IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR SPRINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

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

Cross-Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.,

Cross-Petitioner,

vs.

RANGEN, INC.,

Cross-Petitioner,

vs.

DAVID K. TUTHILL, JR., in his capacity as Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

Case No. CV-2008-0000444

GROUND WATER USERS' OPENING BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148

(Clear Springs Delivery Call)

GROUND WATER USERS' OPENING BRIEF

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

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Appeal from the Idaho Department of Water Resources

Honorable John M. Melanson, District Judge, Presiding

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TABLE OF CONTENTS

ATTACHMENT INDEX

TABLE OF AUTHORITIES

Cases:

Constitutions and Statutes:

Rules and Regulations:

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* ("Final Order") issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") on July 11, 2008. The Final Order mandates the permanent curtailment of tens of thousands of ground water-irrigated acres across southern Idaho in response to water delivery calls made by Blue Lakes Trout Farm, Inc. ("Blue Lakes") and Clear Springs Foods, Inc. ("Clear Springs"). Idaho Ground Water Appropriators, Inc. ("IGWA"), North Snake Ground Water District, and Magic Valley Ground Water District (collectively the "Ground Water Users") represent hundreds of ground water appropriators affected by the Final Order. The Ground Water Users seek judicial review of the Final Order pursuant to the Idaho Administrative Procedure Act, Title 67, Chapter 52, Idaho Code.

B. Procedural History.

On March 22, 2005, the Director of IDWR ("Director") received a hand-delivered letter from Blue Lakes requesting that he "direct the Watermaster for Water District 130 to administer water rights in the Water District as required by Idaho Code § 42-607 in order to supply Blue Lakes' prior rights" (the "Blue Lakes Delivery Call"). (R. Vol. 1, p. 45.) On May 2, 2005, the Director received by email two letters from Clear Springs requesting "water rights administration in Water District 130 pursuant to I.C. Section 42-607 in order to effectuate the delivery of Clear Springs Foods, Inc., a/k/a Clear Springs, water rights …." (the "Clear Springs Delivery Call").

(R. Vol. 3, p. 487.) Blue Lakes and Clear Springs are referred to collectively herein as the "Spring Users."

In response to the Blue Lakes Delivery Call, the Director issued an order on May 19, 2005 (the "Blue Lakes Order") for the curtailment of 57,220 ground water-irrigated acres in an attempt to increase flows from the spring that supplies Blue Lakes' water rights. (R. Vol. 1, p. 61, ¶ 77.) In response to the Clear Springs Delivery Call, the Director ordered the curtailment of 52,470 ground water-irrigated acres via an order dated July 8, 2005 (the "Clear Springs Order"). (R. Vol. 3, p. 503, ¶ 72.) The Blue Lakes Order and the Clear Springs Order are referred to collectively herein as the "Curtailment Orders."

The Curtailment Orders were issued on an emergency basis without the benefit and deliberation of a prior hearing. (R. Vol. 1, p.75; R. Vol. 3, p. 525.) IGWA objected to the Curtailment Orders and filed petitions for reconsideration on June 2 and July 19, 2005, and again on June 20, 2007. (R. Vol. 1, p. 161; R. Vol. 3, p. 547; R. Vol. 8, p. 1941.) The Curtailment Orders remained in force for more than two years without a hearing despite the numerous legal and factual defenses raised by IGWA and the other petitioners. On July 5, 2007, the Director issued an *Order Regarding Petitions for Reconsideration (Blue Lakes and Clear Springs Delivery Calls)* finally scheduling a hearing on the petitions for reconsideration. (R. Vol. 9, p. 1931.) That hearing was held November 28 through December 13, 2007, at the Department, before the honorable Gerald F. Schroeder as hearing officer ("Hearing Officer").

The Director issued the *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* on July 11, 2008 ("Final Order"), adopting all findings of fact and conclusions of law of

the Blue Lakes Order, Clear Springs Order, and orders of the Hearing Officer, except as specifically modified by the Final Order. (R. Vol.16, p. 3959.) Substantive orders of the Hearing Officer that are incorporated into the Final Order include the *Order re Discovery* dated September 10, 2007 ("Discovery Order") (R. Supp. Vol. 3, p. 4401), *Order Granting in Part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment* dated November 14, 2007 ("Summary Judgment Order") (R. Vol. 14, p. 3230), *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* dated January 11, 2008 ("Recommended Order") (R. Vol. 16, p. 3690), *Responses to Petitions for Reconsideration and Clarification and Dairymen's Stipulated Agreement* dated February 29, 2008 ("Response Order") (R. Vol. 16, p. 3839) and *Order re Joint Petition for Clarification* dated March 26, 2008 ("Clarification Order") (R. Vol. 16, p. 3875). Petitions for Judicial Review of the Final Order have been filed with this Court by Blue Lakes, Clear Springs, the Ground Water Users, the Idaho Dairymen's Association, Inc. ("Dairymen"), and Rangen, Inc..

C. Standard of Review.

The Idaho Administrative Procedures Act governs this Court's review of the Final Order. I.C. § 42-5270; IDAPA 37.01.01.791. The Court must set aside the Final Order to the extent it is found to be: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279. Reversal of the Final Order additionally requires evidence that substantial rights of the appellant have been prejudiced by the Department's error. *Id*. This case

presents multiple, weighty matters of first impression. The outcome will turn substantially on the Court's interpretation of statutes and agency regulations, which are questions of law over which the Court exercises free review. *Lane Ranch Partnership v. City of Sun Valley*, __ Idaho __, 175 P.3d 776, 778 (2007).

D. Statement of Facts.

i. Ground Water Users.

The Ground Water Users represent more than 1,700 agricultural, municipal and industrial water users across southern Idaho. The Ground Water Users make beneficial use of underground water that is diverted from wells drilled into Idaho's vast East Snake Plain Aquifer ("ESPA"), including the irrigation of nearly one million acres. (Ex. 429[1]; Carlson, R. Supp. Vol. 7, p. 4849.) Their contribution to the economy and social fabric of their communities and the State of Idaho is substantial. Yet, as a consequence of the Final Order, hundreds of the Ground Water Users' water rights are threatened with permanent curtailment, including the drying up of nearly 70,000 acres of irrigated land. (Ex. 44, 151, 435, 456.)

ii. East Snake Plain Aquifer.

This case will fundamentally define the legal framework within which the ESPA will be managed for the current and future benefit of Idahoans. The ESPA underlies more than 10,800 square miles of southern and southeastern Idaho, covering more than thirteen percent of the State, including all or part of twenty counties. (Recommended Order, R. Vol. 16, p. 3691; Ex.

[1] The Ground Water Users just recently discovered that Exhibit 429 (included in the Agency Record) is the wrong document. Attached hereto as Attachment A is the correct Exhibit 429 (March 2006 Oversight Monitor) along with the Second Affidavit of Charles M. Brendecke dated November 1, 2007, which was also inadvertently omitted from the Agency Record.

429; Brendecke, R. Supp. Vol. 3, p. 4415, L. 7-26, p. 4416, L. 1-2; Brockway, R. Supp. Vol. 7, p. 4874.) It is an underground reservoir approximately the size of Lake Erie, estimated to contain one billion acre-feet of water—thirty to fifty times more water than all of the surface water reservoirs in the Snake River system combined. (Ex. 429.) The ESPA provides ninety-seven percent of the water used by Idahoans living on the eastern Snake River Plain. (Carlson, R. Supp. Vol. 7, p. 4849-50.) It is one of the largest and most productive aquifers in the world. (Ex. 429.)

The ESPA is akin to a large, underground bathtub confined to fissures, vesicles, and cavities in a basalt geologic structure. (Ex. 429; Carlson, R. Supp. Vol. 7, p. 4849-50.) The lava basalts are discontinuous, periodically inter-laid with sedimentary or Aeolian (wind-borne) materials and riven with fractures, joints and lava tubes. (Brendecke, Supp. R. Supp. Vol. 3, p. 4416, L. 19-26, p. 4417, L. 1-10; Ex. 429.) Water travels slowly through the fractured lava beds that make up the ESPA, following preferential pathways from areas of higher elevation to areas of lower elevation and from areas of higher pressure to areas of lower pressure. (Brendecke, R. Supp. Vol. 3, p. 4418, L. 7-11.)

The volume of water stored in the ESPA derives from natural inputs (precipitation, tributary underflow, seepage from rivers) and from artificial, irrigation-related inputs (seepage from canals and farm fields). (Ex. 429; R. Supp. Vol. 3, p. 4418, L. 7-11.) Annual inputs total approximately eight (8) million acre-feet per year. (R. Vol. 3, p. 487-88 ¶ 3.) The primary source of ESPA "recharge" is irrigation (sixty percent), underflow from tributary basins (eighteen percent), seepage from the Snake River and other streams and canals (thirteen percent),

and rain and snow (nine percent). (Ex. 429; Clear Springs Order, R. Vol. 3, p.487-88; Brendecke, R. Supp. Vol. 3, p. 4430, L. 19-22.) Thus, ESPA recharge is approximately two-thirds (2/3) irrigation-related inputs and one-third (1/3) natural inputs. (Brendecke, R. Supp. Vol. 3, p. 4417, L. 19-21; Brockway, R. Supp. Vol. 7, p. 4876.)

Flood irrigation of the eastern Snake River Plain began shortly after the Civil War and continued to expand through the 1950s, at which time there were approximately 1.83 million acres under irrigation. (Carlson, R. Supp. Vol. 7, p. 4848, L. 10-14; Ex. 408, 409, 410.) Historic flood irrigation practices were very inefficient, resulting in millions of acre-feet of surface water percolation into the ESPA. (Ex. 429; Carlson, R. Supp. Vol. 7, p. 4848, L. 10-14.) For example, North Side Canal Company diverted as much as thirty acre-feet per acre from the Snake River during its early years of operation. (Ex. 427, 467, 468, 469; Brockway, Tr. p. 1622, L. 4-8.)[2] With only two acre-feet per acre typically consumed by crops, a substantial amount of the water diverted through the North Side Canal and other surface water irrigation systems seeped into the ESPA as "incidental recharge." (Brockway, Tr. p. 1622, L. 9-13.) [3]

Seepage from surface water irrigation practices on the Snake River Plain caused an extraordinary rise in the water table of the ESPA. (Carlson, R. Supp. Vol. 7, p. 4848, L. 12-14; Ex. 406, 411; Recommended Order, R. Vol. 16, p. 3692.) Water levels immediately north of the

[2] Exhibit 469 shows the location of North Side Canal Company's service area and its proximity to the springs in question. (Ex. Vol. 19, Exhibit 469.)

[3] Lands irrigated by the North Side Canal are very leaky, and that water percolates to the aquifer relatively quickly. (Brendecke Tr. p. 1848, L. 19-25, p.1849, L. 114; Brockway Tr. p. 1633-p. 1635, L. 1.) For instance, historical documents show that attempts to build the Jerome Reservoir failed because of the reservoir's inability to store water. (Ex. 467, 470.)

Thousand Springs area increased by approximately forty-five feet between 1900 and 1950, primarily due to incidental recharge from the North Side Canal Company. (Brendecke, R. Supp. Vol. 3, p. 4426, L. 3-7; Ex. 415.) In some parts of the ESPA the water table rose by as much as 200 feet. The amount of water stored in the ESPA peaked in the 1950s and has since declined due to more efficient surface water irrigation practices, the termination of winter canal flows, ground-water pumping, and drought. (Recommended Order, R. Vol. 16, p. 3692-93; Brendecke, R. Supp. Vol. 3, p. 4421, L. 9, p. 4422, L. 10, p. 4423, L. 1-27, p. 4424, L. 1-13, p. 4431 L. 23-p. 4432 L. 5.) Still, the amount of water currently stored in the ESPA and discharging from the Thousand Springs area remains well above the historic, pre-irrigation development levels. (Blue Lakes Order, R. Vol. 1, p. 76.; Ex. 154; Brendecke, R. Supp. Vol. 3 p. 4431, L. 23-p. 4432, L. 5, p. 4446, L. 22-27.)

Conversions from flood to sprinkler irrigation and the termination of winter canal flows are the primary reasons that the amount of water stored in the ESPA has decreased from peak levels. (Brockway, Tr. p. 1551, L. 11-23.) To a lesser extent the expansion of ground water pumping contributed to the decrease.[4] However, the effects of ground water pumping have largely been realized. (Brendecke, Tr. p. 1889, L. 14-21.; Wylie, Tr., Vol. 5, p. 845, L. 2-17.) First, there have been very few new ground water appropriations since the 1985 Swan Falls Settlement. (Wylie, Tr. p. 856, L. 16-24.) Moreover, in 1992 the Department issued a moratorium on ground water development, putting an end to any major new ground water

[4] The amount of land being irrigated with ground water expanded rapidly with the advent of turbine pumps and encouragement of Idaho Power which offered inexpensive power. (Carlson Direct R. Supp. Vol. 7, p. 4841 L. 9- p. 4842 L. 30; Ex. Vol. 17 Exhibit 435).

appropriations. (Dreher, Tr. Vol. 7, p. 1149, L. 21-25, p. 1150, L.1.)[5] Consequently, the ESPA is now at or near equilibrium, with future changes in aquifer levels caused primarily by changes in precipitation and incidental recharge. (Dreher, Tr. p. 1372, L. 16-25, p. 1376, L. 1; Wylie, Tr. Vol. V, p. 845, L. 2-13.)

Annual recharge of the ESPA is far greater than annual ground water depletions from the ESPA. Current data indicates that the ESPA experiences approximately 2.1 million acre-feet of depletion annually from ground water diversions. (Clear Springs Order, R. Vol. 3, p. 488.) The average rate of recharge from precipitation alone between 1980 and 2002 was 2.2 million acre-feet per year. (Clear Springs Order, R. Vol. 3, p. 488.) And recharge from surface water irrigation is greater than recharge from precipitation. (Clear Springs Order, R. Vol. 3, p. 487.) Thus, the total amount of annual recharge of the ESPA is far greater than annual ground water depletions. (Dreher, Tr. p. 1375, L. 16-p. 1376, L. 1.) Contrary to some contemporary propaganda, ground water diversions do not deplete the ESPA in excess of the average rate of recharge. The ESPA is not "over-appropriated" and is not being "mined" by ground water appropriators. *Id.*

iii. ESPA Spring Discharges.

Blue Lakes' and Clear Springs' water rights are supplied entirely by water from the ESPA that discharges from various spring outlets located at the western edge of the ESPA along the Snake River between Twin Falls and King Hill. (Brendecke, R. Supp. Vol. 3, p. 4420, L. 16-26.) Springs in this area act as an overflow valve for the ESPA, producing water when the aquifer is

[5] Exhibit 417 indicates that from the early 1980s until the moratorium in 1992 there were very few new permits issued to allow ground water pumping in the ESPA. (Ex. Vol. 16, Exhibit 417).

full. (Brendecke, R. Supp. Vol. 3, p. 4427, L. 8); *see also, American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* ("*AFRD2*"), Gooding County Case No. CV-2005-600, n.21 at 90 (June 2, 2006). Spring flows fluctuate congruent with the amount of water stored in the ESPA. (Brendecke, R. Supp. Vol. 3, p. 4471, p. 4427; Ex. 429.) Water does not discharge at a constant rate across springs, however, due to subterranean pathways that differ in size and hydraulic resistance. (Dreher, Tr. p. 1113, L. 15-17; Brendecke, R. Supp. Vol. 3, p. 4419-4420.) The locations and characteristics of these pathways are largely unknown. (Brendecke, R. Supp. Vol. 3, p. 4420, L. 1-2.) Consequently, it is difficult to predict with any degree of certainty either the timing or location of the impact of well pumping on a particular spring outlet. (Recommended Order, R. Vol. 16, p. 3692; Brendecke, R. Supp. Vol. 3, p. 4420, L. 8-10; Ex. 403 & 404; Brockway, R. Supp. Vol. 7, p, 4874-4875, 4894.)

The great increase in the amount of water stored in the ESPA from irrigation-related recharge during the first half of the twentieth century caused spring discharges in the Thousand Springs area to increase dramatically. (Carlson, R. Supp. Vol. 7, p. 4848, L. 21-24, R. Vol. 3, p. 488 ¶ 5; Brendecke, R. Supp. Vol. 3, p. 4425-5527, 4429-4431; Ex. 411-415, 429.)[6] Cumulative spring discharges increased more than sixty-three percent from 1902 to 1952, from approximately 4,100 cfs to 6,700 cfs. (Brendecke, R. Supp. Vol. 3, p. 4430, R. Vol. 3, p. 426; Ex. 154, 407, 429; Dreher, Tr. p. 1117, L. 10-15.) ESPA discharges from the springs that supply Blue Lakes' and Clear Springs' water rights increased even more dramatically, rising by 89

[6] Peak spring discharge levels of the early 1950s can never be restored absent the return of pre-1950 conditions which would require the elimination of sprinkler irrigation in favor of flood irrigation and the elimination of storage in Palisades Reservoir in favor of winter canal flows. (Brendecke, R. Supp. Vol. 3 p. 4432, L. 6-12; Luke, Tr. p. 761, L. 9-14).

percent (Crystal Spring), 188 percent (Blue Lakes Spring), and 255 percent (Clear Lakes Spring). (Brendecke, R. Supp. Vol. 3, p. 4431.) Without the application of large amounts of surface water to farmlands north of the Snake River, much of the water appropriated by Blue Lakes and Clear Springs would have remained in the Snake River and flowed out of Idaho and been lost. Instead, the water was stored in ESPA and the spring discharges increased. (Brendecke, Tr. p. 1799, L. 10-25, p. 1800, L. 1-2.)

Cumulative spring flows in the Thousand Springs area declined after 1960 as the result of conversions to sprinkler irrigation, the termination of winter canal flows, ground water pumping, and record drought.[7] (Brendecke, R. Supp. Vol. 3, p. 4424-4426; Blue Lakes Order, R. Vol. 1, p. 49 ¶ 17; Clear Springs Order, R. Vol. 3, p. 492, ¶ 20.; *Cf*. Ex. 154 w/ Ex. 432.) Still, current spring discharges, averaging approximately 5,300 cfs, remain far above historic levels, which averaged approximately 4,100 cfs. (Land, Tr. p.1551, L. 24-p. 1552, L. 5; Brendecke, R. Supp. Vol. 3 p. 4424-4425, 4431-4432; Dreher, Tr. p. 1121, L. 18-p. 1122 L. 3; Ex. 406, 407, 429; Carlson, R. Supp. Vol. 7, p. 4849 L. 1-8; R. Vol. 1, p. 46, R. Vol. 3, p. 488; Ex. 154.) Moreover, spring flows have increased since 2004 congruent with increased precipitation. (*Cf*. Ex. 154 w/ Exs. 431 and 432.) This reflects the ESPA's high level of responsiveness to wet and dry cycles. *Id*.; (Brendecke, Tr. p. 1891, L. 15-p. 1892, L. 17; Tr. p. 1904 L. 1- p. 1905, L. 22.) As expected, flows from the springs that supply Clear Springs' and Blue Lakes' water rights have likewise increased. (Ex. 154-156, 158.)

[7] The drought that Idaho has been experiencing in the last seven years is the worst back-to-back sequence on record with a probability of it occurring once in every 500 years. (Dreher, Tr. p. 1134, L. 12-19.)

iv. Blue Lakes Delivery Call.

The Blue Lakes Delivery Call sought the curtailment of junior-priority ground water rights in an attempt to increase ESPA discharges from the spring that supplies Blue Lakes' fish propagation facility. The facility consists of three ponds with thirty-five raceways each. (Kaslo, Tr. p. 268, L. 11-20.) The facility is supplied by three water rights that cumulatively authorize a maximum rate of diversion of 197.06 cfs.[8] (Ex. 13.) Notably, this quantity greatly exceeds natural spring flows. "[B]etween August of 1902 and August of 1910 … flow of Blue Lakes spring rose from 80 cfs to 110 cfs. By August of 1914, the flow had risen to 199 cfs." (Brendecke, R. Supp. Vol. 3, p. 4429, L. 8-13, p. 4430, L. 1-p. 4431, L. 5; Ex. 415.) Before the ESPA was amplified by incidental recharge from surface water irrigation, natural flows from the spring were approximately 80-86 cfs. (Brendecke, R. Supp. Vol. 3, p. 4430, L. 1-p. 4431, L.5.) Thus, Blue Lakes' first appropriation of 99.83 cfs in 1958 exceeded the natural spring discharge. (Brendecke, R. Supp. Vol. 3, p. 4435, L. 12-p. 4426, L. 5; Ex. 419, 420.) Blue Lakes' subsequent appropriations relied exclusively on incidental recharge from inefficient surface water irrigation. *Id*.

As of Blue Lakes' third appropriation in 1973, the accumulated total of all appropriations from the spring exceeded the highest seasonal spring flow ever previously recorded by 30 cfs. *Id*. This occurred because the Department often licensed aquaculture rights based upon the maximum facility volume rather than actual water use. (Ex. 464, Dreher, Tr. p. 1151, L. 6-17; Tr. p. 1202, L. 1-p. 1206, L.16.) Because aquaculture was deemed "non-consumptive"

[8] Water Right Nos. 36-02356A (99.83 cfs), 36-07210 (45 cfs), and 36-07427 (52.23 cfs).

(Recommended Order, R. Vol. 16, p. 3694), and because the Department understood that ground water rights could not be curtailed in an attempt to increase spring discharges, the Department was not concerned with issuing a license for more water than was actually being put to beneficial use if the appropriator was willing to accept the risk of constructing a facility with room to grow. As testified to by Ronald Carlson, longtime watermaster and Eastern Region Supervisor for IDWR, such non-consumptive water rights "have never been considered historically to be in a position to demand delivery." (Carlson, R. Supp. Vol. 7, p. 4853, L. 4-5; *see also*, R. Supp. Vol 7. p. 4852, L. 21-p. 4853, L. 5, p. 4855 L. 15-p. 4857, L. 10.) It is therefore likely that Blue Lakes has not actually ever put its maximum authorized rate of diversion (197.06 cfs) to beneficial use.

Notwithstanding, the Director found that Blue Lakes' water rights were short 35.25 cfs in the year 2004, which is nineteen percent of the authorized maximum of 197.06 cfs. (R. Vol. 1, p. 58, ¶ 61.) Thus, more than eighty percent of Blue Lakes' water rights were delivered in 2004.[9] Additionally, ESPA spring discharges have increased since 2004. (Ex. 154, 155, 156.)

v. Clear Springs Delivery Call.

As with the Blue Lakes Delivery Call, the Clear Springs Delivery Call sought the curtailment of junior-priority ground water rights in an attempt to increase ESPA discharges from the springs that supply water to its Snake River Farms fish propagation facility. (Clear Springs Order, R. Vol. 3, p. 487.) The facility is supplied by six water rights which cumulatively

[9] The shortage is even smaller when considering that the Blue Lakes facility is but one of five aquaculture facilities controlled by the Kay Hardy family, with total aquaculture appropriations of 715.6 cfs.[9] The shortage at Blue Lakes (35.25 cfs) represents a shortage of only 4.9 percent of the 715.6 cfs total.

authorize the diversion of 117.67 cfs. (Ex. 301-306.) The Director found a shortage of 24.5 cfs, or 20.8 percent of the total authorized diversion for Snake River Farms, based upon flow records between 1988 and 2004.[10] (Clear Springs Order, R. Vol. 3, p. 500, ¶ 60.) As with other aquaculture rights, it is likely that Clear Springs has never put its maximum authorized rate of diversion (117.67 cfs) to beneficial use. Flow records prior to 1988 were not considered, though such information is clearly relevant to multiple issues in this case. (MacMillan, Tr. p. 101, L. 1-17.)[11] Notably, the Clear Springs Snake River Farm facility was reconstructed in 1981. (MacMillan, Tr. p. 102, L. 22-p. 104, L. 14; Tr. p. 106, L. 5-8.) The Blue Lakes facility was reconstructed in 1999-2000. (Kaslo, Tr. p. 291, L. 5-16.)

vi. The Curtailment Orders.

In response to the Blue Lakes Delivery Call, the Director ordered the curtailment of 57,220 ground water-irrigated acres. (Blue Lakes Order, R. Vol. 1 p. 61 ¶77.) The Director ordered the curtailment of 52,470 ground water-irrigated acres in response to the Clear Springs Delivery Call. (Clear Springs Order, R. Vol. 3, p. 502 ¶ 71.) Due to some overlap of the acres curtailed between the Curtailment Orders, there is a total of approximately 70,000 acres subject to curtailment. (Ex. 44, 151, 435 and 456.) The curtailments are an effort to increase Snake River flows based on predictions generated by the ESPA Model. The Director presumed that if

[10] Clear Springs operates five aquaculture facilities, with total aquaculture appropriations of 1,004.27 cfs. The shortage at the Snake River Farm facility (24.5 cfs) represents only 2.4 percent of Clear Springs' cumulative aquaculture appropriations.

[11] Evidence presented at the hearing indicates that 24.5 cfs overstates the shortage to the Snake River Farms facility. Exhibit 28 and testimony of Clear Springs' CEO and expert hydrologist indicate that peak flows available to Snake River Farms were only 10 cfs short of the authorized maximum rate of diversion in 2004. Cope Tr. p. 143, L. 1 – p. 144, L. 24. This shortage represents a shortage of only 8.5 percent of the cumulative water rights that supply the Snake River Farms facility.

Snake River flows are to increase then it is likely that ESPA discharges from the springs that supply Blue Lakes' and Clear Springs' water rights will also increase. (Clear Springs Order, R. Vol. 1, p. 48-49, ¶ 15; Blue Lakes Order, R. Vol. 3, p. 491, ¶ 15; Final Order, R. Vol.16, p. 3952, ¶8.) Yet, Dr. Wylie testified that he was not confident that the springs would increase at the fractions used in the Orders. (Wylie, Tr. p. 860, L. 5-17.)

The ESPA Model ("Model") was designed "with the intent of evaluating the effects of land and water use on the exchange of water between the Snake River Plain aquifer and the Snake River." (Ex. 461.) As with most scientific models, the ESPA Model is not perfect but is limited by the degree of error in the Model's inputs, which cause "model uncertainty." (Ex. 460; Wylie, Tr. p. 850, L. 7-p. 851 L. 2; Tr. p. 847, L. 10-p. 848 L. 10.) The Director considered one element of uncertainty, stream gauge error, in formulating the Curtailment Orders. (Blue Lakes Order, R. Vol. 1, p. 49, ¶ 16, p. 59, ¶ 67; Ex. 109; Wylie, Tr. p. 817, L. 12-p. 818, L. 9.) Because the Snake River gauges that are used to calibrate the Model have a ten percent margin of error, the Director implemented a "trim line," which limited curtailment to those water rights for which the Model predicts at least a ten percent return to the target segment, or "reach," of the Snake River. (Dreher, Tr. p. 1166 L. 7-p. 1167 L. 8; p. 1227, L. 21-p. 1228 L. 4; Wylie, Tr. p. 888, L. 16-24, p. 819, L. 22-p. 820 L. 2.)

The Model was designed "with the intent of evaluating the effects of land and water use on the exchange of water between the Snake River Plain aquifer and the Snake River." (Ex. 461.) Dr. Wylie testified that the model <u>cannot</u> be used to accurately predict the amount of water that will discharge at a particular spring based on curtailment of wells or groups of wells. (Wylie

Tr. p. 857, L. 25 – p. 858, L. 4.) This is consistent with both the Ground Water Users and Clear Springs' experts. (Brendecke, R. Supp. Vol. 3, p. 4455, L. 23-p. 4456, L. 5, p. 4457, L. 2-14; Brockway Rebuttal, Exhibit 313 p. 5, L. 25-26.) Therefore, in an attempt to estimate the effect of curtailment on the springs that supply Blue Lakes' and Clear Springs' water rights, the Director utilized a linear analysis that essentially apportions reach gains between various springs. (Blue Lakes Order, R. Vol. 1, p. 48-49, ¶ 15; Clear Springs Order, R. Vol. 3, p. 491, ¶ 15, Recommended Order, R. Vol.16, p. 3710; Final Order, R. Vol. 16, p. 3952, ¶8.) However, Dr. Wylie testified that this approach was not technically defensible and he was not confident in the results. (Wylie, Tr. p. 860, L. 5-17.)

The spring that supplies Blue Lakes' water rights is located in the Devil's Washbowl to Buhl Gauge reach of the Snake River. (Ex. 434.) The linear analysis estimates that this spring receives 19.7 percent of all gains to that reach of the River. (Blue Lakes Order, R. Vol. 1, p. 48-49, ¶ 15.) The Model predicts that the curtailment of 57,220 ground water-irrigated acres, as ordered by the Director, will increase flows in that reach of the Snake River by 51 cfs. (Blue Lakes Order, R. Vol. 1, p. 61 ¶ 77.) Therefore, Blue Lakes is projected to receive an additional 10 cfs (19.7 percent of 51 cfs) over the next 100 years as a result of the curtailment of 57,220 acres. (Blue Lakes Order, R. Vol. 1, p. 61, ¶¶ 77, 78, p. 72, ¶2; Ex. 462.)

The spring that supplies Clear Springs' water rights is located downstream in the Buhl Gauge to Thousand Springs reach of the Snake River. (Ex. 434.) The linear analysis estimates that this spring receives 6.9 percent of all gains to that reach of the River. (Final Order, R. Vol. 16, p. 3952, ¶ 9.) The Model predicts that the curtailment of 52,470 ground water-irrigated acres

will increase flows in that reach of the Snake River by 38 cfs. *Id.* Therefore, Clear Springs is projected to receive 2.6 cfs (6.9 percent of 38 cfs) at steady state from the curtailment of 52,470 acres. (*Id.*; Wylie Tr. p. 874, L. 20-p. 878 L. 17.)

Since Blue Lakes and Clear Springs are presumed to receive only 19.7 percent and 6.9 percent of the respective reach gains, the greater part of any increased spring flows will either be lost downriver or will accrue to junior-priority water rights that are not entitled to the additional flows. (Brendecke, R. Supp. Vol. 3, p. 4457, L. 5-18.) Moreover, the anticipated increase in spring flows is not expected to accrue for decades. (Ex. 462, 463.) The curtailment simulations generated by the Model are based on steady state conditions which will not fully be realized for 50-100 years. (Ex. 430, 461, 462, 463; Wylie, Tr. p. 874, L. 20-p. 878 L. 17.)

There is a gross disparity between the amount of water use curtailed and the anticipated benefit to Blue Lakes and Clear Springs. Assuming the typical annual diversion of four acre-feet per acre for ground water rights located in the zone of curtailment, the curtailment of 57,220 ground water-irrigated acres eliminates the use of 228,880 acre-feet annually. The estimated gain of 10 cfs to Blue Lakes amounts to 7,276.0 acre-feet at steady state—just 3.2 percent of the total amount curtailed. The disparity is even more severe with respect to Clear Springs where, assuming an annual diversion of four acre-feet per acre, the curtailment of 52,470 acres eliminates the use of 209,880 acre-feet at steady state. The estimated gain to Snake River Farm of 2.6 cfs amounts to 1,896.8 acre-feet annually, or 0.9 percent of the total amount curtailed. Thus, the zone of curtailment is so broad that only one to three percent of the water curtailed is expected to accrue to the springs that supply Blue Lakes' and Clear Springs' water rights.

viii. Economic Impact of Curtailment.

The anticipated economic benefit to Blue Lakes and Clear Springs as a result of an additional 10 cfs and 2.6 cfs is largely unknown. A protective order prevented the Ground Water Users from discovering information relative to Blue Lakes' and Clear Springs' production records and business economies. (Discovery Order, R. Supp. Vol. 3, p. 4401) Notwithstanding, the Spring Users' admitted at trial that the aquaculture industry is highly-regulated and highly-competitive, and that much of the imported seafood arises at a significantly lower cost than domestic seafood as a result of international production cost advantages in the form of less environmental constraints and cheap labor. (Cope, Tr. p. 133, L. 1-5; p. 136, L. 2-p. 137, L. 4; p. 138 L. 5-17; Kaslo, Tr. p. 313, L. 19-p. 317 L. 2.) Various economic factors including market conditions and competition affect profitability. In fact, in 2001 Clear Springs experienced a ten percent decline in aquaculture demand due to market factors. The company reduced production accordingly. (Cope, Tr. p. 96, L. 24-p. 97, L. 7.) The record is devoid of evidence that an additional 10 cfs and 2.6 cfs will allow Blue Lakes and Clear Springs to produce more or larger or healthier fish.

In contrast, the economic impact of curtailment will be immediate, severe, and potentially irreversible. (Attachment B, Church Testimony at 6.)[12] Physical curtailment in accordance with the Curtailment Orders "would result in an immediate and largely permanent net loss of nearly

[12] Attached hereto as Attachment B is a copy of the Prefiled Expert Testimony of John S. Church dated September 12, 2007. The Ground Water Users just recently discovered that these eight pages of testimony were not included in the Agency Record in this case. However, Dr. Church testified at hearing that he filed direct testimony that consisted of eight pages with two attached exhibits, Exhibits 442 and 443. (Church, Tr. p. 1690, L. 21 – p. 1691 p. 24). Exhibits 442 and 443 were included in the Agency Record.

3,500 jobs, at least $160 million near term decrease in the area's personal annual income, and a loss of between $4.4 to $7 million in annual local property tax revenues." *Id*. The proposed curtailment would "cause the state's economy to lose a present value of close to $8.1 billion in gross output during the next twenty years to gain a present value of $423.5 million." (Attachment B, Church Testimony at 7.)

Physical curtailment of ground water rights has not yet occurred only because the Ground Water Users have been able to temporarily and on a year-to-year basis mitigate the alleged injury to Blue Lakes and Clear Springs by expending millions of dollars to gain the Department's approval and implement mitigation plans providing replacement water to meet the Director's staged curtailment requirements. (Carlquist, R. Supp. Vol. 7, p. 4837, L. 20-p. 4840, L.2; Stevenson, R. Supp. Vol. 6, p. 4823, L. 1-p. 4825, L. 6.) Because the curtailment increases in annual increments under the Curtailment Orders, mitigation plans have to date provided adequate replacement water, though only barely in 2007. (Wylie, Tr. 1496, L. 20-1497, L. 20; Brendeck, Tr. p. 1907, L. 25-p. 1908, L. 7; p. 1909, L. 13-18; Carlquist, R. Supp. Vol. 7, p. 4837, L. 20-p. 4840; Stevenson, R. Supp. Vol. 6, p. 4823, L. 1-p. 4825). However, because of the increasing mitigation obligation and physical constraints on recharge and other mitigation proposals, physical curtailment is no longer avoidable. It has not become physically impossible to supply an amount of replacement water sufficient to meet the increased mitigation requirements mandated by the Curtailment Orders. Drought will only further compound the ability of ground water users to provide replacement water. Thus, the above-described economic impact of curtailment is inevitable unless the Curtailment Orders are reversed in this proceeding.

ISSUES PRESENTED FOR JUDICIAL REVIEW

1. Whether the Curtailment Orders violate the State of Idaho's commitment and obligation to manage the ESPA based on minimum Snake River flows consistent with the Swan Falls Agreement and State Water Plan.

2. Whether the Curtailment Orders give adequate effect to the legislative mandate in the Ground Water Act for full economic development of ground water resources by curtailing tens of thousands of ground water-irrigated acres in an uncertain attempt to fractionally increase Blue Lakes' and Clear Springs' water supplies.

3. Whether the Director's finding that Blue Lakes and Clear Springs suffered material injury is supported by substantial evidence in the record since there is no reliable evidence that the additional water that may accrue from curtailment will enable them to produce more, larger, or healthier fish.

4. Whether the Director erred by failing to exercise his authority under the Conjunctive Management Rules to compel Blue Lakes and Clear Springs to convert to a ground water source.

5. Whether the Director abused his discretion by failing to apply the futile call doctrine and ruling that the amount of time required for the curtailment to produce increased spring flows has no bearing on Blue Lakes' and Clear Springs' water delivery calls.

6. Whether the Director erred by refusing to account for known uncertainties in the East Snake Plain Aquifer Model, resulting in the curtailment of ground water rights without a

reasonable degree of certainty that additional water will accrue to the springs that supply Blue Lakes' and Clear Springs' water rights.

7. Whether the Director exceeded his authority by issuing the Curtailment Orders on an emergency basis without a prior hearing.

ARGUMENT

This landmark case will critically decide the extent to which the State of Idaho will be able to utilize and benefit from its vast East Snake Plain Aquifer ("ESPA") and sustain the thriving agricultural economy that has for more than fifty years been created by farmers, dairymen, industries and municipalities in response to and reliance upon the legislative mandate for "full economic development of underground water resources." I.C. § 42-226. Estimated to contain one billion acre-feet of water, the ESPA holds thirty to fifty times more water than all of the surface water reservoirs in the Snake River system combined. (Ex. 429.) It covers more than 10,800 square miles and provides ninety-seven percent of the water used by Idahoans living on the eastern Snake River Plain. (Ex. 401, 402, 429; Brendecke, Supp.R. Vol. 3 p. 4415-16.) It is, by far, Idaho's largest and most productive water resource. And this case will in large measure determine its fate, and the fate of the thousands of citizens whose livelihoods depend upon it.

At the heart of this case is a contemporary collision between two bedrock principles of Idaho water law. On one hand is the principle of priority, that "first in time is first in right." Idaho Const. art. XV, § 5. On the other is the directive for "optimum development of water resources in the public interest." *Id*. at § 7. Both constitutional edicts aim to maximize beneficial use of a vital, yet finite, resource. Priority guides water administration at a basic level, providing a structure that gives would-be appropriators the confidence necessary to undertake to develop water resources. Yet the prior appropriation doctrine, if applied unconditionally, may yield perverse results. Consequently, Idaho law also demands consideration of the public's interest in optimum development of its water resources, assuring that the prior appropriation

doctrine will not be exercised unreasonably so as to *minimize* beneficial water use. It is toward that end that the legislature declared that "while the doctrine that 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." I.C. § 42-226.

In 1993 the Idaho Department of Water Resources ("IDWR" or "Department") undertook to integrate the prior appropriation doctrine and the directive for full economic development of ground water resources by adopting *Rules for Conjunctive Management of Surface and Ground Water Resources* ("Conjunctive Management Rules" or "CM Rules") which are procedures for responding to delivery calls made by senior-priority water rights against junior-priority ground water rights having a common ground water supply. IDAPA 37.03.11. The Rules were deemed facially constitutional in 2007. *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* ("*AFRD2*"), 143 Idaho 862, 883, 154 P.3d 433, 454 (2007). How the CM Rules are to be applied, however, has until now been largely untested. Accordingly, this case presents multiple, weighty issues of first impression.

The parties to this case all hold water rights that are supplied entirely by water from the ESPA. Blue Lakes and Clear Springs divert from spring discharges from the ESPA. The Ground Water Users divert from wells drilled into the ESPA. In response to water delivery calls made by Blue Lakes and Clear Springs in 2005, the former Director of the IDWR ordered the curtailment of tens of thousands of ground water-irrigated acres in an attempt to fractionally increase ESPA discharges from the springs that supply Blue Lakes' and Clear Springs' water rights. The Curtailment Orders violate the Ground Water Act and set an erroneous and

dangerous precedent that minimizes beneficial use of the ESPA and threatens severe harm to the economic and social welfare of the people of Idaho by allowing a single senior water user to retire tens of thousands of irrigated acres in a tenuous effort to fractionally supplement his already substantially-full water supply.

The Ground Water Users respectfully ask this Court to reverse certain of the Director's applications of the CM Rules and related law. First, the Curtailment Orders violate the State's obligations to manage the ESPA based on minimum Snake River flows in accordance with the Swan Falls Agreement and State Water Plan. Second, the Curtailment Orders fail to give meaningful effect to the legislative mandate for "full economic development of underground water resources" by curtailing ground water rights when a significant portion of the quantity curtailed will not reach Blue Lakes and Clear Springs within a reasonable amount of time. Third, Blue Lakes' and Clear Springs' claims of material injury are not supported by substantial competent evidence that additional water is needed and will enable the production of more or larger or healthier fish. In addition, this Court should reverse conclusions pertaining to the futile call doctrine, IDWR's obligation to compel a surface water right to convert to a ground water source, use of the ESPA Model for curtailment purposes, and violation of the Ground Water Users' due process rights.

The magnitude of this Court's decision cannot be overstated. Its ramifications are far greater than Blue Lakes and Clear Springs. This Court's interpretation of the law of this case will significantly define the extent to which Idaho will be able to utilize the entire ESPA, and the future of the agricultural economy across southern Idaho, now and into the future.

I. THE DIRECTOR ERRED BY ORDERING THE CURTAILMENT OF GROUND WATER RIGHTS IN VIOLATION OF THE STATE'S COMMITMENT AND OBLIGATION TO MANAGE THE ESPA BASED ON MINIMUM SNAKE RIVER FLOWS AT THE MURPHY GAUGE.

In 1951 the Idaho legislature enacted the Ground Water Act (I.C. § 42-226 et seq.) in response to the prospect for a massive expansion of irrigated agriculture in Idaho. Advances in pumping technology and hydropower generation and delivery had made it economically feasible for farmers to irrigate from ground water wells, enabling the agricultural development of new lands and providing a way to supplement surface water supplies during drought periods. (Ex. 435.) It was a new dawn, and the economic potential was tremendous. However, the prior appropriation doctrine presented a formidable obstacle, since, if the doctrine were strictly applied, a lowering of the water table could result in vast curtailments regardless of the total amount of water in the resources. The legislature alleviated this concern and promoted ground water development by declaring that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of ground water resources," and by assuring would-be ground water appropriators that they "shall be protected in the maintenance of reasonable ground water pumping levels …." I.C. § 42-226. The legislation achieved its intended goal, with more nearly one million acres brought under irrigation from the ESPA. (Ex. 429; Carlson, R. Supp. Vol. 7, p. 4849.)

Consistent with the Ground Water Act, it is has long been an established policy of Idaho water law that the holders of spring-fed water rights in the Thousand Springs area are not absolutely protected from reduced spring flows that result from ground water development of the ESPA. To absolutely protect spring flows would require that the water table of the ESPA be

maintained at unnaturally high levels, effectively precluding ground water development on the eastern Snake River Plain. As a result, water users in the Thousand Springs area were entitled to appropriate and make use of available spring flows, but were not absolutely protected against declining flows and were not entitled to make a delivery call against ground water rights diverting from the ESPA. As explained by A. Kenneth Dunn ("Dunn"), former Director of the IDWR (1981-87), "there was an understanding that the spring flows themselves would not be protected from other development." (R. Vol. 13 p. 2881-82, ¶ 11.) This longstanding policy is reflected in the Department's licensing practices for aquaculture facilities (the primary users of spring flows in the Thousand Springs area) and was incorporated into State Water Plans and the monumental Swan Falls Agreement.

A. Water right licensing practices for aquaculture facilities in the Thousand Springs area reflect the policy that spring flows are not absolutely protected.

The IDWR's water right licensing practices for aquaculture facilities in the Thousand Springs area deviated from traditional licensing practices. Whereas water right licenses are normally strictly defined by the amount of water actually put to beneficial use, aquaculture rights were often licensed based on maximum facility volume regardless of the amount of water being used. (Dunn, R. Supp. Vol. 6, p. 4787; Carlson R. Supp. Vol. 7, p. 4841; Ex. 439, 439, 440.) Since aquaculture is a non-consumptive water use, and because the Department understood that ground water rights could not be curtailed in an attempt to increase spring flows, the Department was not concerned with issuing a license for more water than was actually being put to beneficial

use if the appropriator was willing to accept the risk of constructing a facility with room to grow. (Carlson, R. Supp. Vol. 7 p. 4841; Dunn, R. Supp. Vol. 6 p. 4787.)

B. State Water Plans confirm that spring flows are not absolutely protected and that the Spring Users will have to adjust to reduced spring flows as a result of ground water development on the eastern Snake River Plain.

The first Idaho State Water Plan, adopted in 1976, reinforced the policy that spring flows are not absolutely protected:

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

(Ex. 438 at 118.) The Plan clearly iterated the State's policy that spring flows may decline as a result of ground water development of the ESPA and that aquaculture facilities may have to adjust accordingly. The 1982 State Water Plan includes identical language (Ex. 439 at 44) and the 1986 State Water Plan includes nearly-identical language (Ex. 440 at 38).

The statement that "adequate water for aquaculture will be protected" reflects that State's commitment to maintain a minimum Snake River flow of 3,300 cfs at the Murphy Gauge. (Ex. 438 at 116.) Since the Snake River below Milner Dam is supplied almost entirely by spring flows, the maintenance of a minimum flow of 3,300 cfs necessarily secures spring flows to meet the minimum. In the event the minimum flow was not met, ground water rights would be subject to curtailment in order to increase Snake River flows, in the process providing water to Blue Lakes, Clear Springs, and other spring users. (Wylie, Tr. p. 891 L. 12 - p. 892 L. 2.) Aquaculture

rights are deemed to be non-consumptive and therefore would not be subject to a delivery call. The State's commitment to maintain a minimum Snake River flow allowed development of the ESPA consistent with the Ground Water Act while at the same time protecting existing hydropower rights below Milner Dam and spring water rights in the Thousand Springs area. As explained in the 1986 State Water Plan, "[t]he minimum flows established for the Murphy Gauging State should provide an adequate water supply for aquaculture." (Ex. 440 at 38.)

The policy that spring flows are not absolutely protected was repeatedly and consistently explained by the Idaho Water Resource Board (the "Board") in public hearings held throughout Idaho to address amendments to the 1986 State Water Plan which increased the minimum flow at Murphy Gauge to 3,900 cfs. In Burley, the Board explained:

> If we're gonna have 3900 going past the Murphy gage, we're gonna have to have the water coming up 1000 Springs. Therefore those guys are probably protected to some degree. It does specify, as does the existing water plan, however, that a water right is not a guarantee of your means of diversion. It says you're entitled to the water as long as there's a legitimate way to get it. If the spring flows were to decline, some people, the trout farmers for example, may have to change their diversion works. In an extreme case some of them might even have to pump water. These water rights will still have its priority date [means that?] water available to him but his means of diversion are not necessarily protected.

(Ex. 441 at 15-16.) In Pocatello the Board likewise explained that spring users may need to adjust to reduced spring flows because "the State is not gonna promise someone who uses those spring flows that it's always gonna be there …." *Id*. at 9. The same assurance was provided at Idaho Falls. *Id*. at 3-4.

These statements of the Board do not reflect a change in State water law, but confirm the time-honored policy that spring flows in the Thousand Springs area are not absolutely protected under the Ground Water Act. As explained by former Director Dunn,

> there was no specific guarantee that [spring users] would continue to have the kinds of artificially-inflated flows that they had been experiencing since the inception of their water right, not unlike other users of ground water. Therefore they may be required to change their diversion structures up to an including the drilling of wells in order to guarantee that flow. That is the reason it was specifically stated that development of the Eastern Snake Plain Aquifer may diminish the flow of water to those springs.

(R. Vol. 13, p. 2880, ¶ 7.) There was a universal understanding that spring users like Blue Lakes and Clear Springs would have to adjust to decreased spring flows as a result of development of the ESPA such as by improving spring outlets, reusing spring flows, or drilling wells. They had no right to demand that ground water rights be curtailed to increase spring flows.

The State Water Plans were enacted under Constitutional authority and ratified by the legislature. I.C. § 42-1736. The Idaho Constitution gives the State Water Board "power to … formulate and implement a state water plan for optimum development of water resources in the public interest." Art. XV, § 7. The Constitution also authorizes the legislature to impose "reasonable limitations as to the quantity of water used and the times of use" to facilitate optimum water development. *Id*. at § 5. This the legislature has done by requiring that "[a]ll state agencies shall exercise their duties in a manner consistent with the comprehensive state water plan." I.C. § 42-1734B(4). The Director therefore has a legal duty to manage the Snake River watershed consistent with the

minimum stream flows established by the State Water Plan and the attendant policy that spring flows are not absolutely protected.

C. The Swan Falls Agreement and its incorporated amendments to the State Water Plan further confirm that spring flows in the Thousand Springs area are not absolutely protected.

The State's commitment to manage the Snake River watershed based on minimum Snake River flows is also incorporated into the Swan Falls Agreement, which not only resolved litigation but also defined a sound comprehensive plan for management of the ESPA. (Ex. 437.) Idaho Power brought the so-called Swan Falls lawsuit in an effort to increase Snake River flows at the Company's hydropower facility at Swan Falls Dam. The lawsuit threatened to curtail thousands of existing ground water rights and block all future development of the ESPA which would have reversed sound water management policies. The State of Idaho entered into the settlement as a means to assure the protection of existing water rights and to facilitate future development of water rights in the upper Snake River Basin. (Dunn, R. Supp. Vol. 6, p. 4787.)

The Swan Falls Agreement ("Agreement") provided additional protection to the holders of spring water rights in the Thousand Springs area by increasing the minimum flow at the Murphy Gauge to 3,900 cfs during the summer and 5,600 cfs during the winter. (Agreement, Ex. 437 at 3, ¶ 7.A.) The Agreement expressly required "[a]mendment of the State Water Plan to implement the [minimum flow] provisions of Exhibit 6." (Ex. 437 at 7, ¶ 13; Ex. 437 at Ex. 6, ¶1.) In addition to the increased minimum Snake River flows at the Murphy Gauge, the Agreement confirmed the existing

State Water Plan provision that "minimum daily flow at the Milner gauging station shall remain at zero cfs." (Ex. 437 at Ex. 6, ¶1.) The increased minimum Snake River flow at the Murphy Gauge effectively secured increased spring flows in the Thousand Springs area.

The Agreement additionally secured protection for existing ground water rights and secured a water supply for future development. First, the Agreement unconditionally protects ground water rights with a priority date prior to October 1, 1984. (Ex. 437 at 4, ¶ D.) The State agreed that only those ground water rights with a priority date after October 1, 1984, could be curtailed to meet the minimum Snake River flow requirement at the Murphy Gauge. (Carlson, R. Supp. Vol. 7 p. 4841, L. 18- 22; Dunn, R. Supp. Vol. 6 p. 4787, L. 10.) Second, the Agreement secured a supply of ground water (the "trust water") that could be developed so long as the minimum Snake River flows are satisfied. (Ex. 437 at 3-4, ¶7.B.) As attested by Dunn, who served as Director of the IDWR during the time of the Agreement, the intent of the Agreement was to provide increased flows for hydropower (and, consequently, spring users) while protecting existing ground water users and providing for additional development of the ESPA water supplies in excess of the amount of discharge necessary to meet the minimum flow requirements. (R. Vol. 13 p. 2879, ¶¶ 6-7.)

Management of the ESPA based on minimum flows at the Murphy Gauge facilitates full economic development of the ESPA consistent with the Ground Water Act, while still providing significant protection to both spring users and hydropower

interests. The State agreed that "this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest" and that the Agreement "together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed." (Ex. 437 at 5, ¶ 11.) To the extent that management of the ESPA based on minimum Snake River flows "result[s] in water being administered in a manner differing from strict priority, the prior appropriation doctrine is not necessarily violated." *In Re SRBA*, Subcase 91-00005 (Basin-Wide Issue 5) Order on Cross Mot. for Summ. J.; Order on Mot. to Strike Aff. at 31 (July 2, 2001). The legislature's approval of the Agreement and its incorporation into the 1986 State Water Plan is a valid exercise of the its constitutional authority to place reasonable limits on spring water rights in the Thousand Springs area. Idaho Const. art. XV, § 5.

The Blue Lakes Order and Clear Springs Order are contrary to and a total reversal of water administration policy incorporated into the Agreement and State Water Plan that provides that aquaculture will be deemed to have adequate water so long as the minimum stream flows at the Murphy Gauge are met. Even though Snake River flows at the Murphy Gauge have not dropped below the established minimums, the Director ordered the curtailment of tens of thousands of ground water-irrigated acres, effectively requiring Snake River flows in excess of those provided in the Agreement and State Water Plan. Moreover, the Curtailment Orders impermissibly eliminate the State's right to develop the trust water, thereby stripping the State of benefits it secured under the Agreement.

The Director has a legal duty to manage and administer the ESPA based upon the minimum Snake River flows established in the Agreement and incorporated into the State Water Plan. I.C. § 42-1734B(4). The Curtailment Orders are inconsistent with those obligations, exceed the Director's authority, are an abuse of discretion, and therefore must be reversed as a matter of law. Blue Lakes and Clear Springs cannot be permitted to force the State to abandon the Agreement, provide Snake River flows that are greater than what are required by the Agreement and State Water Plan, and deprive the State of its right to develop the trust water provided under the Agreement.

II. THE LEGISLATIVE MANDATE FOR FULL ECONOMIC DEVELOPMENT OF GROUND WATER RESOURCES DOES NOT TOLERATE THE CURTAILMENT OF TENS OF THOUSANDS OF IRRIGATED ACRES IN AN ATTEMPT TO FRACTIONALLY SUPPLEMENT ESPA DISCHARGES FROM THE SPRINGS THAT SUPPLY BLUE LAKES' AND CLEAR SPRINGS' WATER RIGHTS.

In the event that the Spring Users' delivery calls are not denied in consequence of the State's obligation to manage the ESPA based on minimum Snake River flows, this Court must then decide the extent to which Blue Lakes and Clear Springs will be permitted to interfere with the statutory directive for full economic development of the ESPA. I.C. § 42-226.

Under Idaho law, intrastate waterways are the "property of the state" and are dedicated to "public use." I.C. § 42-101; Idaho Const. art. XV, § 1. Accordingly, a water right "is not an unrestricted right, but must be exercised with some regard to the rights of the public." *Schodde v. Twin Falls Water Co.*, 224 U.S. 107, 120 (1911). Among those rights is the public interest in seeing "optimum development of water resources." Idaho Const. art. XV, § 7. Toward that end,

Idaho law requires that water use be reasonable in all respects. *AFRD2*, 143 Idaho at 876-77, 154 P.3d at 447-48.

The law of reasonable water use is incorporated into the Idaho Constitution, vesting the legislature with express authority to impose reasonable limitations on the prior appropriation doctrine: "priority of right shall be subject to such reasonable limitations as to the quantity of water used and the times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe." Idaho Const. art. XV, § 5. In 1953 the legislature exercised its authority, declaring that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." I.C. § 42-226; *see* 1953 Idaho Sess. Laws, ch. 182, § 1, p. 277. The mandate for full economic development of ground water resources is a definite water administration criterion, grounded in the constitution, that is no less meaningful or binding than the prior appropriation doctrine.

Laws of reasonable water use and full economic development of ground water resources are ingrained water administration criteria. As early as 1911, the United States Supreme Court, in applying Idaho law, held that a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." *Schodde*, 224 U.S. at 120 (quoting *Basey v. Gallagher*, 87 U.S. 670, 683 (1874)). In 1923 the Idaho Supreme Court affirmed as much with respect to ground water resources, declaring that an appropriator has "no right to insist the water-table be kept at the existing level in order to permit

him to use the underground waters." *Nampa & Meridian Irrigation Dist. v. Petrie*, 37 Idaho 45, 51, 223 P. 531, 532 (1923). In 1973 the Court specifically considered the statutory directive for full economic development of ground water resources and found it to be "consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest." *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973). As a result, the Court explained, "in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development." *Id*. Recently the Court again affirmed the constitutionality of the laws of reasonableness water use and full economic development of ground water resources, stating: "Clearly … the Director may consider factors such as those … in water rights administration." *AFRD2*, 143 Idaho at 876, 154 P.3d at 447.

While there is an inherent tension between the prior appropriation doctrine and the policy of full economic development of ground water resources, they are not incompatible, as some suggest. Within the bounds of reasonableness, the prior appropriation doctrine operates without restraint. But there are limits beyond which the administration of water by priority will unreasonably hinder the public's interest in maximizing beneficial use of its water resources. The pioneering facts and circumstances of this case call upon Idaho's judiciary to consider those limits and decide the point at which the public's interest in maximum development of the ESPA should step in and temper the curtailment of beneficial water use based on priority. It is not a matter of choosing between the prior appropriation doctrine and the principle of optimum development of water resources, but of demarcating parameters of reasonable water use.

Whether a given water right unreasonably interferes with full economic development of a ground water resource is a highly fact-driven decision that cannot be condensed to a tidy, formulaic analysis *.AFRD2*, 143 Idaho at 440, 446, 154 P.3d at 869, 875. Still, certain legal principles have developed that sustain and give substance to the directive for full economic development of ground water resources. That the Curtailment Orders unreasonably interfere with full economic development of the ESPA is underscored by laws against monopolistic and wasteful water use, the substantial amount of time required for the effects of curtailment to accrue to Blue Lakes and Clear Springs, the effective protection of the water table of the ESPA, and the economic impact of curtailment. The application of these principles to the facts of this case persuasively demonstrates that the scope of curtailment is overbroad and unreasonably interferes with full economic development of the ESPA. The solution requires confining the scope of curtailment to those ground water rights for which a significant portion of the quantity curtailed will accrue to the springs that supply Blue Lakes' and Clear Springs' water rights within a reasonable time.

A. The Curtailment Orders vest Blue Lakes and Clear Springs with an unreasonable monopoly over vast quantities of the ESPA.

The directive for full economic development of the ESPA is buttressed by the law against monopolistic use of Idaho's water resources. As prescribed in CM Rule 20.03: "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." IDAPA 37.03.11.020.03. The Rule has support in the Idaho Constitution, which provides that

"[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Idaho Const. art. XV, § 3. The Constitution thus prevents a senior-priority water user from preventing subsequent appropriator's from accessing and using water from a given source.

The United States Supreme Court articulated the rule against monopolistic water use in its seminal decision in *Schodde*, explaining that a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." 224 U.S. at 121 (quoting *Basey*, 87 U.S. at 683). In that case, the newly-constructed Twin Falls Canal prohibited a prior appropriator (Schodde) from diverting his water right from the Snake River, thereby ruining his ability to raise crops on his 430-acre farm. *Id*. at 114-16. Though Shodde's water right was senior in priority to all water rights diverting through the Twin Falls Canal, the Court denied him recourse because the protection of his water right would unreasonably interfere with the public's interest in maximizing development of the Snake River. The Court pointed out that the Canal cost $1.5 million to construct and delivered water to 5,000 water users for irrigation, stock and manufacturing purposes, including the irrigation of 300,000 acres, and that "there is no other supply of water available for use on said lands." *Id*. at 115-16.

The Court further justified its decision in *Schodde* with the following hypothetical, which is remarkably relevant to this case:

> Suppose from a stream of 1000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100, could it be said that he made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that

> when the entire 1000 inches are running, they so fill the channel that by a ditch he can draw off to his land 100 inches, can he then object to those above him and appropriating the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation.

Id. at 119. As explained, it is patently unreasonable to curtail a beneficial water use where only ten percent of the quantity curtailed will accrue to the calling senior water user. Arguably, even a ten percent return is unreasonable with respect to the ESPA in light of the legislative directive for full economic development of ground water resources. In fact, Clear Springs' CEO Larry Cope testified that he expected no less than two-thirds of the amount curtailed will accrue to the spring that supplies Clear Springs' water right within ten years. (Cope Tr. p. 154, L. 17-p. 159, L. 16.)

The Court's hypothetical in *Schodde* could not be more fitting to the facts of this case. Here, the Director ordered the curtailment of 57,220 acres in an attempt to provide Blue Lakes with 10 cfs. The gross disparity between the amount of water use curtailed and the expected return to Blue Lakes is apparent when both figures are converted to acre-feet. Assuming the typical diversion of four acre-feet per acre for irrigated agriculture in the area of curtailment, the curtailment of 57,220 acres equates to 228,880 acre-feet. The anticipated gain to Blue Lakes of 10 cfs (after more than 100 years of curtailment) equates to 7,276 acre-feet—just **3.2 percent** of the amount curtailed. The difference between the amount of water curtailed (228,880 acre-feet) and the anticipated return to Blue Lakes (7,276 acre-feet) is 221,604 acre-feet.

The disparity between the amount of water curtailed and the anticipated return to Clear Springs is even more egregious, where the Director ordered the curtailment of 209,880 acre-feet

(52,470 acres x four acre-feet per acre) annually to provide Clear Springs with just 1,896 acre-feet (2.6 cfs year-round), which is **less than one percent** of the amount curtailed. The difference between the amount of water curtailed (209,880 acre-feet) and the anticipated return (1,896 acre-feet) is 207,984 acre-feet.

Can it be said that Blue Lakes has made such a reasonable use of the 221,604 acre-feet, and Clear Springs such a reasonable use of the 207,984 acre-feet, as to constitute an appropriation of it? The answer must be "no." These are massive amounts of water that are sacrificed to slightly supplement Blue Lakes' and Clear Springs' water rights which are already substantially filled. For reference, the sacrifice of 207,984 acre-feet under the Clear Springs Order is more than double the amount of water that is stored in Lake Walcott (97,000 acre-feet) when full. The Curtailment Orders go far beyond what the United States Supreme Court deemed reasonable in *Schodde* (a ten percent return deemed unreasonable per se) and what Clear Springs itself deems reasonable (at least a two-thirds return). It is patently unreasonable to curtail 57,220 acres when Blue Lakes will receive just 3.2 percent of the water curtailed. Even more startling is the Clear Springs Order, which orders the retirement of 52,470 acres when less than one percent of the water is expected to reach Clear Springs. Surely this is such an unreasonable use of 96.8 percent and the 99 percent of the water use curtailed as to not be tolerated under the law of appropriation.

The Hearing Officer considered this disparity as one justification for limiting the scope of curtailment via implementation of the trim line:

> One of the most startling facts in these cases is the amount of acreage that must be curtailed in order to deliver water to the Spring Users facilities. It is not a one cfs to one cfs increase to the Spring Users ratio. The vast majority of the water that will be produced from curtailment does not go to the Blue Lakes and the Snake River Farm facilities. Perhaps it will go to beneficial use in Idaho, perhaps not.

(Recommended Order at 22-23.) Nevertheless, the Director ratified the broad curtailment that was ordered on an emergency basis in 2005. As a result, these pioneering Curtailment Orders stand for the proposition that it is reasonable to curtail 52,470 irrigated acres even though less than one percent of the quantity curtailed is expected to reach the senior appropriator.

The Director's application (or lack thereof) of the law against monopolistic water use renders CM Rule 20.03 meaningless. The disparity between the amount of water curtailed and the anticipated return to Clear Springs—a less than one percent return—could hardly be more extreme. The Idaho Legislature must have intended to avoid this very type of disparity when it declared that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." I.C. § 42-226. The Director's failure to narrow the scope of curtailment to assure that a significant portion of the quantity curtailed will accrue to the springs that supply Blue Lakes' and Clear Springs' water rights violates the legislative mandate for full economic development of the ESPA and is arbitrary, capricious, and/or an abuse of discretion.

B. The curtailment encompasses ground water rights for which the anticipated return is so miniscule as to be unreasonable.

The legislative mandate for full economic development of ground water resources is also reinforced by the policy against wasteful water use: "The policy of the law of this State is to

secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). The CM Rules require the Director to consider waste in determining whether a water use is reasonable (Rules 40.03 & 42.01) and also in determining whether a delivery call is futile (Rule 10.08).

Idaho law lacks a definite point at which the waste of water becomes unreasonable, but courts consistently decry wasteful water use. *United States v. State (In re SRBA Case No. 39576 Basin-Wide Issue No. 9)*, 131 Idaho 468, 959 P.2d 449 (1998); *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982); *Baker*, 95 Idaho 575, 513 P.2d 627; *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957). The *Schodde* decision stands for the proposition that an unreasonable amount of waste occurs at least if less than ten percent of a curtailed water right will be put to beneficial use by the calling senior water user. 224 U.S. at 119. Yet in light of the Legislature's directive for full economic development of ground water resources, even a ten percent return is not reasonable. If Idaho is to maximize beneficial use of the ESPA, far more than ten percent return should be required to warrant the curtailment of beneficial water use. As compelling evidence of what is reasonable, Clear Springs' CEO testified that even he believed that at least a two-thirds (sixty-six percent) return should be required. (Cope, Tr. p. 159, L. 12-16.)

Notwithstanding the CM Rules' proscription of wasteful water use, the scope of curtailment is so broad that it encompass water rights for which only one to three percent of the quantity curtailed is expected to discharge from the springs that supply Blue Lakes' and Clear Springs' water rights, and then only when steady state conditions are reached in 50 to 100 years.

If it is not unreasonably wasteful to sacrifice a beneficial water use, hoping that a mere one to three percent of that water can be used by another appropriator, then arguably nothing is. The amount of water that effectively wasted further demonstrates that the scope of curtailment is overbroad and unreasonably interferes with full economic development of the ESPA.

C. It will take decades for increased spring discharges to be fully realized, and it is not clear that Blue Lakes and Clear Springs will be able to grow more or larger or healthier fish with the small amount of additional water.

The gross disparity between the amount of water use that is being curtailed and the fractional return to Blue Lakes' and Clear Springs' water rights is compounded by the amount of time required for that return to be realized. It will take close to 100 years for the effect of curtailment to be fully realized by Blue Lakes and Clear Springs. (Ex. 462, 463; Wylie, Tr. p. 874, L. 20-p. 878, L. 17.)

In responding to a water delivery call, if it will take an unreasonable amount of time for the effects of curtailment to reach the calling senior water user, then the Director has a duty to declare the call futile. IDAPA 37.03.11.010.08; *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P2d 1220, 1223 (1976). Until now, Idaho appellate courts have not considered what constitutes a reasonable amount of time for the effects of curtailment to be realized in the conjunctive management context. The determination turns primarily on whether the water will show up in time for the senior appropriator to make beneficial use of it. For example, a delivery call for irrigation water will be deemed futile if the water cannot be delivered by the end of the irrigation season since the senior appropriator would not then be able to put the water to beneficial use.

Since aquaculture is a year-round water use, there is no seasonal limitation as there is with irrigation. (Recommended Order at 20.) Nevertheless, the amount of time required for water to accrue to Blue Lakes and Clear Springs is still important due to the possibility that intervening events such as above-average precipitation, managed recharge, decreased water demand, and market and economic factors could nullify their need or ability to use increased spring flows that result from curtailment. Clear Springs' CEO testified that the aquaculture industry is highly competitive, that foreign competitors have production cost advantages, and that market factors had in fact compelled Clear Springs to scale back its production in recent years. (Cope, Tr. p. 96, L. 24-p. 97, L. 7; p. 133, L. 1-5; p. 136, L. 2-p. 138, L. 5-17.) The record also shows that spring discharges rebound quickly in response to good water years. (Ex. 154, years 1997-2001; Ex. 155, 156.) Just a few years of above-average precipitation will have a greater affect on improving aquifer levels and spring flows than wholesale curtailment. (Wylie, Tr. p. 845, L. 22-25; Brendecke, Tr. p. 1891, L. 15-p. 1892, L. 17; p. 1904, L.-p. 1905, L. 22; *Cf.* Exhibit 154 w/ Ex. 431 and 432.) In fact, Exhibits 156 and 158 show that Clear Springs' claimed "shortage" at Snake River Farms almost disappeared in 2006.

While the determination of reasonableness often requires some exercise of discretion, there must be a point at which the amount of time required for the anticipated benefit of curtailment to be realized is *per se* unreasonable. More than months may be required to render a delivery call futile in the conjunctive management context, but it is not reasonable to curtail water rights when the anticipated benefit will take decades to accrue. It is contrary to the futile call doctrine and it is poor administrative policy to curtail a water right when the intended benefit

is likely to be intercepted and negated by the inevitability of good water years, decreased product demand, business failure, or other factors. That it will take nearly 100 years for increased spring flows to be fully realized further demonstrates that the scope of curtailment is overbroad and unreasonably interferes with full economic development of the ESPA. (Ex. 462, 463; Wylie Tr. p. 874, L. 20-p. 878, L. 17; Church, Attachment B at 7-8.)

D. The Curtailment Orders require that the water table of the ESPA be maintained at unnaturally high levels contrary to the Ground Water Act.

It has long been the law in Idaho that "[a] senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion." *Baker*, 95 Idaho at 584, 513 P.2d at 636. This principle of law dates back to the *Schodde* decision, where the United States Supreme Court concluded that Schodde's means of diversion from the Snake River via water wheels was not absolutely protected because it precluded maximum development of the Snake River. 224 U.S. at 118-21. A short time later the Idaho Supreme Court ruled that an appropriator has "no right to insist the water table be kept at the existing level in order to permit him to use the underground waters …." *Nampa & Meridian Irr. Dist. v. Petrie*, 223 P.531-32 (1923). The legislature reinforced that policy when it enacted the Ground Water Act, which "contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development." *Baker*, 95 Idaho at 584, 513 P.2d at 636. The State Water Resource Board enunciated the effect of the Ground Water Act on the administration of spring-fed water rights in the Thousand Springs area which are used primarily for aquaculture purposes:

> Aquaculture can expand when and where water supplies are available and where such uses do not conflict with other beneficial uses. It is recognized, however, that future management and development of the Snake River Plain Aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities.

(Ex.440, Policy 5G) (emphasis added.)

The policy that an appropriator's means of diversion may not be absolutely protected is incorporated into the CM Rules. In response to a water delivery call, CM Rule 42.01(a) requires the Director to consider "[t]he amount of water available from the source from which the water right is diverted." IDAPA 37.03.11.042.01(a). As in *Schodde*, this Rule allows the Director to declare that a means of diversion is not absolutely protected if doing so would unreasonably interfere with full economic development of the resource. Similarly, CM Rule 42.01(h) calls upon the Director to consider "[t]he 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 …." IDAPA 37.03.11.042.01(h). This Rule affirms the policy that spring flows in the Thousand Springs area are not absolutely protected and that aquaculture water users may have to modify their means of diversion in order to secure their water rights. These pragmatic Rules prevent a senior-priority water user from demanding that the groundwater table be kept at a certain level regardless of whether it interferes with maximum beneficial use of the resource. Both Rules directly aim to prevent the type of wholesale curtailment that has been ordered in this case.

Absolute protection of Blue Lakes' and Clear Springs' means of diversion requires absolute protection of an unnaturally high ESPA water table. Blue Lakes' and Clear Springs'

delivery calls were made on the backs of water rights that were appropriated at a time when spring flows in the Thousand Springs area were at an all-time high due to decades of inefficient flood irrigation practices on the Eastern Snake River Plain. (Brendecke, Tr. p. 1799, L. 5-p. 1800, L. 2; Brendecke, R. Supp. Vol. 3, p. 4424, L. 24-p. 4426, L. 18; Ex. 467, 468, 469.) While spring flows have diminished from peak levels, they still remain well above historic levels and the ESPA is at or near equilibrium. (Ex. 154, 429; Wylie, Tr. p. 845, L. 2-11; Brendecke, R. Supp. Vol. 3, p. 4446, L. 7-p. 4447, L. 7.)

Since spring flows remain well above natural levels and the ESPA is not being mined (i.e. withdrawals from the ESPA do not exceed recharge), Blue Lakes and Clear Springs should have "no right to insist that the water table be kept at the existing level." *Nampa & Meridian Irr. Dist.*, 223 P. at 532. Notwithstanding, the Director ordered the curtailment of tens of thousands of ground water-irrigated acres in an effort to maintain the ESPA water table at inflated levels to support peak discharges from the springs that supply Blue Lakes' and Clear Springs' water rights. The Curtailment Orders require that a massive surplus of unused storage water be maintained in the ESPA that can never be appropriated but exists solely to bear up inflated spring discharges. It is not only unreasonable, but constitutionally impermissible to require that a massive surplus of water be stored in the ESPA which cannot be put to beneficial use. Idaho Const. Art. XV, § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied ….")

Prudent administration of the ESPA must turn on "how best to utilize the annual supply without over-drafting the stock which maintains the aquifer's water level." *Baker*, 95 Idaho at

580. Given that spring flows exceed natural levels and that the ESPA at or near equilibrium, it makes no sense and is contrary to the mandate for full economic development of ground water resources to retire tens of thousands of irrigated acres to top off Blue Lakes' and Clear Springs' water supplies. Blue Lakes must accept that "some modification of their rights [is necessary] in order to achieve the goal of full economic development." *Baker*, 95 Idaho at 584.

E. The severe economic impact of curtailment vividly demonstrates the unreasonable interference with full economic development of the ESPA.

The legislative mandate for "full economic development of underground water resources" inherently gives relevance to the economic effect of curtailment. I.C. § 42-226. As stated in the Recommended Order, "the Director has a responsibility to the State to consider the impact of the requested curtailment." (Recommended Order, R. Vol. 16, p. 3713.) Yet the scope of curtailment was still extended to the point that the State of Idaho will suffer severely. Locally, curtailment "would result in an immediate and largely permanent net loss of nearly 3,500 jobs, at least $160 million near term decrease in the area's personal annual income, and a loss of between $4.4 to $7 million in annual local property tax revenues." (Church, Attachment B at 6.) State-wide, the curtailment would "cause the state's economy to lose a present value of close to $8.1 billion in gross output during the next twenty years to gain a present value of $423.5 million." *Id*. at 7. The value gained from curtailment is less than six percent of the value lost, resulting in a net economic loss of $7,676,500. (Ex. 442 at ¶¶ 34-47.)

The extraordinary economic loss that will result from curtailment speaks for itself. The issue to be decided in this case is whether the Director will be required to administer the State's

water resources in a way that complies with the legislative directive. The projected net economic loss of more than seven and one-half billion dollars powerfully demonstrates that the curtailment is overbroad and unreasonably interferes with full economic development of the ESPA.

F. The scope of curtailment should be narrowed so that a significant portion of the quantity curtailed will within a reasonable time accrue to the springs that supply Blue Lakes' and Clear Springs' water rights.

The solution to reasonable water use in this case lies in reigning in the scope of curtailment so that a significant portion of the curtailed water use will within a reasonable time accrue to the springs that supply Blue Lakes' and Clear Springs' water rights. This can be accomplished via constriction of the trim line: "a point of departure beyond which curtailment [is] not ordered." (Recommended Order, R. Vo. 16, p. 3706.) The lesser the distance between a curtailed ground water right and the target spring outlets, the greater the percentile return on curtailment and the less time it takes for the effects of curtailed to be realized. (Harmon, Tr. p. 931, L. 19-24; Dreher, Tr. p. 1414, L. 4-17; Brendecke, R. Supp. Vol. 3, p. 4455, L. 23-p. 4456, L. 5, p. 4456 L. 15-p. 4457, L. 18.)

Obviously, the implementation of a trim line has the effect of excluding some junior-priority water rights from curtailment. But that is precisely the purpose of the legislative instruction that "a reasonable exercise of the [prior appropriation doctrine] shall not block full economic development of underground water resources." I.C. § 42-226. The language of that statute is unambiguous; therefore, "the clearly expressed intent of the legislative body must be given effect." *Friends of Farm to Market v. Valley County, Idaho Bd. of Commissioners*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). As explained by the Idaho Supreme Court, "when private

property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interest must recognize that the ultimate goal is the promotion of the welfare of all our citizens." *Baker*, 95 Idaho at 584, 513 P.2d at 636. The Court unequivocally affirmed its position on this issue in its recent *AFRD2* decision, stating that "[w]hile the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception." 143 Idaho at 880, 154 P.3d at 451.

It is indisputable that the curtailment of tens of thousands of irrigated acres greatly interferes with full economic development of the ESPA. The unreasonableness of the curtailment is plainly manifest by the fact that that it will take nearly a century for just 3.2 percent of the quantity curtailed to reach Blue Lakes and for less than 1 percent of the quantity curtailed to reach Clear Springs. The monopolistic effect of curtailment, the massive amount of water sacrificed, and the severe economic harm from curtailment all further demonstrate that the scope of curtailment is overbroad. When the Ground Water Users argued that these considerations demand that the scope of curtailment be narrowed, the Director refused because there was no "empirical basis." (Response Order, Vol. 16, p. 3840-41.) Yet an empirical basis is not prerequisite to the determination of reasonableness, which inherently requires "some exercise of discretion by the Director." *AFRD2*, 143 Idaho at 875, 154 P.3d at 446. Ultimately the Director refused to exercise that discretion.

The facts are undisputed that the Curtailment Orders eliminate 100 percent of the beneficial water use of curtailed ground water users while at most, and only then at steady state

conditions achieved after nearly 100 years, will a mere 3 percent of the quantity curtailed reach Blue Lakes and less than 1 percent of the quantity curtailed reach Clear Springs. The disparity between the amount of water curtailed and the anticipated benefit to Blue Lakes and Clear Springs is outlandish. Not surprisingly, the economic impact of curtailment is immediate, severe and potentially irreversible and could cause the permanent net loss of nearly 3,500 jobs, decrease the area's personal annual income in the near term of at least $160,000,000, and result in the loss of millions of dollars in annual property tax revenue. These facts unavoidably demonstrate that the scope of curtailment is overbroad and unreasonably interferes with full economic development of the ESPA. Such broad scope of curtailment exceeds the Director's statutory authority and/or is arbitrary, capricious and an abuse of discretion. The Ground Water Users therefore ask this Court to substantially narrow the scope of curtailment via constriction of the trim line so that a significant portion of the water curtailed will within a reasonable time accrue to the springs that supply Blue Lakes' and Clear Springs' water rights.

III. THE RECORD IS DEVOID OF EVIDENCE THAT THE WATER THAT MAY ACCRUE TO BLUE LAKES AND CLEAR SPRINGS FROM CURTAILMENT WILL ENABLE THEM TO PRODUCE MORE OR LARGER OR HEALTHIER FISH AND DOES NOT TO SUBSTANTIALLY SUPPORT THE DIRECTOR'S FINDINGS OF MATERIAL INJURY.

Conspicuously absent from the record is evidence that Blue Lakes or Clear Springs will be able to produce more, larger, or healthier fish as a result of the curtailment. The record does not substantiate the categorical conclusion that "depletion of the water supply … is material injury when the business is the production of fish." (Response Order, R. Vol. 16, p. at 3840.) Nor does the record show that the amount of water that would be deliverable to Blue Lakes and

Clear Springs is in fact "usable" and can be put to beneficial use. (*Cf*. Recommended Order, R. Vol.16, p. 3710.)

Under Idaho law, an "appropriation must be for some useful and beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." I.C. § 42-104; *see also*, Idaho Const. art. XV, § 3. Accordingly, the curtailment of a junior-priority ground water right is unjustified unless the diversion is causing "material injury" to the senior appropriator, defined as "[h]inderance 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." IDAPA 37.03.11.010.14 (emphasis added). The focus is on whether the senior water user can beneficially use more water, not simply whether there is a capability to divert more water. *Id*. at 37.03.11.010. This means that an appropriator, though junior in priority, will not be deprived of his water right unless the calling senior water user can put to beneficial use the water resulting from the junior's curtailment. *See*, *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1223 (1976).

In this case the Director's finding of material injury to Blue Lakes and Clear Springs is based on a generalized claim of injury without substantial competent evidence that Blue Lakes or Clear Springs will be able to produce more or larger or healthier fish as a result of the curtailment. Remarkably, the lack of supporting evidence was by Blue Lakes' and Clear Springs' design. Prior to the hearing, the Spring Users asked the Hearing Officer to prevent the Ground Water Users from discovering information relating to facility improvements and construction, fish production records, and water use and measurement records prior to the date of their partial

decrees in the Snake River Basin Adjudication (i.e. prior to 2001). (Joint Motion for Protective Order, R. Vol. 10, p. 2021.) The Hearing Officer granted the request with one important caveat—that if either Blue Lakes or Clear Springs refused to produce the requested information, they could not then use that information to support a position that "more water allows for the production of more or larger healthy fish." (Discovery Order, R. Supp. p. 4402, ¶ 2.) The Hearing Officer recognized that the suppression of such information would make it impossible for the Ground Water Users to disprove the Spring Users' claims of material injury. Both Blue Lakes and Clear Springs deliberately chose not to produce the requested information.

In addition, the Ground Water Users were erroneously denied information sought in discovery concerning Blue Lakes' and Clear Springs' "spring construction and improvements, collection systems, diversion facilities, measurement devices, including maps, construction plants and designs, [and] drilling records …" that pre-date the adjudication of their water rights in the SRBA (i.e. prior to 2001.) (Discovery Order, R. Supp. p. 4402, ¶ 4.) The protection of the Spring Users from disclosure of this evidence was based on the conclusion that "[t]he likelihood of any relevant information developing from production of information of this nature prior to that time is slight and the burden is significant." *Id.* To the contrary, such information is highly relevant to this case. "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *AFRD2*, 143 Idaho at 877, 154 P.3d at 449. A valid defense to the Spring Users' delivery calls would be showing that their water shortages "could be met with [their] existing facilities and water supplies by

employing reasonable diversion and conveyance efficiency and conservation practices …." IDAPA 37.03.11.042.01(g). It could also be shown that Blue Lakes' and Clear Springs' water needs "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 …." IDAPA 37.03.11.042.01(h). The erroneous suppression of evidence needed to establish valid legal defenses to the Spring Users' delivery calls was highly prejudicial to the Ground Water Users, exceeded the Director's authority, and was arbitrary, capricious and/or an abuse of discretion.

The suppression of production records and other information relevant to the issue of material injury was premised on the assumption that the Department performs a full factual investigation of the amount of water actually needed and used by each water right before issuing its recommendations to the SRBA Court. However, the record shows that is not the case. Both Director Dreher and Tim Luke testified that the Department does not normally evaluate the amount of water actually used or needed to accomplish the beneficial use of previously licensed or decreed water rights prior to making its recommendation to the SRBA Court, nor do the Department's recommendations contain all of the administrative conditions that are relevant in a delivery call. (Luke, Tr. p. 649, L. 13-20; Dreher, Tr. p. 1141, L. 6-p. 1147, L.4; p. 1348, L.9-p. 1350, L. 22.) Rather, there is a presumption of validity given to the prior license or decree, and no field examination is conducted unless there is obvious evidence of abandonment or forfeiture. (Dreher, Tr. p. 1455, L. 18-p. 1456, L.19.)

It is problematic to assume that Blue Lakes and Clear Springs have put to beneficial use and at all times need the maximum rate of diversion authorized by their water rights because the

Department historically licensed aquaculture facilities based on maximum facility volume and not based on whether the maximum authorized amount was ever put to beneficial use. (Luke, Tr. p. 649, L. 13-20; Dreher, Tr. p. 1141, L. 6-p. 1147, L.4; p. 1348, L.9-p. 1350, L. 22.) It appears that the Department has not—either in these proceedings, in licensing Blue Lakes' and Clear Springs' water rights, or in the Snake River Basin Adjudication—evaluated the extent of beneficial use of Blue Lakes' or Clear Springs' water rights. Consequently, it was improper for the Hearing Officer to assume that Blue Lakes and Clear Springs need to divert at their maximum authorized rates of diversion in order to accomplish the beneficial use for which their water rights were issued.

In any case, the Ground water Users were prohibited from discovering important information relative to the issues of material injury and futile call, such as the amount of water that Blue Lakes and Clear Springs can put to beneficial use, patterns of beneficial water use, the amount of water needed for aquaculture production at different times of the year, whether the amount of water put to use has changed over time, and whether there are feasible alternatives to curtailment. It is very possible that Blue Lakes and Clear Springs cannot produce more or larger or healthier fish with the small amount of water that will result from curtailment, but the record is devoid of such information. Blue Lakes and Clear Springs were excused from substantiating their allegations of material injury, and the Ground water Users have been deprived of a meaningful opportunity to defend against the allegations.

Since Blue Lakes and Clear Springs chose to hide the information necessary to challenge their allegations of material injury, they likewise were precluded from presenting any

documentary evidence that supports their claims. They offered generic testimony by one lay witness, admitted over the objections of the Ground Water Users as being contrary to the Discovery Order, that they could grow more fish if they had more water, but supplied no production records or other evidence to support that bare assertion. It is incredible to assume that such testimony is not based upon knowledge of the very fish production records that were kept from the Ground Water Users. The Hearing Officer assured the Ground Water Users that the weight given to such testimony was reduced because it could not be verified. (Tr. p. 177, L. 5-24.)[13] Nevertheless, the Hearing Officer found that both Blue Lakes and Clear Springs had suffered material injury anyway, concluding that "fish propagate and grow in water. More water allows the production of more fish. Less water accommodates fewer fish. Depletion of the water supply in the ponds and raceways limits the production of fish. That is material injury when the business is the production of fish." (Response Order, Vol. 16 p. 3840)

The supposition that more water, no matter how small the amount, automatically equals more fish is without support in the record. It assumes that there is no minimum amount of water required to fill a raceway and that there is no limit to the number of fish that can be grown in a raceway. Logic may infer that more water equals more fish, but how much more water and how

[13] Q. If additional spring flows were made available to Clear Springs at the Snake River Farms facility, could that water be utilized in those dry raceways?
A. Yes. If we had additional water, we would introduce the water to the empty raceways.
Q. What would result if that additional water was put in the raceways?
A. Obviously, we would stock those raceways with fish, and there would be additional production.
MR. BUDGE: I'd object, Your Honor, and move to strike that question [sic] as being unresponsive. We got into the area where he said more water is more fish. The ruling was very specific that there couldn't be testimony that more water is more fish or bigger fish or healthier fish.
THE HEARING OFFICER: That's relying on production records. This goes to the weight and without the production records to substantiate that it has less weight.

many more fish? Presumably there is a minimum amount of water that is required to fill a raceway, and there could very well be a point at which adding more water to a raceway does not enable increased production. Moreover, given the natural seasonal variability in spring flows, will the additional water show up at a time that it could be applied to beneficial use? And even if, for instance, Clear Springs is able to produce more fish with an additional 2.6 cfs, how many more fish? Is it reasonable to curtail 52,470 acres in order to allow the production of one fish, ten fish, 100 fish? Or could the same result be accomplished more efficiently, as the record indicates, by reusing water[14] or by delivering water from nearby spring sources or by drilling ground water wells rather than by curtailing tens of thousands of irrigated acres? These questions have answers, but they are not in this record because the Director excused Blue Lakes and Clear Springs from substantiating their allegations of material injury and deprived the Ground water Users from the information needed to rebut those allegations.

By barring the discovery of production and facility information, the Curtailment Orders stifled important considerations relevant to issues of material injury and futile call criteria and deprived the Ground Water Users of the information necessary to evaluate Blue Lakes' and Clear Springs' water needs, if any, and whether they could be met in other ways. These aspects of the material injury rule were effectively written out of the CM Rules by the Final Order. Blue Lakes and Clear Springs were permitted to "prove" their allegations of material injury without evidence

[14] At the Clear Springs' facility, water is reused between five and six different times. (Cope Tr. p. 105, L. 8-p. 106, L. 1; Kaslo Tr. p. 292, L. 19-p. 293, L. 2.) Water is re-used three to four times as it flows through different raceways at the Blue Lakes facility and is then re-used through an additional ten raceways at the downstream Pristine Springs facility. (Ex. 201, p. 6.)

that an additional 10 cfs and 2.6 cfs will enable the production of more, larger, or healthier fish. The Director ruled that no matter how little water may accrue to Blue Lakes and Clear Springs, no matter what time of the year it shows up or for how long, so long as a lay witness testifies that it will be "used" when it does show up, that is enough to establish material injury. The bar has been set so low that proving material injury requires nothing more than showing a capability to divert more water, regardless of whether the water will actually be put to beneficial use. By analogy, this reasoning would make the diversion of water onto an uncultivated field a beneficial use regardless of whether crops will be raised. Such a standard is not tolerated in the administration of surface water and should not be tolerated in the administration of ground water. It renders superfluous various material injury factors in CM Rule 42 and sets a dangerous precedent for the conjunctive management of Idaho's ground water resources.

Moreover, by excusing senior appropriators from having to substantiate their allegations of material injury, at least when challenged, the door has been opened for junior-priority water users to make delivery calls by proxy through senior-appropriators. For example, a downstream hydropower right that is subordinate to upstream development and not entitled to make a delivery call could conspire to make a delivery call by proxy through an unsubordinated spring water right holder acting as nothing more than a strawman. By eliminating consideration of an appropriator's need for water, the prior appropriation doctrine is exposed to fraudulent manipulation.

The injustice of the findings of material injury, which are based on assumptions that Blue Lakes and Clear Springs strategically precluded the Ground Water Users from rebutting, is

inescapable. Their stratagem to suppress the information necessary for the Ground Water Users to properly defend against their delivery calls paid off, with the CM Rules applied in a manner that turned their bare allegations of material injury into un-rebuttable presumptions of material injury. Prudent administration of Idaho's water resources consistent with the laws of reasonable water use and full economic development of ground water resources cannot tolerate curtailment without assurance that the calling senior water user needs and can put additional water to beneficial use. Therefore, the Ground Water Users respectfully ask this court to reconsider and reverse the conclusions that Blue Lakes and Clear Springs have suffered material injury, as they are not substantially supported by competent evidence in the record.

IV. THE DIRECTOR ERRED BY FAILING TO CONSIDER HIS AUTHORITY UNDER CM RULE 42.01 TO COMPEL A DECREED SURFACE WATER RIGHT TO CONVERT TO A GROUND WATER SOURCE.

As explained above, the principle of law that a senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion is incorporated into CM Rule 42.01(a), which requires the Director, in response to a delivery call, to consider "[t]he amount of water available in the source from which the water right is diverted," and into Rule 42.01(h), which considers "[t]he 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 …." IDAPA 37.03.11.042.01. These CM Rules embody the Director's common law authority to deny a delivery call if the means of diversion unreasonably interferes with full economic development of a groundwater source and his authority to compel a surface water right to convert to a

groundwater source. The CM Rules place pragmatic limits on the prior appropriation doctrine and are guided by the policy that "[a]n appropriator is not entitled to command the entirely 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." The Idaho Supreme Court recently affirmed the Director's authority under CM Rule 42.01(h) to "compel[] a surface user to convert his point of diversion to a ground water source." *AFRD2*, 143 Idaho at 870, 154 P.3d at 441.

In this case the Director abused his discretion by failing to consider whether Blue Lakes' and Clear Springs' means of diversion should be absolutely protected or whether they should be compelled to improve their means of diversion to facilitate full economic development of the ESPA. Before issuing the Curtailment Orders on an emergency basis, Director Dreher considered only whether Blue Lakes' and Clear Springs' immediate diversion structures were reasonably efficient. (Clear Springs Order, R. Vol. 3, 501 ¶ 64; Blue Lakes Order, R. Vol. 1, p. 59 ¶ 66; Ex. 15, 130.) He did not analyze whether the global effect of their method of appropriation, which relies on gravity overflow from the ESPA, should be absolutely protected, and thereby failed to properly apply CM Rules 42.01(a) and (h) to the facts of this case.

The purpose of CM Rule 42.01(h) is not to protect the senior-priority water user from his own inefficiency (that motivation should exist anyway). Rather, its purpose is to protect junior-priority water users from a senior water user whose means of diversion, if absolutely protected, would prevent optimum development of the resource. In *Schodde*, it was determined that water wheels are an unprotected means of diversion because to do so would effectively bar subsequent appropriations from the River. 224 U.S. at 120-21. The Court refused to absolutely protect the

right to divert by way of water wheels due to the global effect which precluded maximum development of the Snake River.

In contrast, Director Dreher considered only the local efficiency of Blue Lakes' and Clear Springs' means of diversions, ruling that so long as an appropriator's immediate diversion structure is reasonably efficient then the means of diversion will be absolutely protected regardless of whether the diversion globally interferes with optimum development of the resource. The precedent that was set effectively eliminates consideration of the global effect of a diversion under CM Rules 42.01(a) and (h). Under that interpretation of the CM Rules, it is inconceivable that any means of diversion could be declared unreasonable or that a surface water user would ever be compelled to convert to a ground water source.

The Ground Water Users asked the Hearing Officer to reconsider Director Dreher's narrow application of CM Rule 42.01(h), arguing that it is contrary to principles of reasonable water use and full economic development of the ESPA because it absolutely protects Blue Lakes' and Clear Springs' means of diversion. The Hearing Officer, however, refused to consider the Rule because, he reasoned, Partial Decrees had been issued for Blue Lakes' and Clear Springs' water rights in the SRBA and it would be impermissible to change the source element of a Partial Decree. (Summary Judgment Order, R. Vol. 14, p. 3236-37). However, allowing the Director to determine the hydraulic connection between surface and ground water rights and administer water accordingly does not constitute a "change" to the water rights, and is precisely the purpose of CM Rules 42.01(a) and (h) and the very instruction given by the Idaho Supreme Court in

AFRD2. The Rules have no application at all if they do not apply to surface water rights, regardless of whether the right is permitted, licensed, or decreed.

The Director also concluded erroneously that a means of diversion must be absolutely protected unless an alternate means of diversion is available to satisfy the water right, stating that "[t]he burden is upon IGWA to show that there is a satisfactory alternative to curtailment that would satisfy the adjudicated rights of the Spring Users." (Recommended Order at 8.) This is a misapplication of the law set forth in *Schodde*. In *Schodde* there was no evidence of an alternate means of diversion than by water wheels, but the Court declared that water wheels are not absolutely protected. This is because the question turned on the global effect of the diversion rather than on the efficiency of water wheels. The Director abused his discretion by ruling that the question of whether a means of diversion unreasonably interferes with the public interest is conditional upon the existence of an alternate means of diversion.

The Director must use his discretion to evaluate the hydraulic relationship between water sources and to apply the CM Rules consistent with the legislative mandate for full economic development of ground water resources and determine whether a given diversion unreasonably interferes with optimum development of the resource. Certainly the Idaho Supreme Court did not act without forethought in specifically affirming the authority of the Director to "compel[] a surface user to convert his point of diversion to a ground water source." *AFRD2,* 154 P.3d at 441. If that rule is ever to be implemented, this is the case. Since the ESPA is the sole source of the water that supplies Blue Lakes, Clear Springs and the Ground Water Users, and is more than ample to supply all of their existing rights, Blue Lakes and Clear Springs should be required to

reasonably improve their means of diversion just as a shallow well is required to drill deeper before being authorized to call out junior-priority ground water users. The Ground Water Users therefore ask this Court to declare that Blue Lakes and Clear Springs are not absolutely protected and that "some modification of their rights [is necessary] in order to achieve the goal of full economic development." *Baker*, 95 Idaho at 584.

V. THE DIRECTOR ERRED BY RULING THAT THE TIME REQUIRED FOR CURTAILED WATER USE TO REACH THE SPRINGS THAT SUPPLY BLUE LAKES' AND CLEAR SPRINGS' WATER RIGHTS HAS NO BEARING ON WHETHER THEIR DELIVERY CALLS ARE DEEMED FUTILE.

The futile call doctrine is a well-established principle of water administration under Idaho law, and applies in the administration of both surface and ground water resources, and in fact was the basis of the Director's denial of the Rangen, Inc., delivery call. (*In the Matter of Distribution of Water to Water Rights Nos. 36-15501, 36-2551, and 36-7694*, Second Amended Order, IDWR, May 19, 2005.) As defined in CM Rule 10.08, a futile call is "[a] delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource." IDAPA 37.03.11.010.08. The futile call doctrine is discussed *supra* relative to the Curtailment Orders' interference with full economic development of the ESPA. Additional consideration of the futile call doctrine is necessary here because the Final Order appears to eliminate considerations of the timing element of the doctrine in the conjunctive management of ground water resources.

The Hearing Officer initially acknowledged that the amount of time required for Blue Lakes' and Clear Springs' to receive additional water from curtailment bears on whether their delivery calls are deemed futile, stating that "the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks." (Recommended Order, R. Vol. 16, p. 3709.) However, the Hearing Officer subsequently appears to have changed course and disregarded the timing aspect of the futile call doctrine by ruling that no amount of delay can render a delivery call futile in the conjunctive management context: "The amounts of water set forth in the targeted goals are usable by the Spring Users. If these targets are met the injuries that have developed over a period of years as the consequence of ground water pumping will be ameliorated. The delayed response time does not make the calls futile." (Response Order, R. Vol. 16, p. 3843.) (emphasis added). In light of the fact that it will take more than 100 years for the effects of curtailment to be fully realized by Blue Lakes and Clear Springs, the statement that "delayed response does not make the calls futile" indicates that no amount of delay would be sufficient to render a delivery call futile in the conjunctive management context, and that staged-in curtailment is the only tool available to the Director to minimize the harsh effect of a curtailment that will not increase flows to the calling senior for years.

As explained *supra,* even though aquaculture is a year-round water use, the amount of time required for a senior spring user to see the effects of curtailment is still relevant to the futile call determination. While more than months may be required to render a delivery call futile in

the conjunctive management context, it is not reasonable to curtail water rights when the anticipated benefit will take decades to accrue, since a myriad of intervening events such as above-average precipitation, managed recharge, decreased water demand, and market and economic factors could nullify the senior water user's need or ability to use increased spring flows that may eventually arise.

The Curtailment Orders improperly apply the CM Rules by requiring a curtailment response that is not reasonable in time or quantity, thus violating the principles of beneficial use and futile call, and are therefore arbitrary, capricious, and/or constitute an abuse of the Director's discretion. The Ground Water Users ask this Court to affirm that the futile call doctrine, as defined in CM Rule 10.08, applies to the conjunctive administration of Idaho ground water resources, and rule that the Director must make a specific determination of a "reasonable time" period within which water generated from a curtailment must be realized and be able to be put to beneficial use by a senior water user to avoid the denial of the call based upon the futile call doctrine. Based on the foregoing and for the additional reasons explained in section I.C above, the Ground Water Users ask that Blue Lakes' and Clear Springs' delivery calls be denied as futile calls. Alternatively, that the scope of curtailment be narrowed to assure that a significant portion of the water curtailed will accrue to Blue Lakes and Clear Springs within a reasonable time of curtailment.

VI. THE DIRECTOR ERRED BY CURTAILING GROUND WATER RIGHTS WITHOUT REASONABLE CERTAINTY THAT ADDITIONAL WATER WILL ACCRUE TO THE SPRINGS THAT SUPPLY THE BLUE LAKES' AND CLEAR SPRINGS' WATER RIGHTS.

A fundamental promise of due process is that one's property will not be deprived arbitrarily. Applied to the administration of water rights, this means that one's water right will not be curtailed arbitrarily. Under Idaho law, an "appropriation must be for some useful and beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." I.C. § 42-104. Accordingly, an appropriator, though junior in priority, will not be deprived of his water right unless the calling senior water user can put to beneficial use the water resulting from the junior's curtailment. *See Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1223 (1976). As a pre-condition of curtailment, there must be reasonable certainty that the water that would have been used by the junior-priority water user, or at least a significant portion of it, will be put to beneficial use by the calling senior-priority water user. In this case the scope of curtailment goes beyond that threshold and encompasses ground water rights without reasonable certainty that Blue Lakes or Clear Springs will receive additional water as a result of their curtailment.

The rule against arbitrary curtailment has unique relevance when, as in this case, a scientific model is used as the basis for curtailment. Here, the ESPA Model was used to predict the degree of hydraulic connection between ground water rights and the respective reaches of the Snake River where Blue Lakes and Clear Springs are located. Those predictions are no more reliable than the degree of uncertainty that is built into (or not worked out of) the ESPA Model. (Ex. 460; Wylie, Tr. p. 850, L. 7p. 851, L. 2; Tr. p. 847, L. 10p. 848, L. 10.) Of course, the level

of uncertainty is more critical to some Model applications than others. For instance, uncertainly is less important when the Model to guide general water policy decisions. In contrast, it is vitally important that the level of uncertainty in the Model be understood and accounted for if it is to be used as the basis to deprive private property rights via curtailment. The reliability of the linear analysis that was used to allocate reach gains to various spring outlets must also be accounted for. (Wylie, Tr. p. 860, L. 5-17.)

The record in this case establishes that the ESPA Model is the best science currently available to the Department to predict the hydrologic relationship between surface and ground water rights. (Final Order at 9.) That does not mean, however, that the Model perfectly predicts the effects of curtailment or that the Director should apply the Model irrespective of its short-comings. (Recommended Order at 13.) Given the State policy for full economic development of ground water resources, the scope of curtailment must be confined to those ground water rights that the Model and other analyses can predict with a reasonable degree of certainty will benefit Blue Lakes and Clear Springs.

The degree of uncertainty in the ESPA Model is a product of the accuracy of its inputs and assumptions. Director Dreher accounted for only one element of uncertainty—stream gauge error—in issuing the Curtailment Orders. (Recommended Order at 14.) Because there is a ten percent margin of error in the Snake River gauges that are used in the ESPA Model, the Director assigned an uncertainty factor of 10 percent to the Model. *Id*. (Wylie, Tr. p. 850, L. 7-p. 851 L. 2; Tr. p. 847, L. 10-p. 848, L. 10, p. 888, L. 16-24, p. 819, L. 22-p. 820, L. 2; Dreher, Tr. p. 1166, L. 7-p. 1167, L. 8; p. 1227, L. 21-p. 1228, L. 4.) The zone of curtailment (a/k/a trim line)

was then confined to junior-priority ground water rights for which at least ten percent of the quantity curtailed was predicted to return to the reaches of the Snake River where Blue Lakes and Clear Springs are located. (Recommended Order, R. Vol, 16, p. 3703.) Director Dreher did not account for sources of uncertainty other than stream gauge error in defining the location of the trim line. (Blue Lakes Order, R. Vol. 1, p. 49, ¶ 16, p. 59, ¶ 67; Ex. 109; Wylie, Tr. p. 817, L. 12-p. 818, L. 9.)

At the hearing, all experts, including Dr. Brockway for Clear Springs and Dr. Wylie for the Department, agreed that the degree of uncertainty in the ESPA Model must be accounted for and does not result from stream gauge error alone. Expert testimony established that Model uncertainty also derives from the non-uniform geology of the ESPA, variations within the Model cells, the assumption that well impacts are isotropic, the assumption that all data was accurate and reliable, the use of complex mathematics, unaccounted for impacts of surface water diversions, precipitation recharge, and tributary underflow. (Recommended Order, R. Vol. 16, p. 3703; Wylie Testimony, Tr. p. 842 L. 25-p. 843, L. 3; p. 847 L. 10-p. 848 L. 10; p. 888 L. 20-24; Dreher Testimony, Tr. p. 1166 L. 1-p. 1167 L. 8; Land Testimony, Tr. p. 1561 L. 22-p. 1566 L. 5; p. 1566 L. 6-12; Brockway, Tr. p. 1647 L.18-p. 1650 L.17.) Each of these variables contributes a degree of uncertainty to Model predictions. (Recommended Order, R. Vol. 16, p. 3703.) Consequently, Dr. Brendecke, who participated in developing the ESPA Model, estimated that actual Model uncertainty is likely between twenty to thirty percent. (Brendecke Testimony Tr. p. 1900 L. 26 - p. 1901 L. 25.) In hindsight, Director Dreher agreed that ten percent is the minimum possible degree of Model uncertainty, and that the actual degree of

uncertainty is likely higher than ten percent. (Dreher Testimony Tr. p. 1227 L. 21 - p. 1228 L. 4.) Dr. Brendecke's opinion that Model uncertainty is twenty to thirty percent went unchallenged.

In addition to uncertainty in the ESPA Model, a degree of error must be attributed to the linear analysis used to predict ESPA discharges from discrete spring outlets. The record unequivocally established that the Model is incapable of predicting the effect of curtailment on discrete spring flows; it can only predict reach gains: "It's not good at figuring out what the flow would be at one individual spring given any administrative action." (Wylie, Tr., p. 812, L. 10-16; p. 857 L. 25-p. 858 L. 4; Brockway R. Supp. Amend. Vol. 16 p. 4871 at 11.) As a result, the Director utilized a linear analysis in an attempt to allocate reach gains between different springs. *Id*. The analysis has not been tested or verified and Dr. Wylie, who developed the analysis, testified that he is not confident in its application. (Wylie Testimony Tr. p. 856 L. 2-7; p. 860 L. 5-17; p. 867 L.2-16; Ex. 6; Brockway, Tr. p. 1658 L.19 - p. 1659 L.3; Land, Tr. p. 1565 L.19 - p. 1566 L. 5; p. 1566 L. 17 to p. 1567 L. 9; p. 1567 L. 24-11.) Notwithstanding, the Hearing Officer accepted Director Dreher's use of the linear analysis on the basis that "there was no credible evidence of a better result." (Response Order, Vol. 16, p.3844.) However, non-evidence of a better methodology does not make the linear analysis sufficiently reliable to justify its use to deprive property rights. There is a point at which even the best available methodology would still be so unreliable as to preclude its use for there must be an accounting for the degree of uncertainty in its predictions before it can be relied upon to deprive ground water users of their property rights.

Given the unanimous expert testimony that uncertainty in the ESPA Model is greater than ten percent and the unreliability of the linear analysis, all evidence indicates that the actual degree of uncertainty in the curtailment predictions must exceed ten percent. The Hearing Officer refused to assign any level of uncertainty to factors other than stream gauge error because the other contributing factors of uncertainty "were not assigned a percentile of error that could be tested and peer reviewed," and for lack of an "empirical basis" to verify Dr. Brendecke's opinion. (Response Order, R. Vol. 16, p. 3840-41.) That ruling is compromised by the emergency assignment of ten percent uncertainty which also has not been tested but was made solely on the Director's "best judgment" at the time the Curtailment Orders were issued in 2005. The subsequent hearing revealed additional factors of uncertainty that were not initially considered, but that all experts at the hearing agreed contributed a degree of uncertainty to the curtailment scenarios beyond the ten percent figure that was used. The Director has an obligation to exercise his best judgment to account for all known factors of uncertainty. It is one thing to conclude that these known factors do not add uncertainty to curtailment predictions, but quite another to disregard them altogether in deference of an assignment that was made on an emergency basis without the evidence presented at the hearing. (*Cf.* Recommended Order at 14.) The Director's failure to attribute a degree of uncertainty to known factors of uncertainty in the ESPA Model and the linear analysis is an abuse of discretion.

Prudent administration of Idaho's water resources consistent with the directive for full economic development of ground water resources cannot tolerate the curtailment of beneficial water use without reasonable certainty that Blue Lakes and Clear Springs will benefit therefrom.

The unchallenged testimony of Dr. Brendecke that Model uncertainty is realistically twenty to thirty percent provides the only conclusion substantially supported by the record. And that figure does not account for the questionable nature of the linear analysis, which casts serious doubt on the amount of additional water, if any, that will accrue to the target spring outlets. Therefore, the Ground Water Users ask this Court to reverse the Final Order on these points and remand this matter to the Director to account for and incorporate in his decision all undisputed contributing factors of Model uncertainty, to assign a degree of uncertainty to the linear analysis, and to re-define area of curtailment accordingly.

VII. THE DIRECTOR EXCEEDED HIS AUTHORITY BY ISSUING THE CURTAILMENT ORDERS ON AN EMERGENCY BASIS WITHOUT A PRIOR HEARING.

A fundamental constitutional protection is the promise that no state "shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. It is well established in Idaho that "individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state." *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977). Due process guarantees all citizens "an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations." *Lowder v. Minidoka County Joint Sch. Dist. No. 331*, 132 Idaho 834, 840 (1999) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). A pre-deprivation notice and hearing is required except in "extraordinary circumstances" where some valid governmental interest justifies the postponement of the notice and hearing. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Nettleton*, 98 Idaho 90.

In this case the Director ordered the curtailment of tens of thousands of irrigated acres *without* prior notice or hearing. The Ground Water Users objected and filed petitions for reconsideration within two weeks of the date of both the Blue Lakes Order and the Clear Springs Order. (R. Vol. 1, p. 161; R. Vol. 3, p. 547, R. Vol. 8, p. 1941.) The Curtailment Orders remained in force for more than two years without a hearing despite numerous legal and factual defenses raised by the Ground Water Users and the other petitioners. Pending the hearing, and to avoid the disastrous results of curtailment ordered by the Curtailment Orders, the Ground Water Users have been forced to expended millions of dollars to secure approval of and implement mitigation plans each year to provide replacement water to Blue Lakes and Clear Springs. (Carlquist, R. Supp. Vol. 7, p. 4837, L. 20-p. 4840, L.2; Stevenson, R. Supp. Vol. 6, p. 4823, L. 1-p. 4825, L. 6.)

The Director issued the Curtailment Orders without a hearing as emergency orders pursuant to Idaho Code § 67-5247. (Blue Lakes Order, R. Vol. 1, p. 75; Clear Springs Order, R. Vol. 3, p. 525.) Emergency orders are permitted only in extraordinary circumstances "in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action." I.C. § 67-5247. The Curtailment Orders do not rise to that standard.

In all procedural due process cases, the interest of the individual, the risk of an erroneous deprivation of the individual's interest, and the interest of the government must be balanced. *Lowder*, 132 Idaho at 840 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (emphasis added). Factors to be considered include "the importance of the private interest at stake, the risk of an erroneous deprivation of rights given the processes at hand, the probable value, if any, of

additional or substitute procedural safeguards and the government's interest and 'including the function involved and the fiscal and administrative burdens that the additional and substitute procedural requirements would entail.'" *In re Snake River Basin Adjudication Case No. 6 LU Ranching Co, v. United States*, 138 Idaho 606, 608 (2003) (citing *Mathews*, 424 U.S. at 335).

The alleged shortage of water to Blue Lakes and Clear Springs did not create an "immediate danger to the public health, safety, welfare requiring immediate agency action." I.C. § 67-5247. Blue Lakes' and Clear Springs' delivery calls were not made under oath as required by Idaho Code § 42-237b, nor do they claim any significant injury if curtailment is not immediate. (R. Vol. 1, p. 1; R. Vol. 1, p. 2.) Clearly, the immediate curtailment of more than 70,000 acres of ground water irrigation was not "necessary to prevent or avoid the immediate danger." I.C.§ 67-5247(1). Further, IDWR's enforcement of the Curtailment Orders for more than two years without a hearing despite multiple petitions for reconsideration violates the statutory requirement that the agency "proceed as quickly as feasible to complete any proceedings that could be required." I.C. § 67-5247(4).

All of the findings of fact and conclusions of law in the Curtailment Orders were developed solely by the Department, perhaps with input from Blue Lakes and Clear Springs, but certainly without input from junior-priority ground water users. By issuing the Curtailment Orders on an emergency basis, the Ground Water Users were deprived of an opportunity to influence the Director's initial decision. Unfortunately, the implementation of that decision for more than two years prior to the hearing unavoidably strained the Director's ability to change course, giving reason to believe that the Curtailment Orders would have looked much different,

or would not have been issued at all, had the Director had the benefit of a full record and consideration of relevant legal arguments prior to issuing the Curtailment Orders.

As the Supreme Court pointed out in its *AFRD2* decision, it is "vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts" than to impose a hasty timeframe for curtailment. 143 Idaho at 875, 154 P.3d at 446. The significant complexities involved in the conjunctive management of ground and surface water rights, the permanency of curtailment, and the reality that curtailment will not immediately increase spring flows all persuade against curtailment without a prior hearing. The Ground Water Users should not be deprived of their property rights and have to bear the heavy burden of mitigating for unproven claims of material injury. Additionally, the agricultural communities of Idaho should not have to risk economic devastation from curtailment, when there are very real and legitimate questions concerning the Spring Users' right to make a delivery call against ground water rights, the degree of material injury, and the permissible scope of curtailment.

The Curtailment Orders exceed the Director's statutory authority to issue emergency orders under Idaho Code § 67-5274 and violate the Ground Water Users' due process rights, resulting in a regulatory taking of water rights. The Ground Water Users are entitled to just compensation for the unlawful deprivation of their water rights.

CONCLUSION

The importance of this Court's decision cannot be underestimated. It is destined to set precedent that will define the extent to which the State of Idaho will be able to use and benefit from the entire ESPA and sustain its vital ground water-dependent agricultural economy.

It is undisputed that the Final Order curtails the supply of irrigation water to roughly 70,000 acres in response to the Spring Users' delivery calls. A mere three percent of the quantity curtailed is expected to reach Blue Lakes and less than one percent is expected to reach Clear Springs, and only then under steady state conditions that will not be realized for a century. The gross disparity between the massive curtailment and the miniscule corresponding return to Blue Lakes and Clear Springs will work disastrous consequences to the economy of Idaho. The Spring Users are projected to receive in future decades some small fractional increase to their already substantially-filled water supplies, with which they may or may not be able to raise more fish. By contrast, the economic harm from the retirement of 70,000 irrigates acres is immediate, severe, and to a significant extent irreversible, potentially resulting in a permanent net loss of nearly 3,500 jobs, a decrease in annual personal income in the near term of at least $160 million, and a loss of millions of dollars in annual property tax revenue. The economy of the State of Idaho would lose a present value of close to $8.1 billion in gross output during the next twenty years to gain a present value of $423.5 million. This economic devastation has been temporarily avoided and forestalled only because the Ground Water Users have spent millions of dollars to secure approval of and implement temporary mitigation plans providing replacement water. But

it is no longer physically possible to meet the staged curtailment requirements, and inevitable drought will only increase physical curtailment unless the Curtailment Orders are reversed.

The Curtailment Orders issued by the Director disregard and/or misapply well-established principles of Idaho water law that do not tolerate the mass curtailment of ground water rights that has been ordered in this proceeding. The Curtailment Orders exceed the Director's statutory authority, and/or are arbitrary, capricious, or an abuse of discretion on the following points.

First, the Curtailment Orders violate the State's commitment and obligation to manage the ESPA based on minimum Snake River flows consistent with the Swan Falls Agreement and the Idaho State Water Plan.

Second, spring flows in the Thousand Springs area are not absolutely protected under the Ground Water Act. Blue Lakes and Clear Springs are not entitled to reverse decades of ground water development in an effort to increase the water table in the ESPA to unnaturally high levels to support increased spring flows. They must adjust to reduced spring flows that may occur as the result of changes in incidental recharge and ground water development on the eastern Snake River Plain, such as by improving spring outlets, increasing water use efficiencies, acquiring water from junior-priority spring users, or drilling wells.

Third, the Curtailment Orders are arbitrary, capricious and/or an abuse of discretion in that there is no substantial competent evidence that Blue Lakes and Clear Springs have suffered material injury, or that that the small amount of water derived from curtailment in future decades can be applied to beneficial use to produce more, larger, or healthier fish. On these bases the

Spring Users' delivery calls should be denied as a matter of law, being dispositive of any further proceedings.

In the event the Spring Users' delivery calls are not denied, the constitutional policy for "optimum development of water resources," Idaho Const. art. XV, §7, together with the legislative mandate for "full economic development of underground water resources," I.C. § 42-226, demand a substantial narrowing of the scope of curtailment to assure that a significant portion of water rights that are curtailed will in fact within a reasonable time accrue to the springs that supply Blue Lakes' and Clear Springs' water rights. That the present scope of curtailment based on the a 10 percent trim line unreasonably interferes with full economic development of the ESPA is manifest by the monopolistic effect of curtailment, the amount of water that is sacrificed to fractionally increase spring flows, the significant amount of time for the effects of curtailment to be realized, and the severe economic harm that will result from curtailment. These considerations powerfully compel more clearly defining and narrowing the present scope of curtailment.

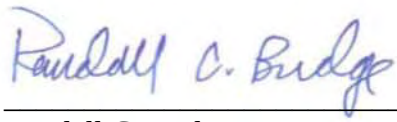
Furthermore, the scope of curtailment cannot include water rights for which the ESPA Model and the linear analysis do not provide a reasonable degree of certainty that Blue Lakes and Clear Springs will receive additional water from the curtailment thereof. The Director acted arbitrarily and capriciously and/or abused his discretion by refusing to account for multiple known factors that all testifying experts agreed contribute uncertainty to the curtailment simulations of the ESPA Model and linear analysis.

Finally, the Curtailment Orders violate the Director's statutory authority to issue emergency orders under Idaho Code § 67-5274, unduly infringe upon the Ground Water Users' due process rights, and cause an unlawful taking of water rights. The Ground Water Users are entitled to just compensation for the unlawful deprivation of their water rights contrary to the constitutional protection of due process.

RESPECTFULLY SUBMITTED.

DATED this 9th day of January, 2009.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED



Randall C. Budge
Candice M. McHugh
Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 2009, the above and foregoing document was served in the following manner:

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