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

CLEAR SPRINGS FOODS, INC.,  
Petitioner,

Case No. CV-2008-444

vs.

BLUE LAKES TROUT FARM, INC.,  
Cross-Petitioner,

**GROUND WATER USERS'  
REHEARING BRIEF**

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.

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

Respondents.

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)**

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively, the “Ground Water Users”), through counsel, respectfully submit this rehearing brief pursuant to Rule 42 of the Idaho Appellate Rules, in support of the *Ground Water Users’ Petition for Rehearing* filed July 10, 2009.

**INTRODUCTION**

The Ground Water Users petitioned for rehearing in response to the Court’s *Order on Petition for Judicial Review* dated June 19, 2009 (the “*Order*”), asking the court to reconsider and clarify its decision. In an effort to avoid duplicity, the Ground Water Users have in this brief combined certain issues identified in the *Ground Water Users’ Petition for Rehearing*, and therefore address herein the following issues for rehearing in like order:

1. Since the Director did not independently apply the law of full economic development of ground water resources set forth in Idaho Code § 42-226, does the Director have discretion to reconsider that law on remand?
2. Was the Directors analysis of seasonal variation properly treated as a material injury issue rather than a futile call issue?
3. How does the Director determine material injury without considering evidence about water supply, diversion, and use of water?

4. Can the Director find material injury without evidence being presented that the Spring Users in fact need additional water that can be put to beneficial use?
5. Can the Director order curtailment without considering the extent to which curtailment will enable the Spring Users to increase fish production?
6. Can the Director adequately apply the law of full economic development without considering the extent to which curtailment will enable the Spring Users to increase fish production?
7. Are individual water users entitled to, collectively or individually, preclude the additional development of the ESPA that was secured by the Swan Falls Agreement?

## **ARGUMENT**

This case is chiefly about how the Director of the Idaho Department of Water Resources (“IDWR”) is to apply the law of full economic development, as set forth in Idaho Code § 42-226, in managing the Eastern Snake Plain Aquifer (“ESPA”). Accordingly, the Ground Water Users expected the Director to carefully and deliberately consider whether the law of full economic development warrants a narrowing of the scope of curtailment, beyond the ten percent “trim line” that derived from ESPA Model (the “Model”) uncertainty. Yet, the Director failed to take this most important issue head-on, leaving the parties and this Court with nothing more than an inference that the Director believed shutting down more than 70,000 irrigated acres does not block full economic development of the ESPA when less than one percent of that water will accrue to Blue Lakes and Clear Springs (collectively, the “Spring Users”).

The Director’s application of the law of full economic development should not be left to inferences, especially given the landmark nature of this case. Rather, the Director must address the relevant evidence in the record head-on, and articulate why shutting down more than 70,000 irrigated acres does or does not block full economic development of the ESPA when only a small fraction of that water is expected to reach the Spring Users, resulting in the loss of an estimated

3,500 jobs and more than \$7.6 billion in net present value to the economy of Idaho. (*See Ground Water Users' Opening Br.* at 17-18.)

Accordingly, the Ground Water Users ask the Court to a) instruct the Director to reconsider and independently apply the law of full economic development on remand, and issue specific findings of fact and conclusions of law concerning the same; b) reconsider its conclusion that seasonal variation is a futile call issue, and sustain the Director's decision on seasonal variation as part of his material injury determination; c) clarify its conclusion that "before the Director can hear evidence about water supply, diversion, and use of water, he must first issue an order, informing the parties of his initial determination of material injury" (*Order* at 48); d) confirm there is no substantial, competent evidence in the record to support the Director's conclusions that i) the Spring Users need additional water that can be put to beneficial use, ii) curtailment will provide the Spring Users with a usable quantity of water, and iii) the anticipated benefit to the Spring Users justifies the curtailment of more than 70,000 irrigated acres under Idaho Code § 42-226; and e) reverse the curtailment orders for failure to comply with the comprehensive management plan adopted by the legislature in the Swan Falls Agreement and State Water Plan.

**I. The Director has discretion, on remand, to reconsider and independently apply the law of full economic development of ground water resources.**

The Director of the IDWR has a statutory duty to ensure that "a reasonable exercise of [the doctrine of 'first in time is first in right']] shall not block full economic development of underground water resources." Idaho Code § 42-226. The "law of full economic development" recognizes that 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). It authorizes the Director to limit the administration of water rights based on priority, even though

it means that “senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development.” *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584 (1973).

The facts of this case unquestionably demand application of the law of full economic development. However, the scope of curtailment was in reality limited only by the Director’s assignment of an uncertainty factor of ten percent to the Model. (*Ground Water Users’ Opening Br.* at 14, 65-66.) Although the Director acknowledged Idaho Code § 42-226, the statute was treated merely as supplemental authority to justify the Director’s accounting for Model uncertainty, rather than a standalone water administration criterion.

Consequently, the Ground Water Users have argued that the Director erred by failing to make an independent and meaningful analysis of whether the scope of curtailment should be further constricted, pursuant to Idaho Code § 42-226, beyond the ten percent clip that derived from Model uncertainty. (*See Ground Water Users’ Reply Br.* at 23-32.) This Court agreed, explaining that it “reads the law regarding the state’s policy of full economic development of ground water resources as standing for more than just lending support for factoring a margin of error into a scientific model to account for uncertainty.” (*Order* at 31.) Notwithstanding, the Court did not instruct the Director to reconsider and independently apply the law of full economic development on remand. The Ground Water Users respectfully ask the Court to give that instruction to the Director.

In the *Order*, the Court indicates that the Director did not abuse his discretion because he took full economic development “into account” and “considered” the public interest in the “development for his implementation of the ‘trim-line.’” (*Order* at 31, 36.) The critical reality, however, is that the location of the trim line originated solely from the Director’s analysis of

Model uncertainty, with Idaho Code § 42-226 cited merely to support the Director’s authority to account for Model uncertainty, rather than as an independent water administration criterion. (Tr. 1165:18-1167:24.)

The Director’s accounting for Model uncertainty was, but should not have been, the same analysis undertaken to consider full economic development. Whereas Model uncertainty is an issue of predictive accuracy, the law of full economic development is an issue of public policy. Model uncertainty justifies limiting curtailment to the extent there is no assurance that water will in fact reach the calling senior as a result of curtailment. It defines the point beyond which a delivery call is futile. In contrast, Idaho Code § 42-226 requires the Director to limit curtailment in the interest of full economic development even if the delivery call is *not* futile (*i.e.*, even if some additional water would reach the calling senior from curtailment). They are different analyses, and the Director should not have combined them. While the Director properly considered Model uncertainty, he did not take the next step and independently determine whether Idaho Code § 42-226 warrants a further narrowing of the scope of curtailment.<sup>1</sup>

The Court may have inferred that the Director would not have ordered curtailment had he thought it was inconsistent with Idaho Code § 42-226. But the Director’s application of the law of that statute—the central feature of this case—should not be left to inferences. Prudence demands specific findings and conclusions whether curtailment will block full economic development of the SPA, untainted by the Director’s analysis of Model uncertainty. Indeed, the Idaho Administrative Procedure Act specifically requires the Director to provide “a reasoned statement in support of the decision ... accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.” Idaho Code § 67-5248.

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<sup>1</sup> The Director’s conflation of Idaho Code § 42-226 with the issue of Model uncertainty was presumably motivated, at least in part, by the lack of competent evidence to justify the economic harm that will result from curtailment.

There is important evidence in the record of the huge disparity between the amount of water curtailed and the anticipated benefit (or lack thereof) to the Spring Users, and the resulting economic impact on the economy of Idaho. The scope of curtailment is so broad that less than one percent of the water curtailed is expected to ever reach Blue Lakes,<sup>2</sup> and only a quarter of one percent is expected to ever reach Clear Springs,<sup>3</sup> resulting in a loss of 3,500 jobs and a loss of more than \$7.6 billion in net present value to the economy of Idaho. (*See Ground Water Users' Opening Br.* at 17-18.) There should be specific findings concerning these facts, and specific conclusions that determine the effect of Idaho Code § 42-226 as applied to these facts. It should not be left to inferences.

Indeed, the existence of evidence upon which to make specific findings of fact concerning full economic development does not mean the Director gave proper consideration to such evidence, and further supports a remand of the issue. The Idaho Supreme Court recently confirmed, in *Mercy Med. Ctr. v. Ada County*, the propriety of remanding an agency decision when the record already contains the relevant evidence. 192 P.3d 1050, 1056 (Idaho 2008). In *Mercy*, the Ada County Board of Commissioners concluded that a patient was ineligible for indigent medical assistance benefits because the patient was not a resident of the county. *Id.* at 1052. On appeal, the Idaho Supreme Court found evidence in the record to support the patient's eligibility, but nevertheless remanded the issue, stating:

We recognize that, despite the absence of formal findings by the Board, the agency record contains information submitted by the Patient regarding her financial resources, habitation history, employment, and medical documents, which would tend to support a finding of eligibility on remand. However, when a board fails to make a factual determination on a necessary issue, the district court must not make its own factual determination but must rather remand the case to the board to make that determination.

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<sup>2</sup> 1,144 cfs curtailed to provide 10 cfs to Blue Lakes (0.87%). (*Order* at 31.)

<sup>3</sup> 1,049 cfs curtailed to provide 2.7 cfs to Clear Springs (0.26%). *Id.*

*Id.* at 1056 (citing *Univ. of Utah Hosp. v. Clerk of Minidoka County*, 114 Idaho 662, 665 (1988)) (emphasis added).

The Director's authority to reconsider the law of full economic development is further necessitated by the Court's remand of the issue relating to material injury. If the Director finds material injury to water rights with earlier priority dates, the number of ground water acres curtailed will increase dramatically, requiring additional consideration and application of the law of full economic development. In fact, the possibility of finding material injury to earlier priority water rights highlights the importance of divorcing the Director's consideration of full economic development from his consideration of Model uncertainty. While a finding of material injury to earlier priority rights has no effect on Model uncertainty, it may clearly have an effect on full economic development of the ESPA.

Finally, the Court should clarify that the Director's authority to limit curtailment by priority pursuant to Idaho Code § 42-226 is not conditioned upon the existence of alternative means of administration that will fully satisfy 'the Spring Users' water rights. The Court states in its *Order* that "no results of alternative methodologies were presented from which to review the Director's determination of reasonableness," and that

[w]hile there may be significant disagreement over the Director's determination of reasonableness and the result immediately reached, no concrete evidence was presented of viable reasonable alternatives. Accordingly, based on the applicable standard of review, this Court cannot conclude that the Director abused discretion or acted arbitrarily or capriciously in his determination.

(*Id.* at 38-39.) These statements must not be misconstrued to mean that the Director's authority to limit administration by priority under Idaho Code § 42-226 is dependent upon the existence of "viable reasonable alternatives" that fully satisfy the calling senior.

Neither Idaho Code § 42-226 nor court decisions applying the statute make the Director's authority to limit the exercise of priority contingent upon the existence of alternate means of administration that will satisfy the senior.<sup>4</sup> In fact, the seminal *Schodde* decision proves otherwise. *Schodde*, 224 U.S. at 119. In that case, the United States Supreme Court refused to allow a senior-priority water user (Shodde) to exercise his water right in a manner that would block development of the Twin Falls Canal, even though the Canal would eliminate use of the senior water right altogether. *Id.* at 115-16 ("there is no other supply of water available for use on said lands.") Despite the lack of any "viable reasonable alternatives" to deliver water to Schodde, the Court still determined it would interfere with full economic development of the resource (Snake River) to absolutely protect Schodde's senior right. *Id.* at 120.

Notwithstanding, the Ground Water Users *did* present an alternative methodology from which to review the Director's determination of reasonableness; namely, constriction of the trim line: "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." (*Ground Water Users'* *Opening Br.* at 35.) Citing *Schodde*,<sup>5</sup> the Ground Water Users still maintain that the curtailment

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<sup>4</sup> If curtailment is ordered after determinations of material injury and full economic development are made, junior-priority water users may attempt to avoid curtailment by providing mitigation. The Director's application of I.C. § 42-226 should not be, and cannot practicably be, conditioned upon proof of available mitigation. To combine the law of full economic development with the mitigation provisions of CM Rule 43 would be mixing apples and oranges.

<sup>5</sup> The Court provided the following example of a water use that clearly interferes with the public's interest in full economic development:

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.

*Schodde v. Twin Falls Water Co.*, 224 U.S. 107, 119 (1911).

of ground water rights for which less than ten percent of the water curtailed will reach the calling senior is unreasonable as a matter of law.

*Id.* at 36-37.<sup>6</sup> Narrowing the scope of curtailment via constriction of the trim line is a “viable reasonable alternative” to the overbroad curtailment ordered by the Director.<sup>7</sup>

In sum, the Director’s commingling of Model uncertainty with the law of full economic development creates confusion for water users, difficulty for reviewing courts, and opens the door to further dispute. In fact, the Spring Users have already engaged in an effort to increase the scope of curtailment by improving the accuracy of the ESPA Model. Such efforts only confirm the need for independent findings and conclusions on the issue of full economic development.

Therefore, the Ground Water Users respectfully ask the Court to instruct the Director to reconsider and independently apply the law of full economic development, and issue specific findings of fact and conclusions of law concerning the same. If the Director’s independent consideration of Idaho Code § 42-226 does not result in constriction of the trim line, then the Director must articulate why it does not block full economic development of the ESPA to curtail

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<sup>6</sup> The Ground Water Users argued in their opening brief:

[I]t 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.

<sup>7</sup> The Court surmised that the Ground Water Users may have deliberately chosen not to present evidence of other alternate means of administration, (*Order* n.11 at 38), but that is simply not the case. While Dr. Brendecke found it “conceivable that tracer studies could be done to determine which well areas contribute to particular springs,” he “ha[s] not done a non-model based analysis of pumping effects on spring flows.” (Tr. 1866) All experts agreed that the curtailment of wells closer to the target spring outlets will have a greater impact on spring flows than wells further from the target spring outlets, but they also agreed that the ESPA Model is the best science available for predicting the effect of curtailment. Unless the Director were to curtail ground water rights that are *senior* to the Spring Users, the Ground Water Users know of no defensible alternatives other than narrowing of the scope of curtailment via constriction of the trim line.

57,220 acres when less than one percent of the water is expected to reach Blue Lakes at steady state conditions, and to curtail 52,470 acres when less than a quarter of one percent of the water is expected to reach Clear Springs at steady state conditions; and, further, to articulate why it does not block full economic development of the ESPA to cause a loss of 3,500 jobs and a loss of more than \$7.6 billion in net present value to the economy of Idaho, when there is no evidence that curtailment will enable Blue Lakes and Clear Springs to produce more, larger, or healthier fish. (*Ground Water Users' Opening Br.* at 16-17).

**II. The Director properly treated his analysis of seasonal variation in the Spring Users' water supply as a material injury issue rather than a futile call issue.**

The Ground Water Users' ask the Court to reconsider its conclusion that the Director's analysis of season variability, "[a]lthough considered as one of the factors in the material injury analysis, [] is essentially akin to the application of the futile call doctrine." (*Order* at 19.) The Ground Water Users strongly disagree with the notion that "seasonal variability is relevant to simulating and establishing the affects of a delivery call but not as a means for establishing the quantity to which a senior is entitled *vis a viz* a material injury analysis." *Id.* at 24. The question of whether the Spring Users are legitimately water short (*i.e.*, whether materially injury is occurring) cannot be answered by asking whether curtailment will provide them with additional water (*i.e.*, whether the delivery call is futile).

The primary purpose of analyzing seasonal variations in the Spring Users' water supply is to determine whether the Spring Users are experiencing a legitimate water supply deficit in the first place. Material injury asks whether the calling senior is water short, whether additional water is actually needed by the senior, and if so, whether the senior's needs can be met using alternate means of diversion, improved efficiencies, etc. CM Rule 42. If analysis of the natural seasonal variations in the Spring Users' water supply shows that they are receiving the same

amount of water as at the time of appropriation, then there is no material injury and it matters not whether curtailment will provide the senior with additional water.

In contrast, if material injury is found to be occurring, *then* it becomes relevant to determine whether curtailment will provide the senior a usable quantity within a reasonable time—*i.e.*, whether the delivery call is “futile.” The Director must refuse curtailment to the extent the delivery call is futile, even though material injury may still exist.<sup>8</sup>

The futile call question of whether curtailment will increase spring flows (which can be predicted by the ESPA Model) simply does not address or answer the material injury question of whether the Spring Users are receiving less water than they traditionally received (which cannot be predicted by the Model). The purpose of analyzing seasonal variability is to determine whether the senior is short in the first place, not whether curtailment will increase spring flows.<sup>9</sup>

In fact, the testimony of Director Dreher cited on page 20 of the *Order* does not stand for the proposition that seasonal variability is a futile call analysis; rather, it reinforces that material injury is distinctly different from futile call:

Q: Then the third step would be to see if you curtailed the ground water pumper, for example, would that water arrive at the spring within a reasonable time in a reasonable quantity?

A. Well, that's the opposite image of injury. I mean, you can evaluate, you know, are junior priority ground water rights reducing the supply available to the senior by simulating what would happen if you curtailed those junior priority.

(Tr. at 1249; emphasis added). As Director Dreher pointed out, the question of whether curtailment will provide water to the calling senior (the futile call analysis) is “opposite” the

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<sup>8</sup> Additionally, if material injury exists and curtailment would not be futile, Idaho Code § 42-226 requires the Director to refuse curtailment to the extent it will block full economic development of ground water resources.

<sup>9</sup> Seasonal variability may be relevant in evaluating futile call in the sense that curtailment is improper if water is expected to accrue to the senior during a time when it cannot be put to beneficial use because of inherent flow variability.

material injury analysis (which cannot be simulated by the Model but instead requires historical analysis of the reliability of the water source).

The problem with the Court's treatment of seasonal variation as a futile call issue rather than a material injury issue is that it caused the Court to base its decision upon burdens of proof that apply to the futile call doctrine in the surface water context, rather than upon the material injury standards that apply in the conjunctive management context. (*Order* at 18, 22.) Since seasonal variability is a material injury question, it must be determined based upon independent investigation and analysis by the Director *before* ordering curtailment. CM Rule 40.01 explains that “upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director ... shall regulate the diversion and use of water ....” (emphasis added).

There are important reasons for requiring the Director to make an independent determination of material injury before ordering curtailment of ground water rights. Ground water management presents unique technical challenges, legal concepts, and public policy considerations that are not required of surface water administration, including:

- The effects of curtailment are immediate in surface water administration, whereas the effects of curtailment typically take years and even decades to be realized in ground water administration.
- In the surface water context, the effects of curtailment are relatively easy to predict and usually well-established, whereas the effects of ground water curtailment are very difficult to predict.
- Essentially all of a curtailed surface water right reaches the calling senior, whereas the curtailment of a ground water right has a radial effect, resulting in the calling senior receiving only a fraction of the curtailed junior water use.
- Ground water curtailment is a long-term, often permanent arrangement (as in this case), whereas surface water curtailment is seasonal, with each surface right beginning anew the following spring.
- Surface water appropriations have been made with an understanding of the reliability of the priority date, enabling surface water appropriators to plan and

exercise their rights accordingly. In contrast, ground water appropriators invested in wells and pumps with the expectation that curtailment would not occur unless the source was being “mined,” meaning the rate of recharge is exceeded by the diversion and use of water from the source. (CM Rule 10.19.)

- As between surface water rights, the doctrine of “first in time is first in right” has few if any limitations, but with respect to ground water rights the doctrine shall not block full economic development of the resource.

The developers of the CM Rules recognized the need for thorough analysis of the unique ramifications of ground water administration, and therefore required that determinations of material injury, futile call and full economic development be made prior to curtailment. The CM Rules demand careful and deliberate water administration decisions, not the “curtail now, ask questions later” approach the Director followed in 2005.

Presumably, the Director’s hasty curtailment in 2005 was due to a natural inclination to administer ground water through the familiar lens of surface water administration. However, the expediency required of surface water administration simply does not exist in ground water administration. As the Idaho Supreme Court explained in *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, (“AFRD2”):

Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior’s water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. 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.

143 Idaho 862 at 875(2007). Thus, the Director’s analysis of material injury should not be pigeonholed by familiar surface water administration constructs.<sup>10</sup>

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<sup>10</sup> Even if seasonal variability were an issue of futile call, it would be impractical to treat it as an affirmative defense that does not arise until after the Director has ordered curtailment. While the Court notes that “[f]utile call is a well established part of the prior appropriation doctrine,” *Order* at 21, that is true only with respect to application of the doctrine in the context of surface water administration. Futile call has little, if any, history as applied to ground water management, and must be tailored to accommodate the unique complexities, legal standards, and public

In this case, the Court reversed the Director's analysis of seasonal variation because, the Court states, “[t]he Spring User is put in the position of having to prove up the historical use of his water right as opposed to defending against a futile call where the senior is accorded the established burdens of proof.” (*Order* at 24.) However, as explained above, seasonal variation is not a futile call issue. By treating it as such, the Court has superimposed futile call burdens of proof from the context of surface water administration upon the material injury analysis, which is unique to conjunctive management. (*Order* at 24.) In essence, the Court has forced the Director to presume the existence of material injury, with or without supporting evidence, which is contrary to the Idaho Supreme Court decision in *AFRD2*. In *AFRD2*, the Idaho Supreme Court specifically rejected a district court ruling that “the Rules were fatally defective in not containing a presumption that ‘when a junior diverts or withdraws in times of water shortage, it is presumed that there is injury to the senior.’” *Id.* at 877. Rather than presume injury, the Court held it was proper to require the senior to provide information to support his claim of injury. *Id.*

It is simply impractical to require the Director to take the Spring Users' bare allegations of material injury at face value, and place the entire burden on junior users to prove otherwise. Under the CM Rules, the Director has to make an independent determination of material injury, which cannot be fairly accomplished if material injury must be presumed. Moreover, the Spring Users will in most cases have exclusive possession of the evidence needed to support or rebut their allegations of material injury. Material injury asks whether the Spring Users are legitimately water short, whether additional water is needed and can be put to beneficial use, and whether the Spring Users' needs can be met using alternate means of diversion, improved efficiencies, etc. The Ground Water Users have no access to such evidence, unless a full hearing

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policies of ground water management. Indeed, the futile call concept is incorporated into the material injury analysis (CM Rule 42.01.c) in order to require its consideration before curtailment is ordered.

is held prior to curtailment and the Ground Water Users are able to discover all such information (which was not allowed in this case despite the Ground Water Users' requests).

The Court's conclusion that not requiring the Director to presume material injury will result in "a re-adjudication of the quantity element of the right" is misplaced. (*Order* at 24.) In its *AFRD2* decision, the Idaho Supreme Court overturned the district court's conclusion that the CM Rules impermissibly "allow the Director to, in essence, re-adjudicate water rights by conducting a complete re-evaluation of the scope and efficiencies of a decreed water right in conjunction with a delivery call." 143 Idaho at 876. American Falls had argued in that case that the CM Rules "are defective in giving the Director, in essence, the authority to negotiate with the senior water right holder regarding the quantity of water he will enforce under a delivery call – a quantity that in some instances, has already been adjudicated." *Id.* However, the Idaho Supreme Court rejected that argument, stating:

Clearly, even as acknowledged by the district court, the Director may consider factors such as those listed [in CM Rule 42] in water rights administration. Specifically, the Director "has the duty and authority" to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.

*Id.* (emphasis added). Just as the Director has the duty to evaluate whether a farmer is irrigating the full number of acres authorized under the water right, the Director has the duty to evaluate whether the Spring Users need and will in fact make beneficial use of their maximum authorized rate of diversion.

Finally, this Court's conclusion that material injury must be presumed appears to stem from the mistaken belief that the quantity element of the Spring Users' water rights creates a guaranteed water supply, which it does not. The quantity element defines the maximum amount

of water that can lawfully be diverted under the right when water is available to fill the right; it says nothing of the reliability of the water source. (Recommended Order at 10.) For example, irrigation rights are normally decreed with a season of use that corresponds with the maximum length irrigation season (typically April to October), even though many irrigation rights receive water only for a short period during spring runoff. It is incorrect to presume that all water sources flow at maximum capacity year-round, and SRBA decrees do not define the reliability of water sources. Rather, the question of seasonal variability is one that is not normally raised until a delivery call is made.<sup>11</sup> As the Idaho Supreme Court recognized, “water rights adjudications neither address, nor answer, the questions presented in delivery calls.” *AFRD2*, 143 Idaho at 876.

In sum, seasonal variability is not an aspect of futile call, but rather a genuine material injury issue that the Director is required to independently determine before ordering curtailment. The Director did not err by refusing to presume the existence of material injury, and his decision on the issue of seasonal variations should be sustained.

### **III. The Director cannot determine material injury without considering evidence about water supply, diversion, and use of water.**

The Court states in its Order that “before the Director can hear evidence about water supply, diversion, and use of water, he must first issue an order, informing the parties of his initial determination of material injury.” (*Order* at 48.) It is not clear to the Ground Water Users how the director can make a determination of material injury without such evidence.

The CM Rules define “material injury” as “[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person ....” CM Rule 10.14 (emphasis

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<sup>11</sup> In truth, seasonal variability is a question that may be relevant only in the conjunctive management context, which further highlights the distinct differences between surface and ground water management.

added). By definition, the focus is on actual water use and water needs, not the maximum rate of diversion that is authorized under the senior's "paper right."

Accordingly, the material injury factors go beyond the elements of the senior's paper water right, and consider such things as whether the senior user is "using water efficiently and without waste ...." (CM Rule 42.01), "[t]he amount of water available in the source" (CM Rule 42.01.a), "[t]he effort or expense of the holder of the water right to divert water from the source" (CM Rule 42.01.b.), "[t]he amount of water being diverted and used compared to the water rights" (CM Rule 42.01.e.), and "[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" (CM. Rule 42.01.h).

Therefore, the Ground Water Users ask the Court to clarify how the Director is expected to consider the foregoing material injury factors without evidence of water supply, diversion, and use of water.

**IV. The Director cannot find material injury without evidence that the Spring Users need additional water that can be put to beneficial use.**

An important material injury consideration is whether the senior user actually needs additional water that can be put to beneficial use. This is embodied in CM Rule 42.01.e, which requires the Director to consider "[t]he amount of water being diverted and used compared to the water rights." Analysis of the amount of water actually needed by the senior is required, and does not constitute a re-adjudication of the senior's right, because the quantity element of a water right defines the maximum amount that can be lawfully diverted under the right, not a guaranteed water supply. (Recommended Order at 10.) Since a water user's needs are often satisfied at less than the maximum authorized rate of diversion, the Director is required to make the inquiry of

whether additional water is actually needed. Indeed, the Idaho Supreme Court affirmed the relevance of considering the amount of water needed by the senior in its *AFRD2* decision:

Specifically, the Director ‘has the duty and authority’ to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.

143 Idaho at 876 (emphasis added).

In this case, however, the Director did not inquire into whether Blue Lakes or Clear Springs actually need additional water that can be put to beneficial use. There was an investigation of the efficiency of their diversion structures, but no examination of the amount of water actually being used by the Spring Users. The Director should have requested information about the Spring Users’ water needs before finding material injury and ordering curtailment, but he did not. As a result, there is no substantial, competent evidence in the record that Blue Lakes or Clear Springs need additional water.

One important reason for requiring the Director to determine whether additional water is actually needed by the calling senior is to protect against fraudulent delivery calls made by proxy. For example, some irrigation companies operate hydropower facilities based on junior-priority, non-consumptive hydropower water rights that are supplied simultaneously with the companies’ senior irrigation rights. Although their use of water for hydropower is incidental to irrigation, these companies have an obvious economic motivation to call for water available under their senior irrigation rights in order to generate hydropower at times when water is not legitimately needed for irrigation and would not be available under their junior-priority hydropower rights.

Similarly, a hydropower right that is subordinate to irrigation rights and not entitled to make a delivery call could conspire with an unsubordinated spring water right to make a delivery call for water not legitimately needed by the spring user. Accordingly, the CM Rules require the Director to determine whether the calling senior actually needs the water being called for before ordering curtailment. The Director has yet to do that in this case.

Not being convinced that the Spring Users actually need additional water, the Ground Water Users attempted to discover production records, facility construction and design, and other information needed to prove otherwise. However, the Spring Users went to great lengths to obtain a protective order to avoid disclosure of such information. The Hearing Officer advised the Spring Users that if they refused to produce such information, they could not then use that same information to support a position that “more water allows for the production of more or larger healthy fish.” (Discovery Order at ¶ 2, R. Supp. p. 4402.) Notwithstanding, both Blue Lakes and Clear Springs deliberately chose not to produce the information, and were thereby precluded from presenting any evidence that they legitimately need additional water that they could apply to beneficial use by raising more or larger fish.<sup>12</sup> Their decision not to put on evidence that they need additional water clearly speaks for itself.

Even though there is no competent evidence in the record that the Spring Users actually need additional water that can be put to beneficial use, the Director found that Blue Lakes and Clear Springs were suffering material injury. To support his finding, he made a categorical conclusion that “[m]ore 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.

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<sup>12</sup> At the hearing, Blue Lakes offered nothing more than the generic testimony of one lay witness that they could grow more fish if they had more water, but supplied no production records or other evidence to support that bare assertion. Clear Springs made no attempt to prove they needed more water.

16 p. 3840) In other words, the Director ruled that depletion of the water supply automatically equals material injury, regardless of whether additional water is in fact needed by the calling senior. This conclusion was made without a scintilla of evidence that Blue Lakes and Clear Springs, let alone all fish producers, at all times have received and in fact need maximum authorized rate of diversion.

The bar has been set so low that proving material injury requires nothing more than showing a capability to divert more water. The amount of water actually used and needed is no longer relevant, at least with respect to fish farmers. Apparently, the material injury factors of CM Rule 42, and the Idaho Supreme Court's instruction that the Director has a constitutional duty to consider whether the senior user is using less than the maximum authorized rate of diversion, apply to all surface water users except fish farmers. Apparently the Director no longer has any duty or authority to exercise technical judgment and discretion to determine material injury in response to delivery calls by fish farmers.

For all we know, the Director ordered the curtailment of more than 70,000 irrigated acres to provide the Spring Users with water they do not need and are not putting to beneficial use—like delivering water to fallow fields. The Director's finding of material injury, without any evidence that additional water is needed and would be put to beneficial use, renders superfluous CM Rule 42.01.e and sets a dangerous precedent for the conjunctive management of Idaho's ground water resources. Therefore, the Ground Water Users ask that the Court reverse the curtailment orders for lack of substantial evidence that the Spring Users need additional water that will in fact be put to beneficial use.

Additionally, even if there was substantial evidence that the Spring Users need additional water, there is no substantial evidence that their water needs cannot be met by employing reasonable diversion and conservation practices per CM Rules 42.01.g and h.

If the Director determines that a senior user needs additional water, pursuant to CM Rule 42.02.e, the Director then must determine, before making a finding of material injury, whether their needs could be met using different means of water use or diversion, pursuant to CM Rules 42.01.g and h. The Director erred by making a finding of material injury without doing either.

This Court states that the Ground Water Users had the opportunity to put on evidence that more efficient means of water use were available to the Spring Users, but that is simply not the case. Because the Ground Water Users were not able to discover evidence of production records or facility design and improvements, the Ground Water Users had no way of determining whether the Spring Users' water needs could be met using more efficient means of water use, such as by recycling water. The lack of evidence in the record that the Spring Users actually need additional water that cannot be provided through other means was a decision of the Spring Users, not the Ground Water Users. Therefore, the Ground Water Users further ask the Court to reverse the curtailment orders for lack of substantial evidence that the Spring Users' water needs cannot be met by employing alternative reasonable diversion and conveyance practices.

In sum, there is no substantial evidence in the record to support the Director's finding of material injury to Blue Lakes and Clear Springs, which should therefore be reversed. But if the Court refuses to reverse the Director's finding of material injury despite the lack of supporting evidence, then the Ground Water Users were wrongfully precluded from discovering records concerning diversions, fish production, facility improvements, etc., and this issue should be remanded to the Director with instructions to obtain such information from the Spring Users and

make further findings and conclusions concerning a) whether additional water is actually needed by the Spring Users, and b) if so, whether their needs could be met using alternative means of diversion and use of water.

**V. The Director cannot order curtailment without knowing that curtailment will enable the Spring Users to produce more, larger, or healthier fish.**

Even if Blue Lakes or Clear Springs were legitimately suffering material injury, the Director still must consider whether their delivery calls are “futile,” meaning they “cannot be satisfied within a reasonable time of the call … or [] would result in waste of the resource.” CM Rule 10.08. In other words, even if a senior needs additional water that can be put to beneficial use, curtailment is not justified unless “curtailment of a junior’s water right will indeed provide water to the senior.” *AFRD2*, 143 at 875.

In this case, there is no admissible evidence in the record that curtailment will supply a usable quantity of water to Blue Lakes, and especially to Clear Springs. The Court notes that the Hearing Officer found that “the percentages of the gains that would accrue to the respective springs supplying the Spring Users’ facilities were usable quantities.” *Order* at 29. However, that finding is not supported by substantial evidence in the record. There is in fact—at the Spring Users’ behest—no competent evidence in the record that the 10 cfs that is expected to accrue seasonally to Blue Lakes and the 2.6 cfs that is expected to accrue seasonally to Clear Springs over the next few decades of curtailment will enable them to produce more, larger or healthier fish. (*See Ground Water Users’ Opening Br.* at 49-57.) Consequently, the record is devoid of substantial, competent evidence to support the Director’s finding that such quantities are “usable.”

Moreover, since the Ground Water Users sought to discover the evidence necessary to show that curtailment will not result in a usable quantity to the Spring Users, and since the

Spring Users had the option to supply that information but chose not to, the Spring Users must suffer the consequence. It would be an impossible burden to require the Ground Water Users to prove that curtailment would be futile while allowing the Spring Users to conceal the information needed to make that showing.

Without evidence that the Spring Users will be able to produce more, larger or healthier fish with the amount of water that will result from curtailment, the Director's determination that their delivery calls are not futile is not supported by substantial evidence in the record.

**VI. The Director cannot adequately apply the law of full economic development without understanding whether, or the extent to which, curtailment will enable the Spring Users to produce more, larger or healthier fish.**

The extent to which curtailment will enable the Spring Users to produce more, larger or healthier fish is equally relevant to the law of full economic development. Even if curtailment will enable the Spring Users to produce a few more fish, if curtailment unreasonably interferes with full economic development of the ESPA then the Spring Users' delivery calls must be denied nonetheless. As applied to the facts of this case, the law of full economic development cannot tolerate the permanent curtailment of more than 70,000 irrigated acres if it will not enable Blue Lakes and Clear Springs to produce more fish. Further, even if the Spring Users could produce some additional fish from curtailment, the economic benefit must be factually determined and compared with the economic injury that will result from the curtailment of 70,000 plus acres. Yet, there is still no evidence in the record that curtailment will enable Blue Lakes or Clear Springs to produce any more, larger or healthier fish. Thus, if the Director is deemed to have adequately applied Idaho Code § 42-226, his decision is arbitrary and capricious and not supported by evidence in the record. Additionally, if the Director is deemed to have

failed to independently consider and apply Idaho Code § 42-226 to the facts of this case, that issue must be remanded for further analysis.

**VII. The Spring Users cannot, either collectively or individually, preclude the additional development of the ESPA that was secured by the Swan Falls Agreement.**

The Court acknowledges in its *Order* that “the State Water Plan and the Swan Falls Agreement establish, at least on a macro scale, what constitutes ‘full economic development’ of the ESPA,” *id.* at 40, but the Court refuses to enforce the Swan Falls Agreement (“Agreement”) and State Water Plan on the basis that they “are not conclusive of full economic development in responding to individual delivery calls,” *id.* at 41-42. The Court’s ruling on this matter does not reflect the realities of the Agreement, and entitles individual spring users to collectively undo and reverse the benefit of the bargain that the state received under the Agreement in 1984.

As explained in the *Ground Water Users’ Opening Brief*, the monumental Agreement was the result of a lawsuit by Idaho Power to curtail thousands of ground water pumpers on the Eastern Snake River Plain in an effort to increase Snake River flows from springs in the Thousand Springs area, including the springs from which Blue Lakes and Clear Springs divert their water rights. At that time, the minimum observed flow of the Snake River at Murphy Gauge was approximately 4,500 cfs—1,200 cfs above the 3,300 cfs minimum flow provided for in the State Water Plan. Notwithstanding, Idaho Power filed a lawsuit to curtail thousands of ground water pumpers in an effort to increase Snake River flows at its Swan Falls hydropower plant. The suit threatened to dry up thousands of ground water irrigated acres and preclude all future ground water development on the Eastern Snake River Plain, resulting in massive economic harm to local and state economies.

To settle the lawsuit, the state of Idaho and Idaho Power agreed to split the difference between the minimum observed flow (4,500 cfs) and the ultimate minimum flow fixed by the

State Water Plan (3,300 cfs). The fixed minimum flow was increased to 3,900 cfs,<sup>13</sup> which secured an additional 600 cfs for hydropower, aquaculture, and environmental purposes while congruently allowing an additional 600 cfs of consumptive ground water development. The Agreement expressly assured that all existing ground water use would be protected and that an additional 600 cfs of consumptive ground water development could occur. (Agreement, ¶¶ 7A-D, Ex. 437.) The 1986 State Water Plan, which was amended as part of the Agreement, explained it clearly:

The minimum flows established for the Snake River at the Murphy and Weiser gauging stations are management constraints; they further insure that minimum flow levels of Snake River water will be available for hydropower, fish, wildlife and recreational purposes. The establishment of a zero minimum flow at the Milner gauging station allows for existing uses to continue and for some new uses above Milner. It also means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.

Ex. 440 at 35 (emphasis added).

The state clearly anticipated that spring flows would decline until the 3,900 cfs minimum flow was reached, which would obviously affect spring users who had by that time appropriated all significant spring flows in the Thousand Springs area. The state did not view the impact to spring users as a problem, however, because spring flows were primarily used for aquaculture purposes (a non-consumptive use) and the policy of the state was that “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.” (Dunn Direct Testimony, R. Vol. 13, p. 2880, ¶ 7.) Indeed, the 1986 State Water Plan specifically provided that

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<sup>13</sup> The minimum flow was increased to 5,600 cfs during the non-irrigation season to account for the cessation of irrigation diversions below Milner Dam and above Swan Falls during the non-irrigation season.

[a]quaculture 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 at 38; emphasis added).

The state of Idaho, acting on behalf of the thousands of water users named as defendants in Idaho Power’s lawsuit and acting as steward of the water resources of the state, agreed that the Agreement and State Water Plan “provide a sound comprehensive plan for the management of the Snake River watershed. (Agreement ¶ 11, Ex. 437.) The legislature ratified the Agreement as the “plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest.” *Id.*

Now, however, the Director and this Court have eliminated the benefit of the bargain that the state negotiated by ordering massive curtailment of water rights and reversing decades of economic development that were expressly protected by the Agreement. The Court states in its *Order* that even though the minimum stream flow is satisfied, curtailment is proper because “it is possible to over-develop a particular sub-reach and still satisfy the Swan Falls Agreement.” *Id.* at 41. Such reasoning is contrary to the Agreement. Under the Agreement, all existing ground water development was protected, regardless of the sub-reach of the Snake River to which it is tributary.<sup>14</sup> (Ex. 437 at ¶¶ 7C-D.) Further, it would have been useless for the state to secure an additional 600 cfs’ worth of depletive ground water development if such development were not permitted to impact existing spring rights. Due to the radial impact of ground water pumping, it would have been entirely impractical to limit ground water development to areas that only impact springs that had not already been fully appropriated (if any existed).

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<sup>14</sup> Because it takes years for a ground water pumping from a given well to impact the Snake River, not all impacts from existing ground water development had been realized at the time of the Agreement.

The Court further asserts that the Agreement cannot be enforced until “sources other than ground water rights do not need to be relied on to satisfy minimum flows in times of shortage even on a short term basis.” *Order* at 41, n.14. Again, however, such reasoning nullifies the protection of existing ground water rights and the additional ground water development that was secured by the Agreement. Due to the zero flow at Milner Dam, the Director must administer the minimum flow under the presumption that Snake River flows will at times be supplied entirely by ground water. (*See* 1986 State Water Plan, Ex. 440 at 35.) The potential use of other sources to avert a breach of the minimum is only a temporary remedy until the delayed affects of ground water administration are realized. *Id.* at 40. It does not follow reason to reject long-term administration of the ESPA based on the minimum flows simply because a short-term remedy may be needed to temporarily maintain the minimum until the delayed impacts of ground water administration are realized.

The Court does properly recognize that “a senior surface right that depends on a connected aquifer for essentially amounts to ‘dead storage’ to support the means of diversion may not be absolutely protected in the historic means of diversion to the extent the ‘dead storage’ is not subject to appropriation or development by subsequent appropriators.” (*Order* at 36.) However, the Court is not entirely correct in concluding that “what constitutes [a] reasonable or acceptable amount of ‘dead storage’ is a determination left to the Director.” *Id.* The legislature has already decided what constitutes a reasonable amount of dead storage to support spring rights in the Thousand Springs area—it is the amount of storage needed to maintain a minimum flow of 3,900 cfs at the Murphy Gauge.

The Director does not have discretion to obviate the bargain gained under the Agreement and incorporated into the State Water Plan by unilaterally deciding to manage the ESPA to increase Snake River flows at the Murphy Gauge even though the minimum is satisfied. He cannot allow Blue Lakes and Clear Springs to curtail ground water rights that are expressly protected from curtailment under the Agreement and State Water Plan. By allowing one spring user to demand curtailment of ground water pumping even though the minimum flows are satisfied, the Court has entitled spring users to collectively reverse decades of economic development from ground water pumping that the state labored so diligently to secure in 1984.

Therefore, the Ground Water Users respectfully ask this Court to reconsider its decision and reverse the curtailment orders for failure to comply with the comprehensive management plan adopted by the legislature in the Swan Falls Agreement and State Water Plan.

### **CONCLUSION**

For the foregoing reasons, the Ground Water Users ask the Court to 1) instruct the Director to reconsider and independently apply the law of full economic development on remand, and issue specific findings of fact and conclusions of law concerning the same; 2) sustain the Director's decision on seasonal variability as part of his material injury determination; 3) clarify its statement that "before the Director can hear evidence about water supply, diversion, and use of water, he must first issue an order, informing the parties of his initial determination of material injury" (*Order* at 48); 4) confirm there is no substantial evidence in the record to support the Director's conclusions that a) the Spring Users legitimately need additional water that can be put to beneficial use, b) curtailment will provide the Spring Users with a usable quantity of water, and c) the anticipated benefit to the Spring Users justifies the curtailment of more than 70,000 irrigated acres under Idaho Code § 42-226; and 5) reverse the

curtailment orders for failure to comply with the comprehensive management plan adopted by the legislature in the Swan Falls Agreement and State Water Plan.

RESPECTFULLY SUBMITTED.

DATED this 21<sup>st</sup> day of August, 2009.

RACINE OLSON NYE BUDGE &  
BAILEY, CHARTERED



Thomas J. Budge

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of August, 2009, the above and foregoing document was served in the following manner:

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