Even though that matter was dismissed, the Director failed to take any action until nearly 60-days after the *Notice* originally required curtailment. See [R. Vol. 7 at 1430](#). On June 15, 2007, the Director issued his *Order Curtailing Junior Priority Ground Water Rights*. *Id.* The *Curtailment Order* notified junior prior ground water users that they would be curtailed, beginning on July 6, 2007, unless groundwater users provided sufficient mitigation by June 29, 2007. [R. Vol. 7 at 1445-46](#). In other words, even though the irrigation season began in March, the Director allowed junior ground water diversions to continue to divert out-of-priority for half of the irrigation season. Importantly, however, the Director failed to consider the impact that such delayed mitigation would have on the quantity of water realized in the reaches. The Director failed to re-evaluate the number of ground water rights that would need to be curtailed after July 6<sup>th</sup> in order to comply with the annual mitigation requirements. Instead, junior ground water users were permitted to continue diverting without any consideration of the material injury they were causing that year.

Finally, a supplemental replacement plan was submitted, on June 29, 2007. [R. Vol. 9 at 1853](#). However, that supplemental plan, *again*, failed to meet the mitigation requirements by at least 6.6 cfs. [R. Vol. 9 at 1907, ¶ 11](#). The Director admittedly acknowledged the shortfall: “The Replacement Plan, Supplemental Plan, and water committed by IDA for recharge do not fully satisfy the June 2007 Order.” [Ex. 262 at 9, ¶ 13](#) (emphasis added). Inexplicably, however, the Director approved the supplemented plan, finding that curtailment of ground water pumping to make up the shortfall – as was required by the 2005 Orders – would be “insignificant” in providing additional water to the reach during the remaining half of the irrigation season. *Id.* at

9, ¶ 15.<sup>22</sup> In summary, the Director’s own delay in implementing his order for 2007 was used as the justification to excuse any administration that year.

## **V. Administrative Hearing and the *Final Order***

A hearing was held before the Honorable Gerald F. Schroeder, Hearing Officer, from November 28, 2007 through December 10, 2007. The *Recommended Order* was issued on January 11, 2008. [R. Vol. 16 at 3690](#). Petitions for reconsideration were filed by Clear Springs, Blue Lakes and IGWA. *See* [R. Vol. 16 at 3720 & 3751](#). The Hearing Officer issued an order on the petitions on February 29, 2008. [R. Vol. 16 at 3839](#). The Director issued the *Final Order*, on July 11, 2008. [R. Vol. 16 at 3950](#). Unless discussed and modified, the Director’s *Final Order* “accepted” prior findings and conclusions by the former Director and Hearing Officer. [Id. at 3959](#). Having exhausted all administrative requirements, this matter is now before the District Court.

## **STANDARD OF REVIEW**

Any party “aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court.” *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter “based on the record created before the agency.” *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005).

---

<sup>22</sup> A hearing on IGWA’s 2005 plan was held on June 5, 2006. The hearing and the Director’s prior orders identified deficiencies in IGWA’s plan. The parties submitted additional briefing, but the Director never issued an order on those matters from 2005 to 2007. The Director has yet to issue an order to properly account for IGWA’s past shortfalls in mitigation. [R. Vol. 16 at 3957](#) (“It is anticipated that a post-audit of the replacement water activities undertaken by IGWA for the benefit of Clear Springs in the Buhl Gage to Thousand Springs reach will be performed during those proceedings.”).

The Director’s 2007 order failed to account for IGWA’s lack of mitigation in 2006 and why no administration occurred in 2006. Although IGWA submitted a replacement plan on May 30, 2006, the Director recognized that it was 6.5 cfs deficient and no curtailment occurred. *See* [R. Vol. 7 at 1439, ¶ 14 & 1443 at 14, ¶ 6](#). In fact, the Director unlawfully permitted junior ground water rights to continue to deplete the water supplies necessary for Clear Springs’ senior surface water rights throughout 2006.

The Court should not substitute its judgment for that of the agency as to questions of fact so long as the decision is “supported by substantial and competent evidence.” *Mercy Medical Center v. Ada Cty.*, 146 Idaho 226, 192 P.3d 1050, 1053 (2008). The Court, however, is “free to correct errors of law.” *Mercy Medical Center, supra*. An agency’s decision must be overturned if (a) violates “constitutional or statutory provisions,” (b) “exceeds the agency’s statutory authority,” (c) “was made upon unlawful procedure,” (d) “is not supported by substantial evidence in the record as a whole” or (e) “arbitrary, capricious or an abuse of discretion.” *Chisholm, supra* (citing I.C. § 67-5279(3)). An agency action is “capricious” if it “was done without a rational basis.” *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). It is “arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles.” *Id.* In addition, the petition must show that “a substantial right has been violated” as a result of the agency action. *Chisholm, supra*.

## **ARGUMENT**

### **I. The Director’s Use of Pre-Decree Information was “Arbitrary and Capricious” and Violated Long Standing Idaho Water Law.**

At the outset, it is important to remind the Court that Clear Springs’ senior water rights have been partially decreed by the SRBA Court. *See Exs. 301-306*. As such, “the nature and extent of” the water rights are “conclusive” and binding on the Department as well as the junior ground water right holders in this case. I.C. § 42-1420(1); *Crow v. Carlson*, 107 Idaho 461, 465 (1984) (“The [] decree is conclusive proof of diversion of the water, and of application of the water to a beneficial use”).

In *AFRD #2 v. IDWR*, 143 Idaho 862 (2007), the Idaho Supreme Court explained the “SRBA Court determines the water sources, quantity, priority date, point of diversion, place, period, and purpose of use” for the decreed water rights. 143 Idaho at 862.

The Idaho Supreme Court further held there is a “presumption under Idaho law [] that the senior is entitled to his decreed water right.” *Id.* Although the Court found that certain post-decree factors may be considered in administration, the Director cannot re-adjudicate a decree. *Id.* at 877-78. In addition, these factors do not create “a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has.” *Id.*

Here, the Director unlawfully used pre-decree information, including assumed facts, to materially impair Clear Springs’ vested property right, its senior water right #36-4013A. By relying on assumptions about pre-decree water supplies, the Director included a “seasonal variation” condition that does not exist on any of Clear Springs’ water rights. The Director included the condition in order to justify a no-injury finding for Clear Springs’ 1955 water right #36-4013A. Such actions were not supported by substantial and competent evidence, constituted an unconstitutional application of the CMRs, and were otherwise arbitrary and capricious in violation of Idaho law.

**A. The Director’s “Seasonal Variation” Limitation is Not Supported by Substantial Evidence, Instead the Evidence Confirms that Clear Springs’ 1955 Water Right #36-4013A Is Being Materially Injured.**

The Director’s concocted “seasonal variation” condition is not supported by the facts. The Director claimed that Clear Springs’ water right #36-4013A was not injured because it was completely satisfied when water was available at temporary “seasonal highs.” [R. Vol. 3 at 500, ¶¶ 60-61.](#)<sup>23</sup> In effect, the Director erroneously used this “seasonal variation” condition to limit Clear Springs’ decreed diversion rate to an undefined period of time each year.

In the *Clear Springs Order* the Director re-evaluated the diversion rate for Clear Springs’ decreed water rights – using conditions *presumed* to have existed when Clear Springs made its

---

<sup>23</sup> Although the Director presumes that “seasonal variations” in the spring flows existed when Clear Springs first appropriated the water, the Director did not identify what the extent of those “variations” was, or if those “variations” even come close to resembling the variations witnessed today.

original appropriations in the 1950s for water right #36-4013A. Admitting he lacked any evidence to support this theory, the Director conceded that “There are *no known measurements, nor any other means, for reasonably determining the intra-year variations* in the discharges from the springs comprising the source for these water rights on the dates of appropriation for these water rights.” R. Vol. 3 at 498-99, ¶ 54 (emphasis added).

Notwithstanding this lack of foundation, the Director found that there is “no material injury to” water right #36-4013A, only after “*taking into account the seasonal variations* in spring flows that have existed since the date of appropriation for this right,” R. Vol. 3 at 518-19, ¶ 24, at 500, ¶ 61 (emphasis added).<sup>24</sup> Although the Director assumed a “seasonal variation” existed at the time of appropriation in 1955 to a degree that Clear Springs’ water right #36-4013A was not filled year round, he had no information or data to support that assumption. At hearing, the Director admitted he did not have any data to support his theory with respect to the water supplies available to Clear Springs at the time of appropriation: “the Snake River Farm diversion data that we have access to only goes back to 1988.” Tr. P. at 1150, lns. 11-12.

Contrary to the Director’s finding, the evidence presented at hearing refutes the “no-injury” finding for Clear Springs’ 1955 water right. The undisputed evidence shows that Clear Springs’ water right #36-4013A was filled, *at all times of the year*, from 1988 through 2001. See Ex. 156. The evidence further shows that the water right was only filled 4 months in 2004 and 2006, and only for 2 months in 2005. *Id.*, see also Ex. 158. This information was affirmed by Tim Luke, IDWR’s Water Distribution Section Manager, the staff member who compiled the information for the Exhibits 156 and 158. See Tr. P. at 2137, lns. 6-18. When questioned about

---

<sup>24</sup> On this basis, the Director ordered curtailment or mitigation for ground water rights junior to Clear Springs’ 1964 priority right, exempting ground water rights with priorities between Clear Springs’ 1955 and 1964 rights from administration. Ex. 138; see also R. Vol. 3 at 522-24.

Clear Springs' 1955 water right at hearing, Mr. Luke testified that the right was filled year-round between 1988 and 2001. *Id.*

Additional evidence further confirms that water right #36-4013A was met on a year-round basis at the time when it was originally appropriated. Specifically, Attachment A to the *Clear Springs Order* depicts a graph of the average annual spring flows in the Thousand Springs Area from the early 1900s through 2002. [R. Vol. 3 at 526](#). The graph shows that spring flows were higher in the mid-1950s than in the late 1980s through 2001 timeframe. *Id.* Accordingly, if Clear Springs' 1955 water right was filled on a year-round basis from 1988 to 2001, there is no question that it was filled year-round in 1955. From this information it is evident that Clear Springs' water right #36-4013A was filled on a year-round basis at the time it was appropriated.

Clear Springs' expert Dr. Charles Brockway further testified as to the spring discharges and the trend of those discharges prior to 1971-72. [Tr. P. at 1684-86](#). Dr. Brockway's opinion supports the evidence and the conclusion that water right #36-4013A was satisfied on a year-round basis at the time it was appropriated in 1955.

Upon review of this evidence, the Hearing Officer agreed:

In this case the evidence indicates that the Blue Lakes 1971 right and the Clear Springs 1955 right [water right #36-4013A] ***were filled throughout the year at the decreed levels at the times of appropriation*** ... Clear Springs' 1955 right was filled year round from 1988 through 2001 and filled for six months in 2004, two months in 2005, and four months in 2006. ***A portion of the declines is attributable to ground water pumping. Consequently, there should be a finding of injury to those water rights.***

[R. Vol. 16 at 3847](#) (emphasis added).

Notwithstanding the water measurement data presented at hearing (1988-2007), the Department's records for spring flows over time in the Thousand Springs area, testimony from

Dr. Brockway, and the Hearing Officer’s recommendation based upon this evidence, the Director refused to recognize any injury to Clear Springs’ 1955 water right.

The Director ignored the overwhelming evidence in the record, and determined that there was “insufficient evidence presented to find that water right no. 36-04013A was injured.” [R. Vol. 16 at 3955, ¶ 17.](#)<sup>25</sup> The Director’s *Final Order* merely refers to the former Director’s testimony at hearing and a 1973 memorandum which identifies measurements taken at the Snake River Farm in April 1971, and May, June, and July of 1972. *Id.*; see also [Ex. 128A](#). Yet, that 1973 memorandum actually shows that Clear Springs’ 1955 water right #36-4013A was being completely filled during the time of those measurements. The total flows measured in the specific months in 1971 and 1972 all exceed 89 cfs, which demonstrates that Clear Springs’ 1955 water right was being fully satisfied at those times. *See supra* at 12 (Clear Springs’ four senior priority water rights, including the 1955 water right, total 89 cfs). Contrary to the Director’s finding, the exhibit actually supports an injury finding to Clear Springs’ 1955 water.

Since the Director’s no-injury finding with respect to Clear Springs’ 1955 water right is not supported by any substantial evidence, it should be set aside.

### **B. The Seasonal Variation Condition Violates Idaho Law.**

Clear Springs relies on all of its water rights. Expectations of water availability are based on the historical flows – which included year-round flow sufficient to fill its water rights. This was confirmed by the Hearing Officer’s findings:

---

<sup>25</sup> Rather than make a technical recommendation to the Director, the Hearing Officer believed the “curtailment orders, and the replacement water plans in their stead, should fill the 1955 and 1971 rights.” [R. Vol. 16 at 3847](#). To the contrary, the *Clear Springs Order* was specific to Clear Springs’ 1964 water right, not its 1955 water right. [R. Vol. 3 at 523](#). Therefore, the Director had a duty to re-calculate his order and make the necessary findings regarding ordered curtailment or mitigation that would satisfy Clear Springs’ 1955 water right since injury was found by the Hearing Officer. This the Director failed to do.



**7. The Spring Users need an adequate supply of water every day of the year.** Trout propagation is a year round process. An adequate and predictable supply of water is necessary twenty-four hours a day. An interruption in the flow of water to the raceways would be devastating to the fish crop.

R. Vol. 16 at 3695 (emphasis in original).

However, the flows have declined. Importantly, “a portion of the declines is attributable to ground water pumping.” R. Vol. 16 at 3847. Any reductions in flow to Clear Springs’ senior water rights caused by junior priority ground water diversions constitute material injury.

The Director’s use of the “seasonal variation” condition drastically diminishes Clear Springs’ decreed diversion rate. As a result of the Director’s *ad hoc* “seasonal high” condition, Clear Springs is forced to suffer injury to its 1955 water right despite the fact the water right was historically satisfied year round. This action violates the Constitution’s required priority administration and the watermaster’s “clear legal duty” to distribute water according to the decrees. *See State v. Nelson*, 131 Idaho 12, 16 (1997) (“the watermaster is to distribute water according to the adjudication or decree”); *see also* I.C. § 42-607. Accordingly, the Director’s use of such a condition constitutes an unconstitutional application of the CMRs. *See* IDAHO CONST. art. XV, § 3; *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) (to “diminish one’s priority works an undeniable injury to the water right holder”); *AFRD #2*, 143 Idaho at 874, 878 (discussing review of an “as applied” challenge to determine constitutionality of Director’s actions in applying CMRs).

Again, none of Clear Springs’ decreed water rights have any “remarks” or “conditions” limiting the respective diversion rates by a “seasonal variation.” *See* Exs. 301-06. At hearing, the Director recognized the lack of such a condition on the decree but proceeded to “interpret” the partial decree to allow for such a limitation in administration: “But as you pointed out in an

earlier question, the decrees are silent about the seasonal variability, as would be expected.” [Tr. P. at 1152, Ins. 3-5](#). Apparently, the Director felt empowered by the fact that the decree did not contain any conditions on Clear Springs’ quantity or season of use elements, and began taking liberties in administering the rights. This violated long-standing Idaho law:

A water right is tantamount to a real property right ... *If the provisions define a water right, it is essential that the provisions are in the decree*, since the watermaster is to distribute water according to the adjudication or decree.

*Nelson*, 131 Idaho at 16 (emphasis added).

Clear Springs’ water rights provide “year-round” diversion rates that, pursuant to the Idaho Constitution and water distribution statutes, are entitled to protection from interference by junior ground water rights. *See, supra*. The Director had no authority to “re-adjudicate” Clear Springs’ decreed water rights through administration and include a “seasonal variation” condition to limit water delivery to Clear Springs’ 1955 water right, especially since the evidence at hearing demonstrated that water right #36-4013A was injured by junior priority ground water rights, [R. Vol. 16 at 3846-47](#). The Director’s actions therefore exceeded his statutory authority and were arbitrary, capricious and in violation of the law.

## **II. The Director Erroneously Excluded Certain Hydraulically Connected Junior Priority Ground Water Rights From Administration Based Upon the “10% Trim Line”, or Claimed Model Uncertainty.**

### **A. The Use of a “10% Trim Line” was Arbitrary and Capricious.**

It is undisputed that the ESPAM is the best available tool for addressing the interactions between ground and surface water on the Eastern Snake Plain. [R. Vol. 16 at 3704](#). It is also undisputed that the Model contains imperfections, due to the uncertainties inherent in the multiple data inputs to the model. *Id.* at 3702-03. The Hearing Officer spoke of these imperfections:

The former Director recognized that there had to be a margin of error in the application of the model and assigned a 10% error factor. This conclusion was based on ***the fact that the gauges used in water measurement have a plus or minus error factor of 10%. Some will be high; some will be low.***

*Id.* at 3703 (emphasis added). Stated differently, the impacts of junior ground water diversions on Clear Springs' senior water rights could be ***either higher or lower*** than that shown in the Model results.

In recognizing the inherent uncertainty with the model inputs, however, the Director used the uncertainty against Clear Springs, the senior water right holder, in favor of certain junior ground water right holders. This decision violated Idaho law and impermissibly shifted the burden of water shortage to Clear Springs, the senior water right holder. *See AFRD #2*, 143 Idaho at 874. The Director completely excluded hydraulically connected junior priority ground water rights from administration if their depletions to the particular spring reach were determined to be less than 10% of their total diversions. Amazingly, these junior ground water users were excluded from administration ***even though they were found to be contributing to the material injury suffered by Clear Springs' senior water rights.***

The Director's action flies in the face of the SRBA Court's "connected sources" general provision and the CMRs which do not excuse any class of junior water right holders in a connected source from administration. In addition, such a blanket exemption fails to account for the cumulative injury that those junior ground water rights have on the tributary springs. Using any model uncertainty against one water right for the benefit of another in administration is without a legal basis, particularly when the model input responsible for the "10%" number, the Snake River gage error, could be "high" or "low". Indeed, the Model could be *under-predicting* the depletion caused by junior ground water right holders. Exempting any junior water users

from administration, after it has been determined that they are materially injuring a senior water right, is arbitrary and capricious.

Clear Springs' expert, Dr. Charles Brockway, explained that using the 10% number as a standard confidence level, or "margin of error" for the Model was without scientific basis.

A thorough evaluation of the confidence limits on model simulation results has not been performed. . . . This discharge record rating [10%] cannot imply that the difference between any two discharge measurements (reach gain) on the same river will have exactly the same accuracy as a single measurement. Similarly, when daily discharge measurements are aggregated to calculate monthly or longer period total or average flows, the confidence limits  $\pm 10\%$  on the calculated monthly flow are different than for a single measurement. The confidence levels for model output are influenced by the accuracy of individual data utilized in calibrating and developing the model as well as internal algorithm structures in the model code. For the above reasons, the assumption that the simulated output of the model is  $\pm 10\%$  is not justified. It is simply not possible to assign confidence limits to the model output without further extensive evaluation.

[R. Supp. Vol. 7 at 4882.](#)

The Hearing Officer recognized this fact and confirmed that "Development of the model has not proceeded to the point of establishing a margin of error". [R. Vol. 16 at 3702](#). Although the Hearing Officer did not recommend setting aside the 10% used by the Director, he did explain that "Until a better factor is established, the Director in his best judgment may use 10%. The development of a more scientifically based error factor should be a priority in improvement of the model." [Id. at 3702-03](#).

Until a scientifically based confidence limit is established for the Model, the Director's use of a "10%" margin of error to exclude certain junior water rights from administration, is arbitrary and not supported by substantial and competent evidence. Although a confidence level in the Model may be developed at some point in the future, the Director did not have a basis to

use the “10%” number to the detriment of a senior water right holder such as Clear Springs in this case.

**B. Assuming the “10%” Model Uncertainty Was Appropriate, the Director Should Not Have Applied it to the Benefit or Detriment of Any Water Right Holder – Senior or Junior.**

If the Director is to apply any margin of error for the Model he should apply it equally against (or in favor of) all water users in the ESPA. Any 10% trim line, as applied against a senior surface water right holder for the benefit of certain junior ground water right holders, is not proper and contrary to the law of prior appropriation in Idaho. *See Jenkins*, 103 Idaho at 388. In essence, it allows out-of-priority diversions by certain junior ground water right holders to continue, to the detriment of senior surface water right holders even though the ground water diversion depletes and injures the senior’s water right. Such action unlawfully diminishes Clear Springs’ priority.

The 10% trim line is based on one input into the Model calibration and *has nothing to do with the elements of decreed junior ground water rights* and whether or not those rights are subject to priority administration in connected water sources like the ESPA and the tributary springs. It does not describe wells used to measure ground water levels across the ESPA or gages used to measure spring discharges in the Thousand Springs reach. Rather, the model is used to determine the impacts of the curtailment of diversions on reach gains. [R. Vol. 3 at 490, ¶ 12.](#)

The Ground Water Model was calibrated according to recorded ground water levels, spring discharges, reach gains and losses to the Snake River, and other stream flow measurements for the period from 1980 to 2002. [R. Vol. 16 at 491, ¶ 17.](#) The stream gages on the Snake River have uncertainties up to 10%, *id.* – meaning that a stream gage could be

measuring an amount of water that is 10% lower *or* higher than the actual flow in the river at the time of the measurement.

Under the law of prior appropriation, a senior water right should be afforded the benefits of uncertainty in water right administration. At a minimum, the Director should not use any “margin of error” or “confidence level” for the benefit of either junior or senior water rights. In summary, it should not be applied as a penalty against senior water users exercising their legal right to water right administration in times of shortage.

**C. The 10% Trim Line Violates the SRBA Court’s “Connected Sources” General Provision.**

Unless a water right contains a “separate source” provision on its decree, all water rights in Water District 130 are deemed legally connected for purposes of administration. *See Ex. 225*. Therefore water rights on all hydraulically connected water sources within the district must be administered by priority. The Director’s actions in excluding certain junior priority ground water rights from any administration – even though they are materially injuring Clear Springs’ senior water rights – is not supported by the law and violates the SRBA Court’s connected sources provisions contained on those water rights’ decrees. Accordingly, the Director’s use of the “10% trim line” against Clear Springs’ senior water right is arbitrary and should be set aside.

**D. The Director’s Use of a “10% Trim Line” Violates CMRs**

In addition to violating Idaho’s prior appropriation doctrine, the Director’s use of a “10% trim line” to exclude from administration junior priority water rights that were causing injury also violated the Department’s CMRs. As set forth in the Rules, the Director was obligated to administer all junior ground water rights causing injury “in accordance with the priorities of rights”. Rule 40.01.a. The “10% trim line” allowed the Director to exclude a certain class of junior ground water rights from being subject to curtailment or ordered mitigation. For example,

although a ground water user with a 1965 priority right that had an 11% depletive effect on the spring reach was subject to administration, a ground water user with a 1990 priority right that had a 9% depletive effect on the spring reach was excluded. The Rules do not allow this unlawful result that ignores the law of prior appropriation. If a junior ground water right contributes to the injury of a senior surface water right, the Director has an obligation to regulate the use of water under that junior ground water right. The Director failed to implement the clear provisions of the Rules by using the “10% trim line” to excuse certain junior ground water rights from administration. Accordingly, the decision should be set aside.

**III. The Director’s Use of a Percentage of Reach Gains to the Snake River to Reduce the Quantity of Water Required as Mitigation in Lieu of Curtailment Was Erroneous.**

In determining the amount of water that would arrive at Clear Springs’ Snake River Farm as a result of curtailment, the Director relied on USGS measurements for the Buhl Gage to Thousand Springs reach. [R. Vol. 3 at 491, ¶ 15](#). In doing so, the Director incorrectly concluded that the amount of water authorized under Clear Springs’ water rights (a total of 117.67 cfs) accounted for 7 percent of the measured reach gains in that spring reach. *Id.*

The Director’s decision is not supported by the evidence. That notwithstanding, the Hearing Officer determined that 6.9% should be used – based wholly on the testimony of Tim Luke, IDWR Water Distribution Section Manager. [R. Vol. 16 at 3710](#). The Hearing Officer’s decision was accepted in the *Final Order*. [R. Vol. 16 at 3958, ¶ 5](#).

During the hearing, Dr. Allan Wylie, testified that he was not comfortable with the percentage estimates of flows that would return to the spring complex. Specifically, Dr. Wylie testified as follows:

Q. [MR. SIMPSON] So, other than maybe having an understanding that maybe your methodology wasn't accepted, you don't understand how the 7 percent was reached.

A. [DR. WYLIE] I don't know – no.

Tr. P. at 1475, lns. 18-21.

Q. Would you agree that based upon your previous testimony regarding preferential pathways that are present in the aquifer, that not all of those springs that you identified in the Buhl to Thousand Springs reach would react in a similar manner?

A. Wouldn't react in a similar manner.

Q. Okay. And so would you then agree that – a linear analysis that is looking at the proportional increases between each spring is problematic?

A. It's not a rigorous analysis; that's correct.

Q. And by rigorous can you explain what you mean? I guess I'll say, is it one that you think you could defend?

A. No.

Tr. P. at 1476, lns. 9-22.

Dr. Wylie explained that big spring complexes like the ones supplying Clear Springs' water rights receive more water from the aquifer as ground water levels rise. Tr. P. at 846, lns. 8-25; & 847, lns. 1-9. Consequently, Clear Springs is likely to receive a greater percentage of the increase in water flows as ESPA levels rise than is suggested by the percentages used by the Director. *Id.* This was confirmed by testimony provided by Clear Springs' experts, Dr. Charles Brockway (R. Supp. Vol. 7 at 4882-83) and Eric Harmon (R. Supp. Vol. 7 at 4935-46).<sup>26</sup>

Since the Department's own expert (Dr. Wylie) could not support the percentage used in the *Clear Springs Order*, the Director was without a sufficient basis for the 6.9% number.

---

<sup>26</sup> Testimony was provided by Dr. Charles Brockway and Eric Harmon identified methods to calculate and analyze the percentage of spring flow that could be attributed to the spring complex that supplies water to Clear Springs' Snake River Farm. R. Supp. Vol. 7 at 4882-83 & 4935-46.



Moreover, on reconsideration the Hearing Officer recognized that the percentages used “are subject to question and it may be well that the percentage of reach gains to the Spring Users facilities will be greater, or perhaps less, than that forecast by the former Director.” [R. Vol. 16 at 3845](#). The Hearing Officer also recommended that IDWR should undertake “efforts to clarify the science” and utilize “more reliable percentages for gains to the Spring Users facilities” if they are developed. *Id.* Given the lack of reliability of the percentages used by the Director, as even admitted by his own expert, it was error for the Director to use the 6.9% in this matter. Until IDWR undertakes the effort recommended, the existing percentages are not justified and should not be used.

As provided in the CMRs, once the Director determines a senior water right is injured, he must either curtail the junior ground water rights or approve a Rule 43 “mitigation plan” to “prevent” injury to the senior. Rule 40.01. No curtailment was ordered in this case, and no Rule 43 “mitigation plan” was approved. Moreover, the consideration of the 6.9% was not consistent with the factors to be considered to “prevent” injury to Clear Springs’ water rights since Dr. Wylie recognized it was not defensible. *See e.g.*, Rule 43.03.e (mitigation plans must use “generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal”).

Therefore, the Director’s decision is not supported by substantial and competent evidence and should be set aside.

**IV. The Director’s “Replacement Water Plan Scheme” is Not Authorized by the Law and The Director Failed to Properly Account for and Require Junior Ground Water Right Holders to Perform Outstanding Mitigation Obligations.**

**A. No Regulations or Statutes Authorize a “Replacement Water Plan.”**

The Director has created a new mitigation scheme – the “replacement water plan” – that is not provided for by any statute or rule in Idaho. The Director used the “replacement water plan” (or “substitute curtailment” plan) as a means to avoid curtailing junior priority ground water rights causing material injury.

The CM Rules allow for “mitigation plans.” *See* CM Rule 43. However, a “replacement water plan” is not the same thing as a Rule 43 “mitigation plan.”<sup>27</sup> Yet, the Director unilaterally created this “replacement water plan,” which allows junior ground water users to continue full diversions while the Director conspicuously avoided the available procedures under Rule 43. As such, Clear Springs was denied the due process rights required by Idaho’s constitution and CM Rules and has been forced to suffer continued injuries to its senior surface water rights. Such actions are unconstitutional, exceeded the Director’s statutory authority, and are erroneous as a matter of law.

These actions also plainly conflict with the CM Rules. Under Rule 40, the Director, through the watermasters, is required to “regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users.” CM Rule 40.01.a. The Rule specifically provides that diversions under junior priority ground water rights are ***only allowed*** when a Rule 43 “mitigation plan” – ***not*** a “replacement water” or “substitute curtailment” plan – has been ***approved by the Director***. *See also* CM Rule 40.01.b.

---

<sup>27</sup> These two terms have been used interchangeably at times. However, they are not the same. A “mitigation plan” is a term of art specifically defined in the CMRs. *See* CM Rule 43. A “replacement water plan” by contrast, is nowhere to be found in the CMRs.

The failings of the “replacement water plan” scheme are further emphasized through the Director’s May 19, 2005 *Order* responding to Blue Lakes’ call. There, the Director allowed affected ground water right holders to “submit a plan or plans” to “provide Blue Lakes with a replacement water supply” or “forego (curtail) consumptive” use. [R Vol. 1 at 72 & 73](#). These “plans” were to be submitted by May 30, 2005, and the Director was to act on the “plans” by June 6, 2005. *See Id.* No provision was made to allow Blue Lakes to object, protest or comment on the submitted plans. The Director made no provision for notice or hearing and failed to provide any indication as to the factors that he would consider in determining whether or not the “replacement water plans” would mitigate the injury to Blue Lakes’ senior water rights. The Director used this newly-created process to eliminate the right of the senior water user to address the proposed plan at a meaningful time and in a meaningful manner.<sup>28</sup> Rather, the senior water user was forced to accept the Director’s findings – even though, as discussed herein, those findings were to prove wholly inadequate. This action violated Blue Lakes’ right to due process.

Likewise, the Director provided Clear Springs no due process whatsoever in considering and approving IGWA’s “replacement water plans.” Instead, the Director ordered and approved the plans over the objection of Clear Springs, allowing ground water right holders to divert their full rights out-of-priority to the injury of Clear Springs’ senior water rights. *See R. Vol. 5 at 814; R. Vol. 9 at 1903.*

---

<sup>28</sup> An administrative agency, like IDWR, is bound not only by its own rules and regulations governing administrative actions, but also is bound to ensure that its proceedings meet federal and state due process requirements. *See Withrow v. Larkin*, 42 U.S. 35, 45 (1975); *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979). Clear Springs’ senior surface water rights are protected private property rights under Idaho law and must be afforded the protection of due process before they may be taken or impaired by government action. *Nettleton v. Higginson*, 558 P.2d 1048 (Idaho 1977). Procedural due process required IDWR to provide Blue Lakes and Clear Springs with “an opportunity to be heard at a meaningful time and in a meaningful manner”. *Bradbury v. Idaho Judicial Council*, 28 P.3d 1006, 1015 (Idaho 2001).

In summary, the Director cannot “write-off” Rule 43 in conjunctive administration. The Director’s unilateral substitution of his “replacement water plan” concept for the CM Rule 43 “mitigation plan” is not supported by Idaho law. Therefore, the Director’s use of the “replacement water plan” concept exceeded his statutory authority and violated Idaho law.

**B. The Failings of the Replacement Water Plans are Illustrated by the Director’s Failure to Properly Account for and Require Junior Ground Water Right Holders to Perform Their Mitigation Obligations.**

The Director’s replacement water plan scheme has failed. Rather than providing water to mitigate for the material injuries caused by out-of-priority ground water diversions, this mitigation “shell game” has allowed junior water users to continue depleting the aquifer while Clear Springs is forced to administratively and judicially appeal replacement water plans that have, admittedly, been inadequate. To date, the Director has failed to issue any final decision relative to the 2005 or 2006 plans. Moreover, the 2007 plan was approved even though the Director recognized that IGWA failed to meet the ordered mitigation requirements. After viewing all the facts, the Hearing Officer recognized that the 2007 replacement plan was insufficient.

**3. The Director’s approval of a mitigation plan does not eliminate the need to meet the goals to be achieved by curtailment.** The fact that the Director approves a replacement water plan for a particular year does not eliminate the ultimate goal of providing the amount of water to the Spring Users set forth in the Orders. The value of the approval is that the rights of IGWA and the Spring Users are settled for that year and they may plan accordingly. But ***the ultimate obligation that would be met by curtailment remains and is carried over.*** This is relevant in this case, since it appears that ***the last approved mitigation plan falls short of the targeted goal.***

R. Vol. 16 at 3717 (emphasis added).

Despite the failure of the 2007 plan to deliver sufficient water to Clear Springs’ senior water rights, no curtailment was ordered. See Ex. 262. As summarized in the *Spring Users’*

*Joint Memorandum Regarding Exceptions to the Hearing Officer's Recommended Order*, the former Director and IDWR staff readily acknowledged the failure of junior priority ground water right holders to comply with the ordered mitigation from 2005 to 2007. *See R. Vol. 16 at 3882-3894*. In other words, it has been nearly four years and Clear Springs has yet to receive the mitigation originally required by the 2005 *Clear Springs Order*, where the Director determined that junior priority ground water rights were injuring Clear Springs' senior surface water rights.

**(a) The Department Recognized that the 2005 and 2006 Plans Failed; yet, the Director still refused to curtail junior ground water rights.**

Additional testimony at the hearing, from the former Director, Karl Dreher, and other Department staff, confirm the shortcomings of the Director's replacement water plan scheme. The former Director testified that no order was ever issued on the 2005 or 2006 replacement water plans. *Tr. P. at 1188-89*. Tim Luke confirmed the failure to issue an order. *See Tr. P. at 617-19*. Mr. Luke further testified that IGWA failed to meet the mitigation requirements for 2006. *Id. at 733, lns. 7-13*. Dr. Allan Wylie emphasized that the plan "wasn't going to be adequate particularly for Snake River Farm." *Tr. P. at 1496, lns. 20-24 & 1500, lns. 21-25, at 1501, ln. 1* (emphasis added).

This testimony confirms what the Director previously determined, in the June 15, 2007 *Curtailment Order*. There, the Director acknowledged that IGWA was short in 2006 by 6.5 cfs. *R. Vol. 7 at 1439, ¶ 15* ("In 2006, the second year of phased-in curtailment, it was determined by the Director that IGWA proposed 9.5 cfs (**6.5 cfs shortfall**) to the Buhl Gage to Thousand Springs reach of the Snake River.") (emphasis added).<sup>29</sup> Yet, while recognizing this shortfall, the Director reasoned that the Department "did not have rules under which to enforce the terms

---

<sup>29</sup> This recognition makes the Director's refusal to reconsider the 2007 curtailment requirements, in light of the delay in curtailment, even more arbitrary and capricious.

of its” 2005 orders! *Id.*<sup>30</sup> Contrary to the Director’s excuse, he was not free to disregard the Idaho Constitution and water distribution statutes and refuse to administer water rights in 2006 just because the CMRs were on appeal. Regardless, the Director had a duty to carryover the shortfall from 2006, 6.5 cfs, and add that the ground water users obligations for 2007. The former Director explained that if the ground water users’ did not meet their obligation in one year it would have to be carried over to the next. *Tr. P. 1259-1260*. The Hearing Officer confirmed this as well. *R. Vol. 16 at 3717*. Despite the additional obligations in 2007, the Director refused to require the appropriate level of mitigation and failed to administer the out-of-priority ground water rights.

**(b) As in Prior Years, The 2007 “Replacement Water Plan” Was Inadequate.**

As the Hearing Officer recognized, the 2007 “mitigation plan falls short of the targeted goal.” *See R. Vol. 16 at 3716*. Testimony from IDWR staff at the hearing and the Director’s own 2007 orders confirms the shortfalls and outstanding obligations that must be carried forward into 2008. Again, no such decision was made in the Director’s *Final Order* issued on July 11, 2008.

Mr. Luke testified that the 2007 plan resulted in a shortage of as much as 10.7 cfs. *Tr. P. at 621, lns. 13-18 & 737, lns. 11-22*. Dr. Wylie testified that he reviewed the plan, *Tr. P. at 827, lns. 1-4, 10-14*, and likewise found shortages of as high as 10.7 cfs at steady state conditions, *Id.*

---

<sup>30</sup> The Director misreads the CMR. Under these Rules, the Director is *required* to enforce the prior curtailment orders. *See* CM Rule 40.01 (mandating that, when material injury is determined, the Director “shall” curtail unless a “mitigation plan that has been approved by the Director” is in place); *see also R. Vol. 3 at 523-25* (indicating that junior diversions would be curtailed if they failed to meet the 2005 mitigation requirements). Indeed, as recognized by the Hearing Officer, a “failure in one year to meet the goals of curtailment requires carrying over that shortage to be made up in the following years,” and “the ultimate obligation that would be met by curtailment remains and is carried over”. *R. Vol. 16 at 3716*.

at 828, lns. 1-15 & *Id.* at 830, lns. 13-19 & *Id.* at 1501, lns. 20-23. After considering “additional mitigation,” the shortfall was reduced to 6.6 cfs. *Id.* at 1505, lns. 18-25.

Dr. Wylie testified about the analysis used to analyze the plan and testified that he changed his analysis from a steady state analysis to a transient analysis. *Id.* at 1506-1510. Speaking on this change, Dr. Wylie testified that the change was “very different.” *Id.* However, using the steady state analysis would have made it “very difficult” for IGWA to meet the mitigation requirements. *Id.* In fact, had the 2007 analysis been performed as required by the *Clear Springs Order*, “there would be a larger difference” (i.e. shortfall). *Id.* The fact that mitigation obligations may be “very difficult” for junior ground water users does not excuse administration or the Director’s duty to deliver water to Clear Springs’ senior water rights. Yet, the Director refused to perform his “clear legal duty” in this regard. *See Musser v. Higginson*, 125 Idaho 392, 395 (1994).

A final accounting of actions taken in 2005, 2006, and 2007 should have been resolved and included in a final order to accurately identify the outstanding obligations that need to be added to IGWA’s requirements for 2008. The Director’s failure to make an appropriate accounting of outstanding obligations and carry those forward for purposes of administration in 2005 through 2008 was contrary to the law, constitutes an abuse of discretion, and should be set aside.

#### **V. Phased-in Curtailment is Contrary to the Prior Appropriation Doctrine.**

Contrary to the demands of the prior appropriation doctrine, the Director’s phased-in curtailment scheme fails to provide curtailment or mitigation in a timely fashion. Stated another way, the concept authorizes rather than prevents injury to Clear Springs’ senior water right. Moreover, the scheme allows junior priority diversions to continue – even after the Director has

recognized that those diversions materially injure senior water rights – forcing senior water users to continue suffering material injury to their water rights for at least another five years.

Upon finding that hydraulically connected junior ground water rights were injuring Clear Springs’ senior surface water rights, [R. Vol. 3 at 520, ¶ 30](#), the Director had a “clear legal duty” to administer those junior priority ground water rights in compliance with Idaho’s prior appropriation doctrine. Yet, in applying CM Rule 40.01.a. The Director authorized the continued diversion of junior priority ground water rights specifically identified as materially injuring Clear Springs’ senior water rights! *See* [R. Vol. 3 at 523](#). The Director indicated that phased-in curtailment would be imposed in order to “lessen the economic impact of immediate and complete curtailment.” [R. Vol. 3 at 520, ¶ 32](#).

By authorizing the continued depletion of the aquifer and connected springs sources, the Director’s action violates Idaho’s water distribution statutes and Rule 40’s requirement to regulate junior priority ground water rights that are not covered by an approved Rule 43 mitigation plan “in accordance with the priorities of rights”. *See* I.C. § 42-607; CM Rule 40.01. Neither Idaho’s constitution nor its statutory provisions authorize the Director to provide junior water users with a “free pass” – for any period of time, let alone five years – to continue injuring a senior water right. Rather, Idaho’s prior appropriation doctrine, which has been described as “harsh,” mandates that injurious junior water rights either mitigate or curtail. The Jerome County District Court recognized as much in its *Order Dismissing Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition & Preliminary Injunction*, issued on June 12, 2007 in *IGWA, et. al. v. IDWR, et al.*, (5<sup>th</sup> Jud. Dist., Case No. CV 2007-526):

The doctrine of prior appropriation has been the law in Idaho for over 100 years. It is set forth in our State Constitution at Article 15 and in our statutes at



Idaho Code Section 42-106, which was enacted in 1899. Prior appropriation is a just, although sometimes harsh, method of administering water rights here in the desert, where the demand for water often exceeds water available for supply. The doctrine is just because it acknowledges the reality that in times of scarcity, if everyone were allowed to share in the resource, no one would have enough for their needs, and so first in time-first in right is the rule. The doctrine is harsh, because when it is applied, junior appropriators may face economic hardship or even ruin.

Tr. P. at 1, Ins. 8-21 (attached to District Court's *Order*) See Exhibit B (attached hereto).

The potential for economic impacts to junior priority water users is no reason to condone continued material injury to a senior. Moreover, the “phased-in” curtailment plan, by not completely mitigating the senior’s injury, allows for a type of administration where junior users are allowed “to share in the resource” for up to five years. This type of water right administration plainly violates Idaho’s prior appropriation doctrine. Furthermore, phased-in curtailment is untimely. In *AFRD #2*, the Idaho Supreme Court affirmed the need for timeliness in water administration:

We agree with the district court’s exhaustive analysis of Idaho’s Constitutional Convention and the court’s conclusion that the drafters intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right. Clearly, ***a timely response is required when a delivery call is made*** and water is necessary to respond to that call.

154 P.3d at 445 (emphasis added).

Notwithstanding this clear mandate, the Director continues to promote and utilize a failed phased-in mitigation scheme. Now, nearly four years later, Clear Springs’ senior water rights are still not being satisfied while connected ground water users continue to deplete the aquifer and tributary springs and pump their full rights out-of-priority. *See supra*. As discussed above, Clear Springs has not received the mitigation ordered due to failed plans submitted by affected junior ground water right holders in 2005, 2006, and 2007. The outstanding obligations were never carried over (as required), and no curtailment was ever ordered.

The phased-in curtailment approach has already been rejected by the Idaho Supreme Court. *See Kirk v. Bartholomew*, 3 Idaho 367 (1892). In *Kirk*, the Court reversed a district court’s decision to ignore the law of priority and distribute the waters of Raft River as “common property.” The Court refused to accept a system of water distribution that essentially allowed juniors to phase-in their curtailment based upon the amount of water available throughout the year:

The court then proceeded to distribute the water thus held to be common property, or the right to the use thereof a common right, regardless of priority of appropriation. The parties who appropriated water in 1870 are not given priority of right over appropriations made in 1887. The court failed to determine the priority of right of any of the parties litigant, but, on the unstatutory theory of the use of water being a common right, decrees, by a sliding scale, the amount of water which each shall be entitled to at specified periods of the irrigating season, and, by some abstruse mathematical calculation, reduces, as the supply decreases, one party's amount one-third and another two-thirds for the same dates ... The statutes of this state in regard to water rights evidently did not meet with the approval of the learned judge who tried this case. He brushes them aside, and evidently undertakes to make the judgment herein conform to his ideas of what the law ought to be, and in some future time to make it conform to a constitution and laws thereafter to be adopted and enacted. ‘As between appropriators, the one first in time is the first in right.’ The law is thus written. The law-making power, only, has the power to repeal or amend it. ***It cannot be repealed or amended by the court, but must be enforced as long as it remains the law, even if harsh and unjust.***

*Kirk*, 3 Idaho at 372 (emphasis added).

Idaho’s prior appropriation doctrine does not accept a phased-in curtailment scheme that ignores injury to senior water rights while it authorizes continued diversions by junior water rights. Consistent with the recognition that the priority doctrine is “harsh,” *see supra*, the Supreme Court recognized that “it is ***obvious*** that in times of shortage someone is not going to receive water.” *Nettleton v. Higginson*, 98 Idaho 87, 91 (1977) (emphasis added). Under the law, that “someone” is the junior appropriator(s) materially injuring the senior appropriator(s).

Assuming for argument's sake that the "phased-in" concept is permissible, it's clear the Director unlawfully applied the procedure in response to Clear Springs' call as well. Although Rule 40 states the Director can "phase-in" curtailment, the Director applied the "phased-in" curtailment provision in a manner that injures and prejudices Clear Springs. Rather than phasing-in curtailment as allowed by the Rule, the Director phased-in "mitigation". Stated another way, the Director's order "phased-out" injury, by allowing junior ground water users to only be responsible for mitigating a fraction of the determined injury. This was the case even though they continued depleting Clear Springs' water supplies with their out-of-priority diversions during the phased-in period. Even though the Director determined that Clear Springs was being materially injured in 2005, the Director's "phased-in" mitigation scheme prevented Clear Springs from being made whole since complete mitigation was not ordered. Stated another way, the Director failed to "phase-in" any actual curtailment and order additional mitigation to ensure Clear Springs' injury was completely mitigated. Consequently, the application of the Rule was contrary to Idaho law. Nowhere does Idaho law force a senior water right to suffer continued injury (even partially) while a junior water users divert their full rights.

Since Idaho's prior appropriation doctrine does not permit "phased-in" curtailment of junior water rights, the Director's action in permitting junior ground water right holders to "mitigate" (not even curtail) over a five-year period should be set aside.

**VI. An Undefined "Public Interest" Criteria Does Not Limit or Preclude Administration of Water Rights Pursuant to the Prior Appropriation Doctrine.**

The *Recommended Order* included a section regarding the "role of public interest in considering curtailment" relying upon the policy statements in CM Rule 20.03 and an undefined "public interest" term. [R. Vol. 16 at 3704-06](#). In that section, the Hearing Officer stated that priority administration is "subject to consideration of the public interest" and that the Director's

use of the “trim-line”, timing of curtailment and consideration of economic evidence were a part of that consideration. *Id.* at 3705. The Director affirmed this decision in the *Final Order*. Contrary to the Director’s decision, an undefined “public interest” criteria does not preclude or condition administration of water rights in Idaho.

The Legislature and IDWR have already specifically addressed the “public interest” criteria in specific statutes and in the factors for reviewing Rule 43 mitigation plans. The Legislature has defined the “local public interest” as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource”. I.C. § 42-202B(3). The local public interest is considered when a water right is first appropriated and later when a change to a right is sought through a transfer application. *See* I.C. § 42-203A(5)(e) & § 42-222(1). The Legislature has not used the criteria in the water distribution statutes of chapter 6, Title 42. Moreover, there is no “public interest” criteria in Idaho’s water code that further restricts a water right or limits its use in administration.

IDWR has also specifically addressed consideration of the “public interest” in the CMR. In the factors to be considered in determining whether or not a Rule 43 mitigation plan will prevent injury to a senior right, the CM Rules provide for consideration of “whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge”. CM Rule 43.03.j. As such, the consideration of the “public interest” in evaluating a Rule 43 mitigation plan is consistent with its treatment in the transfer context. *See* I.C. § 42-222(1); CM Rule 43.02.

Nothing in Rule 40 allows the Director to avoid or condition administration of water rights based upon the “public interest”. Instead, if a senior water right is being materially injured, as in Clear Springs’ case, the Director must either:

- a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district [and /or]
- b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

CM Rule 40.01.

The Rule does not allow the Director to disregard his “clear legal duty” to administer water rights just because he may subjectively believe that the “public interest” would be better served without administration.

In addition, the Director’s reliance upon the “hortatory policy statements” in Rule 20.03 do not excuse or preclude administration when a senior water right is injured.<sup>31</sup> [R. Vol. 16 at 3765-66](#). The Rule’s policy statement misquotes the Idaho Constitution, and thus cannot be used to support a “public interest” criteria that is not defined by the constitution.

CM Rule 20.03 states that the law of priority is “subject to conditions of reasonable use as the legislature may prescribe as provided in Article XV, Section 5.” The Rule misstates the meaning of that constitutional provision. Article XV, Section 5 ***only applies to separate water right appropriations “among” users within water delivery organizations***, not between the rights of unrelated water users not within an irrigation project:

Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in [Article XV, § 4], ***as among such persons, priority***

---

<sup>31</sup> In the *AFRD #2* case, the Department represented that “Rule 20.03 is, in name and substance, a ‘merely hortatory’ statement of general policy and purpose.” [R. Vol. 16 at 3766](#). In addition, the Department represented to the Court that the CMRs were constitutional because “they emphasize the importance of priority more than any other principle or policy”. *Id.*

*in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such 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 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.

IDAHO CONST., art. XV, § 5 (emphasis added).

Both Section 4 and Section 5 of Article XV plainly apply “among” those persons *within* water delivery organizations such as canal companies and irrigation districts where persons have settled the land with “the view of receiving water for agricultural purposes, under a sale, rental or distribution thereof . . .”<sup>32</sup> *Id.* The Rule’s policy statement and the Director’s use of the cited provision in his decision ignores the controlling condition that applies “as among such persons” within those irrigation projects and purports to expand the language and make it applicable to all other water rights, contrary to the constitution’s plain language. Nothing implies that any “reasonable limitations” the Legislature might prescribe in that context apply to junior appropriators that are not part of the irrigation project. Moreover, the only statutory law that the Legislature has passed to address this provision is Idaho Code § 42-904, which essentially affirms that the prior appropriation doctrine applies as between different classes of users within an irrigation project.<sup>33</sup>

Contrary to misstatement in the Rule and the Director’s decision, the Idaho Supreme Court has expressly recognized this section as limited to:

---

<sup>32</sup> See *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 604 (1904) (Sullivan, C.J., *dissenting*) (“The provisions of said section 5 contemplate that ditch owners must furnish water to the extent of their ability to all settlers under their ditches in the numerical order of their settlements or improvements, thus contemplating that the rental right to the use of such waters should be given to the settlers in accordance with the priority of their settlement or improvement, carrying out the theory that the first settler in time was first in right.”).

<sup>33</sup> See *Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 543 (1963).

The framers of our constitution evidently meant to distinguish settlers who procure a water right under a sale, rental or distribution from that class of water users who procure their water right by appropriation and diversion directly from a natural stream. The constitutional convention accordingly inserted secs. 4 and 5, in art. 15, of the constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes to be used “under a sale, rental or distribution” ***and to point out the respective rights and priorities of the users of such waters.*** It was clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes. And so sec. 4 is dealing chiefly with the ditch or canal owner, while sec. 5 is dealing chiefly with the subject of priorities ***as between water users and consumers who have settled under these ditches and canals*** and who expect to receive water under a “sale, rental or distribution thereof.” The two sections must therefore be read and construed together.

...

“Mr. Claggett: Mr. Chairman, both of these sections [4 and 5] apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are ‘appropriated or used for agricultural purposes under a sale, rental, or distribution.’

*Mellen v. Great Western Sugar Beet Co.*, 21 Idaho 353, 359 & 361 (1912) (emphasis added).

Article XV, Section 5 therefore only applies as among users within an irrigation project and cannot be construed to imply some undefined “public interest” criteria limits or precludes administration of other water rights. Neither the Director nor the Department are authorized to expand its meaning and create a new “condition” between Clear Springs’ senior surface water rights and junior ground water right holders through some undefined “public interest” criteria. In Idaho, where a “constitutional provision is clear, the Court must follow the law as written and, thus, when the language is unambiguous, there is no occasion for rules of construction.” *Hayes v. Kingston*, 140 Idaho 551, 553 (2004).

CM Rule 20.03 also claims that policy considerations include “optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution”

(emphasis added). Although the Rule references that provision of the constitution, it is misplaced and out of context. Importantly, the use of the term “public interest” in the constitution is specific as to the Idaho Water Resource Board’s “power to formulate and implement a state water plan for optimum development of water resources in the public interest.” See IDAHO CONST., art XV, § 7 (emphasis added). Accordingly, the “public interest” prescribed in Article XV, Section 7 applies only to the Water Board’s duty to prepare and implement a “state water plan”, not to conjunctive administration. The reference in Rule 20 omits the important qualification relative to the state water plan that is contained in the clear language of the constitution. Consequently, the Director has no authority to claim that a “public interest” reference, for purposes of the Water Board’s mandate to formulate a state water plan, somehow applies to water right administration. As such, the Director’s application of the policy statements in Rule 20 are not supported by the law.

The Rules cannot change the meaning of the Idaho Constitution or infer an undefined “public interest” criteria into administration, particularly where that term has already been defined by the Idaho Legislature and included for specific statutes pertaining to water right appropriation and transfer. Therefore, the Director’s use of a “public interest” criteria to preclude or condition administration of Clear Springs’ water rights in this matter exceeded his statutory authority and therefore violated Idaho law.

## **CONCLUSION**

Clear Springs’ senior surface water rights continue to suffer injury due to junior priority ground water diversions. The Director’s failed water right administration scheme, over the last four years, has not provided water due to Clear Springs’ senior water rights under Idaho law. Notwithstanding the clear and overwhelming evidence, the Director continues to refuse



administration to Clear Springs' 1955 water right. Furthermore, even though the Director determined that Clear Springs' other senior surface water rights were being injured, the Director has refused to curtail any junior priority ground water rights since that time – even though the submitted “replacement water plans” have all failed to provide the required mitigation. Since those plans have admittedly failed and have not provided adequate mitigation, Clear Springs' senior rights continue to suffer from the resulting water shortages. The Director's actions constitute an unconstitutional application of the CMRs in this regard.

Moreover, the Director's “clear legal duty” to administer water rights consistent with Clear Springs' partial decrees and Idaho's prior appropriation doctrine, has been turned on its head by the newly created “seasonal variation” condition, the “10% trim line,” an unjustified percentage reach gain and a “replacement water plan” scheme without any statutory or regulatory justification. Indeed, the Director has exceeded his statutory authority and violated Idaho law. Accordingly, to the extent that the Director's *Final Order* violates Idaho law, it must be set aside.

RESPECTFULLY submitted, this 9<sup>th</sup> day of January, 2009.

**BARKER ROSHOLT & SIMPSON LLP**

  
\_\_\_\_\_  
John K. Simpson  
Travis L. Thompson  
Paul L. Arrington

Attorneys for Clear Springs Foods, Inc.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9<sup>th</sup> day of January, 2009, I served true and correct copies of the **PETITIONER CLEAR SPRINGS FOODS, INC.'S OPENING BRIEF** upon the following by the method indicated:

Deputy Clerk  
Gooding County District Court  
624 Main St.  
P.O. Box 27  
Gooding, ID 83330

☐ U.S. Mail, Postage Prepaid  
☒ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☐ Email

*Courtesy Copy to Judge's Chambers:*  
Snake River Basin Adjudication  
253 3<sup>rd</sup> Ave. N.  
P.O. Box 2707  
Twin Falls, ID 83303-2707

☐ U.S. Mail, Postage Prepaid  
☒ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☐ Email

Phillip J. Rassier  
Chris Bromley  
Deputy Attorneys General  
Idaho Department of Water Resources  
P.O. Box 83720  
Boise, Idaho 83720-0098  
[phil.rassier@idwr.idaho.gov](mailto:phil.rassier@idwr.idaho.gov)  
[chris.bromley@idwr.idaho.gov](mailto:chris.bromley@idwr.idaho.gov)

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

Randy Budge  
Candice M. McHugh  
**RACINE OLSON**  
P.O. Box 1391  
Pocatello, Idaho 83204-1391  
[rcb@racinelaw.net](mailto:rcb@racinelaw.net)  
[cmm@racinelaw.net](mailto:cmm@racinelaw.net)

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

Mike Creamer  
Jeff Fereday  
**GIVENS PURSLEY**  
P.O. Box 2720  
Boise, Idaho 83701-2720  
[jcf@givenspursley.com](mailto:jcf@givenspursley.com)  
[mcc@givenspursley.com](mailto:mcc@givenspursley.com)

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

Michael S. Gilmore  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010  
[Mike.gilmore@ag.idaho.gov](mailto:Mike.gilmore@ag.idaho.gov)

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

J. Justin May  
**May Sudweeks & Browning LLP**  
1419 W. Washington  
Boise, Idaho 83702  
[jmay@may-law.com](mailto:jmay@may-law.com)

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

Robert E. Williams  
**Fredericksen Williams Meservy**  
P.O. Box 168  
Jerome, Idaho 83338-0168  
[rewilliams@cableone.net](mailto:rewilliams@cableone.net)

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

Daniel V. Steenson  
Charles L. Honsinger  
S. Bryce Farris  
**Ringert Law, Chartered**  
P.O. Box 2773  
Boise, Idaho 83701-2773  
[dvs@ringertlaw.com](mailto:dvs@ringertlaw.com)  
[clh@ringertlaw.com](mailto:clh@ringertlaw.com)  
[sbf@ringertlaw.com](mailto:sbf@ringertlaw.com)

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

  
Travis L. Thompson



# Exhibit A

# ***Table of Contents***

---

## **37.03.11 - Rules for Conjunctive Management of Surface and Ground Water Resources**

000. Legal Authority (Rule 0). .....	2
001. Title And Scope (Rule 1). .....	2
002. Written Interpretations (Rule 2). .....	2
003. Administrative Appeals (Rule 3). .....	2
004. Severability (Rule 4). .....	2
005. Other Authorities Remain Applicable (Rule 5). .....	2
006. -- 009. (Reserved). .....	2
010. Definitions (Rule 10). .....	2
011. -- 019. (Reserved). .....	4
020. General Statements Of Purpose And Policies For Conjunctive Management Of Surface And Ground Water Resources (Rule 20). .....	4
021. -- 029. (Reserved). .....	5
030. Responses To Calls For Water Delivery Made By The Holders Of Senior-Priority Surface Or Ground Water Rights Against The Holders Of Junior-Priority Ground Water Rights Within Areas Of The State Not In Organized Water Districts Or Within Water Districts Where Ground Water Regulation Has Not Been Included In The Functions Of Such Districts Or Within Areas That Have Not Been Designated Ground Water Management Areas (Rule 30). .....	5
031. Determining Areas Having A Common Ground Water Supply (Rule 31). .....	7
032. -- 039. (Reserved). .....	8
040. Responses To Calls For Water Delivery Made By The Holders Of Senior-Priority Surface Or Ground Water Rights Against The Holders Of Junior-Priority Ground Water Rights From Areas Having A Common Ground Water Supply In An Organized Water District (Rule 40). .....	8
041. Administration Of Diversion And Use Of Water Within A Ground Water Management Area (Rule 41). .....	9
042. Determining Material Injury And Reasonableness Of Water Diversions (Rule 42). .....	10
043. Mitigation Plans (Rule 43). .....	11
044. -- 049. (Reserved). .....	12
050. Areas Determined To Have A Common Ground Water Supply (Rule 50). .....	12
051. -- 999. (Reserved). .....	12

**IDAPA 37  
TITLE 03  
CHAPTER 11**

**37.03.11 - RULES FOR CONJUNCTIVE MANAGEMENT OF SURFACE  
AND GROUND WATER RESOURCES**

**000. LEGAL AUTHORITY (RULE 0).**

These rules are promulgated pursuant to Chapter 52, Title 67, Idaho Code, the Idaho Administrative Procedure Act, and Section 42-603, Idaho Code, which provides that the Director of the Department of Water Resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. These rules are also issued pursuant to Section 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department. (10-7-94)

**001. TITLE AND SCOPE (RULE 1).**

These rules may be cited as “Rules for Conjunctive Management of Surface and Ground Water Resources.” The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply. It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently. (10-7-94)

**002. WRITTEN INTERPRETATIONS (RULE 2).**

In accordance with Section 67-5201(19)(b)(iv), Idaho Code, the Department of Water Resources does not have written statements that pertain to the interpretation of the rules of this chapter, or to the documentation of compliance with the rules of this chapter. (10-7-94)

**003. ADMINISTRATIVE APPEALS (RULE 3).**

Appeals may be taken pursuant to Section 42-1701A, Idaho Code, and the department’s Rules of Procedure, IDAPA 37.01.01. (10-7-94)

**004. SEVERABILITY (RULE 4).**

The rules governing this chapter are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance is declared invalid, that invalidity does not affect the validity of any remaining portion of this chapter. (10-7-94)

**005. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 5).**

Nothing in these rules shall limit the Director’s authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law. (10-7-94)

**006. -- 009. (RESERVED).**

**010. DEFINITIONS (RULE 10).**

For the purposes of these rules, the following terms will be used as defined below. (10-7-94)

**01. Area Having a Common Ground Water Supply.** A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. (Section 42-237a.g., Idaho Code) (10-7-94)

**02. Artificial Ground Water Recharge.** A deliberate and purposeful activity or project that is performed in accordance with Section 42-234(2), Idaho Code, and that diverts, distributes, injects, stores or spreads water to areas from which such water will enter into and recharge a ground water source in an area having a common ground water supply. (10-7-94)

**03. Conjunctive Management.** Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground



water supply. (10-7-94)

**04. Delivery Call.** A request from the holder of a water right for administration of water rights under the prior appropriation doctrine. (10-7-94)

**05. Department.** The Department of Water Resources created by Section 42-1701, Idaho Code. (10-7-94)

**06. Director.** The Director of the Department of Water Resources appointed as provided by Section 42-1801, Idaho Code, or an employee, hearing officer or other appointee of the Department who has been delegated to act for the Director as provided by Section 42-1701, Idaho Code. (10-7-94)

**07. Full Economic Development of Underground Water Resources.** The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42. (10-7-94)

**08. Futile Call.** 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. (10-7-94)

**09. Ground Water Management Area.** Any ground water basin or designated part thereof as designated by the Director pursuant to Section 42-233(b), Idaho Code. (10-7-94)

**10. Ground Water.** Water under the surface of the ground whatever may be the geological structure in which it is standing or moving as provided in Section 42-230(a), Idaho Code. (10-7-94)

**11. Holder of a Water Right.** The legal or beneficial owner or user pursuant to lease or contract of a right to divert or to protect in place surface or ground water of the state for a beneficial use or purpose. (10-7-94)

**12. Idaho Law.** The constitution, statutes, administrative rules and case law of Idaho. (10-7-94)

**13. Junior-Priority.** A water right priority date later in time than the priority date of other water rights being considered. (10-7-94)

**14. Material Injury.** Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42. (10-7-94)

**15. Mitigation Plan.** A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply. (10-7-94)

**16. Person.** Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character. (10-7-94)

**17. Petitioner.** Person who asks the Department to initiate a contested case or to otherwise take action that will result in the issuance of an order or rule. (10-7-94)

**18. Reasonable Ground Water Pumping Level.** A level established by the Director pursuant to Sections 42-226, and 42-237a.g., Idaho Code, either generally for an area or aquifer or for individual water rights on a case-by-case basis, for the purpose of protecting the holders of senior-priority ground water rights against unreasonable lowering of ground water levels caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law. (10-7-94)

**19. Reasonably Anticipated Average Rate of Future Natural Recharge.** The estimated average annual volume of water recharged to an area having a common ground water supply from precipitation, underflow from tributary sources, and stream losses and also water incidentally recharged to an area having a common ground water supply as a result of the diversion and use of water for irrigation and other purposes. The estimate will be based on available data regarding conditions of diversion and use of water existing at the time the estimate is made and may vary as these conditions and available information change. (10-7-94)

**20. Respondent.** Persons against whom complaints or petitions are filed or about whom investigations are initiated. (10-7-94)

**21. Senior-Priority.** A water right priority date earlier in time than the priority dates of other water rights being considered. (10-7-94)

**22. Surface Water.** Rivers, streams, lakes and springs when flowing in their natural channels as provided in Sections 42-101 and 42-103, Idaho Code. (10-7-94)

**23. Water District.** An instrumentality of the state of Idaho created by the Director as provided in Section 42-604, Idaho Code, for the purpose of performing the essential governmental function of distribution of water among appropriators under Idaho law. (10-7-94)

**24. Watermaster.** A person elected and appointed as provided in Section 42-605, and Section 42-801, Idaho Code, to distribute water within a water district. (10-7-94)

**25. Water Right.** The legal right to divert and use or to protect in place the public waters of the state of Idaho where such right is evidenced by a decree, a permit or license issued by the Department, a beneficial or constitutional use right or a right based on federal law. (10-7-94)

**011. -- 019. (RESERVED).**

**020. GENERAL STATEMENTS OF PURPOSE AND POLICIES FOR CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER RESOURCES (RULE 20).**

**01. Distribution of Water Among the Holders of Senior and Junior-Priority Rights.** These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply. (10-7-94)

**02. Prior Appropriation Doctrine.** These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law. (10-7-94)

**03. Reasonable Use of Surface and Ground Water.** These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An 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 of water as described in this rule. (10-7-94)

**04. Delivery Calls.** These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued. (10-7-94)



**05. Exercise of Water Rights.** These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made. (10-7-94)

**06. Areas Having a Common Ground Water Supply.** These rules provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in incorporating the water rights within such areas into existing water districts or creating new districts as provided in Section 42-237a.g., and Section 42-604, Idaho Code, or designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code. (10-7-94)

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

**08. Reasonably Anticipated Average Rate of Future Natural Recharge.** These rules provide for administration of the use of ground water resources to achieve the goal that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge. (Section 42-237a.g., Idaho Code) (10-7-94)

**09. Saving of Defenses.** Nothing in these rules shall affect or in any way limit any person's entitlement to assert any defense or claim based upon fact or law in any contested case or other proceeding. (10-7-94)

**10. Wells as Alternate or Changed Points of Diversion for Water Rights from a Surface Water Source.** Nothing in these rules shall prohibit any holder of a water right from a surface water source from seeking, pursuant to Idaho law, to change the point of diversion of the water to an inter-connected area having a common ground water supply. (10-7-94)

**11. Domestic and Stock Watering Ground Water Rights Exempt.** A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury. (10-7-94)

**021. -- 029. (RESERVED).**

**030. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS WITHIN AREAS OF THE STATE NOT IN ORGANIZED WATER DISTRICTS OR WITHIN WATER DISTRICTS WHERE GROUND WATER REGULATION HAS NOT BEEN INCLUDED IN THE FUNCTIONS OF SUCH DISTRICTS OR WITHIN AREAS THAT HAVE NOT BEEN DESIGNATED GROUND WATER MANAGEMENT AREAS (RULE 30).**

**01. Delivery Call (Petition).** When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at least, the following in addition to the information required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 230: (10-7-94)

**a.** A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water. (10-7-94)

**b.** The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records. (10-7-94)

**c.** All information, measurements, data or study results available to the petitioner to support the claim of material injury. (10-7-94)

**d.** A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated. (10-7-94)

**02. Contested Case.** The Department will consider the matter as a petition for contested case under the Department's Rules of Procedure, IDAPA 37.01.01. The petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 203. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter. (10-7-94)

**03. Informal Resolution.** The Department may initially consider the contested case for informal resolution under the provisions of Section 67-5241, Idaho Code, if doing so will expedite the case without prejudicing the interests of any party. (10-7-94)

**04. Petition for Modification of an Existing Water District.** In the event the petition proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, and the water rights have been adjudicated, the Department may consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure. (10-7-94)

**05. Petition for Creation of a New Water District.** In the event the petition proposes regulation of ground water rights from a ground water source or conjunctively with surface water rights within an area having a common ground water supply which is not in an existing water district, and the water rights have been adjudicated, the Department may consider such to be a petition for creation of a new water district and notice of proposed creation of a water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

**06. Petition for Designation of a Ground Water Management Area.** In the event the petition proposes regulation of ground water rights from an area having a common ground water supply within which the water rights have not been adjudicated, the Department may consider such to be a petition for designation of a ground water management area pursuant to Section 42-233(b), Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

**07. Order.** Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions: (10-7-94)

**a.** Deny the petition in whole or in part; (10-7-94)

**b.** Grant the petition in whole or in part or upon conditions; (10-7-94)

**c.** Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district; (10-7-94)

**d.** Incorporate an area having a common ground water supply into an organized water district following the procedures of Section 42-604, Idaho Code, provided that the ground water rights that would be incorporated into the water district have been adjudicated relative to the rights already encompassed within the district; (10-7-94)

**e.** Create a new water district following the procedures of Section 42-604, Idaho Code, provided that

the water rights to be included in the new water district have been adjudicated; (10-7-94)

**f.** Determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and respondents and initiate such adjudication pursuant to Section 42-1406, Idaho Code; (10-7-94)

**g.** By summary order as provided in Section 42-237 a.g., Idaho Code, prohibit or limit the withdrawal of water 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, or would affect the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. The Director will take into consideration the existence of any approved mitigation plan before issuing any order prohibiting or limiting withdrawal of water from any well; or (10-7-94)

**h.** Designate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights. (10-7-94)

**08. Orders for Interim Administration.** For the purposes of Rule Subsections 030.07.d. and 030.07.e., an outstanding order for interim administration of water rights issued by the court pursuant to Section 42-1417, Idaho Code, in a general adjudication proceeding shall be considered as an adjudication of the water rights involved. (10-7-94)

**09. Administration Pursuant to Rule 40.** Upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40. (10-7-94)

**10. Administration Pursuant to Rule 41.** Upon the designation of a ground water management area, the diversion and use of water within such area shall be administered in accordance with the priorities of the various water rights as provided in Rule 41. (10-7-94)

### **031. DETERMINING AREAS HAVING A COMMON GROUND WATER SUPPLY (RULE 31).**

**01. Director to Consider Information.** The Director will consider all available data and information that describes the relationship between ground water and surface water in making a finding of an area of common ground water supply. (10-7-94)

**02. Kinds of Information.** The information considered may include, but is not limited to, any or all of the following: (10-7-94)

**a.** Water level measurements, studies, reports, computer simulations, pumping tests, hydrographs of stream flow and ground water levels and other such data; and (10-7-94)

**b.** The testimony and opinion of expert witnesses at a hearing on a petition for expansion of a water district or organization of a new water district or designation of a ground water management area. (10-7-94)

**03. Criteria for Findings.** A ground water source will be determined to be an area having a common ground water supply if: (10-7-94)

**a.** The ground water source supplies water to or receives water from a surface water source; or (10-7-94)

**b.** Diversion and use of water from the ground water source will cause water to move from the surface

water source to the ground water source. (10-7-94)

c. Diversion and use of water from the ground water source has an impact upon the ground water supply available to other persons who divert and use water from the same ground water source. (10-7-94)

**04. Reasonably Anticipated Average Rate of Future Natural Recharge.** The Director will estimate the reasonably anticipated average rate of future natural recharge for an area having a common ground water supply. Such estimates will be made and updated periodically as new data and information are available and conditions of diversion and use change. (10-7-94)

**05. Findings.** The findings of the Director shall be included in the Order issued pursuant to Rule Subsection 030.07. (10-7-94)

**032. -- 039. (RESERVED).**

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

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

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

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

**02. Regulation of Uses of Water by Watermaster.** The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in Section 42-604, Idaho Code, and under the following procedures: (10-7-94)

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source. (10-7-94)

b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director. (10-7-94)

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority. (10-7-94)

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by Section 42-606, Idaho Code. (10-7-94)

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated. (10-7-94)

**03. Reasonable Exercise of Rights.** In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste. (10-7-94)

**04. Actions of the Watermaster Under a Mitigation Plan.** Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan. (10-7-94)

**05. Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective.** Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights. (10-7-94)

**06. Collection of Assessments Within Water District.** Where a mitigation plan has been approved, the watermaster of the water district shall include the costs of administration of the plan within the proposed annual operation budget of the district; and, upon approval by the water users at the annual water district meeting, the water district shall provide for the collection of assessment of ground water users as provided by the plan, collect the assessments and expend funds for the operation of the plan; and the watermaster shall maintain records of the volumes of water or other compensation made available by the plan and the disposition of such water or other compensation. (10-7-94)

**041. ADMINISTRATION OF DIVERSION AND USE OF WATER WITHIN A GROUND WATER MANAGEMENT AREA (RULE 41).**

**01. Responding to a Delivery Call.** When a delivery call is made by the holder of a senior-priority ground water right against holders of junior-priority ground water rights in a designated ground water management area alleging that the ground water supply is insufficient to meet the demands of water rights within all or portions of the ground water management area and requesting the Director to order water right holders, on a time priority basis, to cease or reduce withdrawal of water, the Director shall proceed as follows: (10-7-94)

a. The petitioner shall be required to submit all information available to petitioner on which the claim is based that the water supply is insufficient. (10-7-94)

b. The Director shall conduct a fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area. (10-7-94)

**02. Order.** Following the hearing, the Director may take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Find that the water supply of the ground water management area is insufficient to meet the

demands of water rights within all or portions of the ground water management area and order water right holders on a time priority basis to cease or reduce withdrawal of water, provided that the Director shall consider the expected benefits of an approved mitigation plan in making such finding. (10-7-94)

**d.** Require the installation of measuring devices and the reporting of water diversions pursuant to Section 42-701, Idaho Code. (10-7-94)

**03. Date and Effect of Order.** Any order to cease or reduce withdrawal of water will be issued prior to September 1 and shall be effective for the growing season during the year following the date the order is given and until such order is revoked or modified by further order of the Director. (10-7-94)

**04. Preparation of Water Right Priority Schedule.** For the purposes of the Order provided in Rule Subsections 041.02 and 041.03, the Director will utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule. (10-7-94)

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

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

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

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

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

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

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

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

**g.** The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system. (10-7-94)

**h.** The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority. (10-7-94)

**02. Delivery Call for Curtailment of Pumping.** The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan. (10-7-94)

**043. MITIGATION PLANS (RULE 43).**

**01. Submission of Mitigation Plans.** A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

- a.** The name and mailing address of the person or persons submitting the plan. (10-7-94)
- b.** Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)
- c.** A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)
- d.** Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

**02. Notice and Hearing.** Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

**03. Factors to Be Considered.** Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

- a.** Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)
- b.** Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)
- c.** Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)
- d.** Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)
- e.** Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)
- f.** Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)
- g.** Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)
- h.** The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)
- i.** Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or

time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

**j.** Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

**k.** Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

**l.** Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

**m.** Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

**n.** A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

**o.** Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

**044. -- 049. (RESERVED).**

**050. AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY (RULE 50).**

**01. Eastern Snake Plain Aquifer.** The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. (10-7-94)

**a.** The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River. (10-7-94)

**b.** The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply. (10-7-94)

**c.** The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer will be estimated in any order issued pursuant to Rule 30. (10-7-94)

**d.** The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area. (10-7-94)

**051. -- 999. (RESERVED).**



# Subject Index

## A

Actions of the Watermaster Under a Mitigation Plan, Calls for Water Delivery Made by The Holders of Senior-Priority Surface or Ground Water Rights 9  
Administration Of Diversion & Use Of Water Within A Ground Water Management Area 9  
Administration Pursuant to Rule 40, Senior-Priority Water Right 7  
Administration Pursuant to Rule 41, Senior-Priority Water Right 7  
Area Having a Common Ground Water Supply 2  
Areas Determined To Have A Common Ground Water Supply 12  
Areas Having a Common Ground Water Supply, Conjunctive Management of Surface/Ground Water 5  
Artificial Ground Water Recharge 2

## C

Collection of Assessments Within Water District, Calls for Water Delivery Made by The Holders of Senior-Priority Surface or Ground Water Rights 9  
Conjunctive Management 2  
Contested Case, Senior-Priority Water Right 6  
Criteria for Findings, Areas Having Common Ground Water Supply 7  
Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan is Not Effective, Calls for Water Delivery Made by The Holders of Senior-Priority Surface or Ground Water Rights 9

## D

Date & Effect of Order, Diversion & Use of Water Within a Ground Water Management Area 10  
Definitions, IDAPA 37.03.11, Rules For Conjunctive Management Of Surface & Ground Water Resources 2  
Delivery Call 3  
Delivery Call (Petition), Senior-Priority Water Right 5  
Delivery Call for Curtailment of Pumping, Determining Material Injury & Reasonableness of Water Diversions 10  
Delivery Calls, Conjunctive Management of Surface/Ground Water 4  
Determining Areas Having A Common

Ground Water Supply 7  
Determining Material Injury & Reasonableness Of Water Diversions 10  
Director to Consider Information, Areas Having Common Ground Water Supply 7  
Distribution of Water Among the Holders of Senior & Junior-Priority Rights 4  
Domestic & Stock Watering Ground Water Rights Exempt, Conjunctive Management of Surface/Ground Water 5

## E

Eastern Snake Plain Aquifer, Areas Determined to Have a Common Ground Water Supply 12  
Exercise of Water Rights, Conjunctive Management of Surface/Ground Water 5

## F

Factors to be Considered, Mitigation Plans 11  
Factors, Determining Material Injury & Reasonableness of Water Diversions 10  
Full Economic Development of Underground Water Resources 3  
Futile Call 3

## G

General Statements Of Purpose & Policies For Conjunctive Management Of Surface & Ground Water Resources 4  
Ground Water 3  
Ground Water Management Area 3

## H

Holder of a Water Right 3

## I

Informal Resolution, Senior-Priority Water Right 6

## J

Junior-Priority 3

## K

Kinds of Information, Areas Having Common Ground Water Supply 7

## M

Material Injury 3  
Mitigation Plan 3  
Mitigation Plans 11

## N

Notice & Hearing, Mitigation Plans 11

## O

Order, Senior-Priority Water Right 6  
Orders for Interim Administration, Senior-Priority Water Right 7

## P

Petition for Creation of a New Water District, Senior-Priority Water Right 6  
Petition for Designation of a Ground Water Management Area, Senior-Priority Water Right 6  
Petition for Modification of an Existing Water District, Senior-Priority Water Right 6  
Petitioner 3  
Preparation of Water Right Priority Schedule, Diversion & Use of Water Within a Ground Water Management Area 10  
Prior Appropriation Doctrine, Conjunctive Management of Surface/ Ground Water 4

## R

Reasonable Exercise of Rights, Calls for Water Delivery Made by The Holders of Senior-Priority Surface or Ground Water Rights 9  
Reasonable Ground Water Pumping Level 3  
Reasonable Use of Surface & Ground Water, Conjunctive Management of Surface/Ground Water 4  
Reasonably Anticipated Average Rate of Future Natural Recharge, Areas Having Common Ground Water Supply 8  
Reasonably Anticipated Average Rate of Future Natural Recharge, Conjunctive Management of Surface/ Ground Water 5  
Regulation of Uses of Water by Watermaster, Calls for Water Delivery Made by The Holders of Senior-Priority Surface or Ground Water Rights 8  
Respondent 4  
Responding to a Delivery Call, Calls for Water Delivery Made by The Holders of Senior-Priority Surface or Ground Water Rights 8  
Responding to a Delivery Call, Diversion & Use of Water Within a

Ground Water Management Area 9  
Responses To Calls For Water Delivery  
Made By The Holders Of Senior-  
Priority Surface Or Ground Water  
Rights Against The Holders Of  
Junior-Priority Ground Water  
Rights 5  
Responses To Calls For Water Delivery  
Made By The Holders Of Senior-  
Priority Surface Or Ground Water  
Rights Against The Holders Of  
Junior-Priority Ground Water Rights  
From Areas Having A Common  
Ground Water Supply In An  
Organized Water District 8

**S**

Saving of Defenses, Conjunctive  
Management of Surface/Ground  
Water 5  
Senior-Priority 4  
Sequence of Actions For Responding to  
Delivery Calls, Conjunctive  
Management of Surface/Ground  
Water 5  
Submission of Mitigation Plans 11  
Surface Water 4

**W**

Water District 4  
Water Right 4  
Watermaster 4  
Wells as Alternate or Changed Points of  
Diversion for Water Rights From a  
Surface Water Source, Conjunctive  
Management of Surface/Ground  
Water 5

# Exhibit B

DISTRICT COURT  
FIFTH JUDICIAL DIST  
JEROME, IDAHO

2007 JUN 12 PM 3 58

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

IDAHO GROUND WATER )  
APPROPRIATORS, INC. MAGIC )  
VALLEY GROUNDWATER )  
DISTRICT and NORTH SNAKE )  
GROUND WATER DISTRICT, )

Plaintiffs

vs.

IDAHO DEPARTMENT OF )  
WATER RESOURCES and DAVID )  
TUTHILL, JR., IN HIS OFFICIAL )  
CAPACITY AS DIRECTOR OF )  
THE IDAHO DEPARTMENT OF )  
WATER RESOURCES, )

Defendants,

and

BLUE LAKES TROUT FARMS, )  
INC.; CLEAR LAKES TROUT CO., )  
INC.; ANITA K. HARDY; RIM )  
VIEW TROUT COMPANY, INC.; )  
JOHN W. "BILL" JONES, JR. and )  
DELORES JONES; CLEAR )  
SPRINGS FOODS, INC.; RANGEN )  
INC.; AMERICAN FALLS )  
RESERVOIR DISTRICT NO. 2; )  
A&D IRRIGATION DISTRICT; )  
BURLEY IRRIGATION )  
DISTRICT; MILLNER )  
IRRIGATION DISTRICT; NORTH )  
SIDE CANAL CO.; and TWIN )  
FALLS CANAL CO., )

Intervenor.

Case No. CV 2007-526

ORDER DISMISSING APPLICATION  
FOR TEMPORARY RESTRAINING  
ORDER, COMPLAINT FOR  
DECLARATORY RELIEF, WRIT OF  
PROHIBITION AND PRELIMINARY  
INJUNCTION

ORDER DISMISSING APPLICATION FOR TEMPORARY RESTRAINING ORDER, COMPLAINT FOR DECLARATORY  
RELIEF, WRIT OF PROHIBITION AND PRELIMINARY INJUNCTION



## I.

## PROCEDURE

1. This matter came before the Court pursuant to an *Application for Temporary Restraining Order and Order to Show Cause and Complaint for Declaratory Relief, Writ of Prohibition, Temporary Restraining Order and Preliminary Injunction* filed May 7, 2007, through counsel, by the Idaho Ground Water Appropriators, *et al.* On May 31, 2007, the case was assigned to this Court based on the disqualification of the Honorable John Butler.
2. Motions to intervene were filed by Clear Springs Foods, Inc., Blue Lakes Trout Farm, Inc., *et al.*, Rangen Inc., John W. "Bill" Jones, Jr. and Dolores Jones and American Falls Reservoir District #2, *et al.* ("Surface Water Coalition"). The motions to intervene were granted via a separate order issued June 1, 2007.
3. Motions to dismiss were filed by the Idaho Department of Water Resources and the various intervenors, alleging *inter alia* the Court's lack of jurisdiction for failure to exhaust administrative remedies.
4. A hearing was held on the matter on June 6, 2007, wherein the Court granted the motions to dismiss and dismissed the action without prejudice, and to avoid further delay, stated the basis for its decision on the record in open court.

## II.

## ORDER

THEREFORE, for the reasons stated on the record in open court, a copy of the transcript of the Court's oral ruling is attached hereto, the *Motion to Dismiss* is granted and the *Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction* is dismissed without prejudice.

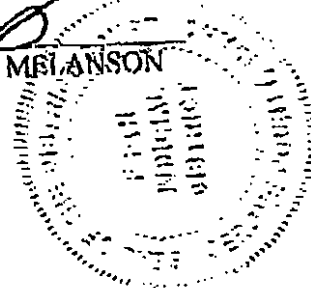
## RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED.

Dated June 12, 2007.

  
HONORABLE JOHN M. MELANSON  
District Judge



1 THE COURT: We're on record in Case Number CV  
2 2007-526, Idaho Ground Appropriators and others, versus  
3 Idaho Department of Water Resources. The parties are  
4 present with counsel -- or I should say that counsel for  
5 the parties are present, as are counsel for the  
6 intervenors. I am prepared to rule from the bench in this  
7 matter and I will do so at this time.

8 The doctrine of prior appropriation has been the  
9 law in Idaho for over 100 years. It is set forth in our  
10 State Constitution at Article 15 and in our statutes at  
11 Idaho Code Section 42-106, which was enacted in 1899.  
12 Prior appropriation is a just, although sometimes harsh,  
13 method of administering water rights here in the desert,  
14 where the demand for water often exceeds water available  
15 for supply. The doctrine is just because it acknowledges  
16 the reality that in times of scarcity, if everyone were  
17 allowed to share in the resource, no one would have enough  
18 for their needs, and so first in time - first in right is  
19 the rule. The doctrine is harsh, because when it is  
20 applied, junior appropriators may face economic hardship or  
21 even ruin.

22 I say these things in an introductory way so the  
23 parties and other people who may be interested will know  
24 that I know the possible consequences of my ruling today,  
25 and I do not take this decision or its consequence lightly,

Page 2

1 but it is a decision that I believe to be mandated by law.  
2 My decision today is based simply and solely upon the fact  
3 that the plaintiffs have not exhausted their administrative  
4 remedies.

5 I do agree that there may be some colorable  
6 defenses, such as reasonable pumping levels, futile call  
7 and reasonableness of diversion. This, however, is not the  
8 proceeding in which those issues should be raised. In  
9 American Falls Reservoir District Number Two versus Idaho  
10 Department of Water Resources, 143 Idaho 862, in a case  
11 decided in March of this year, cited by the parties, the  
12 court dealt with strikingly similar circumstances: A  
13 declaratory judgment action brought while an administrative  
14 proceeding was pending. In American Falls No. 2 it was  
15 surface water users challenging the manner and process by  
16 which the Director responded to a delivery call against  
17 ground water pumpers. The surface water users contended  
18 that the Director's response was contrary to law and  
19 ultimately unconstitutional. Although both the surface  
20 water users and the ground water pumpers, including Idaho  
21 Ground Water Users Association, requested a hearing before  
22 the Director, prior to the hearing being conducted the  
23 surface water users filed an action for declaratory relief  
24 challenging, among other things, the constitutionality of  
25 the rules of conjunctive management. The very same rules

Page 4

1 ground water pumpers appeared in defense of the Director's  
2 application of the rules, including an argument that the  
3 surface water users must first exhaust their administrative  
4 remedies before seeking judicial review. In its opening  
5 brief on appeal IGWA argued: Moreover, the legislature  
6 already has specified the process for resolving challenges  
7 to such unlawful agency action. The proper procedure is  
8 through judicial review, pursuant to the Administrative  
9 Procedures Act, Idaho Code Section 67-5270; not a  
10 collateral attack as the plaintiffs have undertaken here.

11 The APA also contains entire sections on agency  
12 hearing procedures, evidence, and other related matters,  
13 e.g. Idaho Code Sections 67-5242, hearing procedure; and  
14 67-5271, evidence. The Department applies these as part of  
15 its rules. The district court's approach tosses out  
16 administrative law, end quote.

17 That's from the affidavit of Mr. Arrington,  
18 Exhibit I to the IGWA opening brief, page six.

19 Apparently the Supreme Court agreed with IGWA,  
20 holding that administrative remedies must be exhausted  
21 before even constitutional issues can be raised before the  
22 District Court, unless there is a facial challenge. The  
23 Supreme Court held, quote: Important policy considerations  
24 underlie the requirement for exhausting administrative  
25 remedies, such as providing the opportunity for mitigating

Page 3

1 which govern the Director's response to this call.

2 In American Falls No. 2 the court reaffirmed the  
3 long-standing-general requirement that a party not seek  
4 declaratory relief until administrative remedies have been  
5 exhausted unless that party is challenging the rule's  
6 facial constitutionality. The court relied on Idaho Code  
7 Section 67-5271 and the Regan versus Kootenai County Case,  
8 140 Idaho 721, a 2004 case.

9 In the case now before this court, IGWA, I'll  
10 refer to it as both parties have referred to it -- Idaho  
11 Ground Water Appropriators Association by its acronym --  
12 initially requested a hearing before the director. The  
13 hearing was placed on hold when the constitutional  
14 challenges to the rules of conjunctive management was  
15 raised in American Falls No. 2. Finally, because both  
16 cases involved application of the same rules, after the  
17 Supreme Court issued its ruling in American Falls No. 2,  
18 the Director issued a notice of potential curtailment on  
19 May 10, 2007, almost a month ago. Instead of re-noticing  
20 or requesting immediate hearing before the Director and  
21 arguing its claims and defenses, IGWA filed the instant  
22 action. As such, the Director has not developed a  
23 full-administrative record and ruling on the claims and  
24 defenses raised.

25 Ironically, in American Falls No. 2, IGWA and the

Page 5

1 or curing errors without judicial intervention, deferring  
2 to the administrative processes established by the  
3 legislature and the administrative body and the sense of  
4 comity for the quasi-judicial functions of the  
5 administrative body. That's from American Falls No. 2,  
6 quoting White versus Bannock County Commissioners, 139  
7 Idaho 396, at 401 - 402.

8 Frankly, this Court, despite the differences  
9 pointed out by the plaintiffs, has difficulty in  
10 meaningfully distinguishing American Falls No. 2 and the  
11 instant case. Although American Falls No. 2 dealt with a  
12 constitutional challenge, the underlying principles are the  
13 same, and the Supreme Court defined the scope of the  
14 exceptions to the exhaustion of administrative remedies  
15 requirement. The essence of what was at issue in American  
16 Falls No. 2 was the manner in which the Director responded  
17 to the delivery call. Although the action was argued and  
18 analyzed as a facial challenge, the Supreme Court held it  
19 was an as-applied challenge, and it held that an as-applied  
20 challenge did not provide an exception to the exhaustion of  
21 the administrative remedies requirement.

22 The court reasoned, quote: To hold otherwise  
23 would mean that a party whose grievance presents issues of  
24 fact or misapplications of rules or policies could  
25 nonetheless bypass his administrative remedies and go



Page 6

1 straight to the courthouse by the simple expedient of  
2 raising a constitutional issue. Again, from American Falls  
3 No. 2, citing *Foremost Insurance versus Public Service*  
4 *Commission* 985, S.W. 2d 793.

5 Although IGWA has not framed the issues in terms  
6 of a constitutional challenge, it is nonetheless raising  
7 issues pertaining to the perceived misapplication of rules,  
8 and raising issues of fact and law, which according to the  
9 holding in *American Falls No. 2*, must first be ruled on by  
10 the administrative agency prior to seeking judicial review.

11 The surface water users in *American Falls No. 2*  
12 raised issues pertaining to the lawfulness of the  
13 Director's response to a delivery call. They simply  
14 asserted that the infirmities rose to the level of  
15 constitutional proportions because of the property rights  
16 at stake. Ultimately, the district court in that case  
17 applied a facial challenge analysis because the Director's  
18 actions, although alleged to be contrary to law, were  
19 consistent with the conjunctive management rules.

20 Nonetheless, the Supreme Court rejected the  
21 so-called hybrid approach that is as applied in the facial  
22 challenge and held that administrative remedies must first  
23 be exhausted. The result of the holding is that whether a  
24 party raises legal or factual issues, or alleges that such  
25 issues rise to the level of an as-applied constitutional

Page 7

1 challenge, administrative remedies must first be exhausted.

2 IGWA has raised two exceptions to the exhaustion  
3 of administrative remedies doctrine that were mentioned,  
4 but not discussed by the Supreme Court in *American Falls*  
5 *No. 2*. The first being: When the interest of justice so  
6 require; and the second being: When the agency is acting  
7 outside the scope of its authority. As I mentioned a  
8 moment ago, IGWA was a participant in the *American Falls*  
9 *No. 2* case and even advocated dismissal of the case because  
10 surface water users had failed to exhaust administrative  
11 remedies. The Supreme Court affirmed IGWA's position.

12 The court has difficulty finding the justice  
13 required for that exception to exhaustion of administrative  
14 remedies doctrine when IGWA has taken one position in one  
15 proceeding and then adopted the exact opposite position in  
16 a similar proceeding, involving similar issues.

17 The court has considered the justice of the  
18 plaintiff's cause. The timing of the proposed curtailment  
19 should not have come as a surprise. This case has been  
20 going on since 2005, the curtailment was part of a  
21 five-year-phased-in curtailment, and it had only been put  
22 on hold as a result of the *American Falls No. 2* case.  
23 Here, the plaintiff's assertion that the interests of  
24 justice require the court to exercise authority over the  
25 Department before exhaustion administrative remedies, is

Page 8

1 not persuasive.

2 As noted at the beginning of my comments, the  
3 prior appropriation doctrine sometimes leads to a harsh  
4 result, but it is just. If the court were to block this  
5 action now, every proposal curtailment would first be  
6 decided in the courts instead of where the legislature  
7 intended: At the Idaho Department of Water Resources. We  
8 would have judicial administration of water rights.

9 Perhaps if the *American Falls Case No. 2* had not  
10 taken place and there was not a five-year curtailment plan  
11 already in place; and IGWA was being notified of the  
12 curtailment for the first time after the planting season  
13 had already commenced; and if the right to a  
14 pre-curialment hearing were plainly established; and if  
15 IGWA did not have the remedy of mandamus; or perhaps other  
16 remedies such as the judicial review mentioned, perhaps  
17 then their argument that justice requires an exception to  
18 exhaustion of administrative remedies would have more  
19 merit.

20 The plaintiff's claim that the Director has  
21 exceeded his authority is also without merit. The fact is  
22 that we do not yet know what the Director will do. The  
23 question of the Director's authority must first be raised  
24 in the administrative proceeding. Idaho Code Section  
25 42-602 vests the Director with the authority to distribute

Page 9

1 water from all natural sources within a water district in  
2 accordance with the prior appropriation doctrine. All the  
3 rights at issue have been reported or adjudicated and have  
4 been included within a water district.

5 As far as the operation of the ground water  
6 management act, Idaho Code Section 42-237 (a), et seq., and  
7 Idaho Code Section 42-602 and 607, the court will direct  
8 IGWA's attention to its analysis in its own appellate brief  
9 in the *American Falls No. 2* case, wherein IGWA asserted  
10 that the two processes were independent of each other.  
11 Specifically, quote: The rules embody the broad concepts  
12 of the act within the context of the department's  
13 traditional contested case process; rather than the ground  
14 water board proceeding. The board process remains  
15 independently available under the act. It's in the  
16 affidavit of Mr. Arrington, Exhibit I, the IGWA opening  
17 brief, page 11.

18 If the plaintiffs desire a hearing and if the  
19 Director fails to conduct that hearing, their remedies may  
20 include mandamus, possibly judicial review. Not a request  
21 that this court decide the issues that they believe should  
22 have been decided in the administrative proceeding.

23 In summary, this action provides a text book case  
24 in support of the need for exhaustion of administrative  
25 remedies. To date the Director has not ruled on the

Page 10

1 underlying claims and defenses. But despite the fact that  
2 the same claims, issues and defenses are raised in at least  
3 three different jurisdictions, the exhaustion requirement  
4 avoids forum shopping, avoids deciding cases on a piecemeal  
5 basis, and avoids inconsistent rulings on the same issues;  
6 and, frankly, it avoids inconsistent arguments made by the  
7 same parties in different forums.

8 The court finds American Falls No. 2 to be  
9 directly on point in this matter. Accordingly, it is the  
10 decision of this court, and it is hereby ordered, that the  
11 defendant's motion to dismiss is granted without prejudice  
12 as to refiling after completion of the administrative  
13 proceedings, as required by Idaho Code Section 67-5271 in  
14 the American Falls Reservoir District case.

15 Because the underlying complaint has been  
16 dismissed, the plaintiffs cannot show that they are  
17 entitled to a temporary restraining order or a preliminary  
18 injunction in this case. The TRO is therefore dissolved  
19 and the court shall not issue a preliminary injunction in  
20 this matter.

21 That concludes the court's order in this case.

22 The court, of course, doesn't have any  
23 jurisdiction at this point to tell the Director what to do,  
24 but Mr. Rassler, I'm just going to suggest that the  
25 hearings on those matters of law should be conducted with

Page 11

1 dispatch. These folks have a right to a hearing, and  
2 unless that's done, we're just going to be back here. And  
3 if it happens that it really can't be done until later in  
4 the summer or in the fall, then certainly the Director  
5 would see to it that the matters are concluded  
6 expeditiously so we're not back here next spring, perhaps  
7 after the crops are planted again. As I said, I don't have  
8 jurisdiction to order that. I wouldn't presume to do so.  
9 I'm hoping that what I've said will be enough. The court  
10 will enter a written order in this matter and judgment will  
11 be certified as a final judgment so that appeal may  
12 proceed.

13 Is there anything further from the plaintiffs in  
14 this matter?

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 13 day of June, 2007 a true and correct copy of the Order of Assignment was faxed and mailed, postage paid to the following persons.

Randall Budge  
Attorney at Law  
P. O. Box 1391  
Pocatello, ID 83204  
(mailed/faxed 208-232-6109)

Phillip Rassier  
Idaho Attorney General's Office  
P. O. Box 83720  
Boise, ID 83720-0098  
(mailed/faxed 208-287-6700)

Paul Arrington  
Travis Thompson  
Attorneys at Law  
P. O. Box 485  
Twin Falls, ID 83303-0485  
(mailed/faxed 208-735-2444)

Justin May  
Attorney at Law  
P. O. Box 6091  
Boise, ID 83707  
(mailed/faxed 208-342-7278)

Tom Arkoosh  
Attorney at Law  
P. O. Box 32  
Gooding, ID 83330  
(mailed/faxed 208-934-8873)

Roger Ling  
Attorney at Law  
P. O. Box 396  
Rupert, ID 83350  
(mailed/faxed 208-436-6804)

Kent Fletcher  
Attorney at Law  
P. O. Box 248  
Burley, ID 83318  
(mailed/fax 208-878-2548)

Patrick Brown  
Attorney at Law  
P. O. Box 207  
Twin Falls, ID 83303-0207  
(mailed/faxed 208-733-9343)

Daniel Steenson  
Attorney at Law  
P. O. Box 2773  
Boise, ID 83702  
(mailed/faxed 208-342-4657)

Robert E. Williams  
Attorney at Law  
P. O. Box 168  
Jerome, ID 83338  
(court-folder/faxed 208-324-3135)

By   
Judy Owens, Deputy Clerk

CERTIFICATE OF MAILING/DELIVERY