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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, vs. **GARY SPACKMAN**, in his capacity as Interim Director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES,** Respondents.	CASE NO. CV 2008-444 **BLUE LAKES TROUT FARM, INC.'S AND CLEAR SPRINGS FOODS, INC.'S JOINT REPLY IN SUPPORT OF JOINT PETITION FOR REHEARING AND IN OPPOSITION TO GROUND WATER USERS' REHEARING BRIEF**
IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-0413A, 36-04013B, AND 36-07148. **(Clear Springs Delivery Call)** **IN THE MATER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427.** **(Blue Lakes Delivery Call)**	

BLUE LAKES TROUT FARM, INC.'S AND CLEAR SPRINGS FOODS, INC.'S JOINT REPLY IN SUPPORT OF JOINT PETITION FOR REHEARING AND IN OPPOSITION TO GROUND WATER USERS' REHEARING BRIEF

COME NOW, Petitioners BLUE LAKES TROUT FARM, INC. ("Blue Lakes") and CLEAR SPRINGS FOODS, INC. ("Clear Springs) (hereinafter collectively referred to as "Spring Users"), by and through their respective counsel of record, and hereby submits this joint reply to the *IDWR Response Brief on Rehearing ("IDWR Rehearing Brief")* and to the *Ground Water Users' Rehearing Brief ("GWU Rehearing Brief")*.

REPLY TO IDWR REHEARING BRIEF

The record and the findings of the Hearing Officer establish that junior ground water diversions cause material injury to water rights 36-7210 and 36-4013A. Consistent with the Director's *Final Order* and IDWR's original briefing to this Court, the *IDWR Rehearing Brief* completely fails to address the evidence and findings which demonstrate material injury to these water rights. Rather, IDWR again seeks only to justify the Director's consideration of seasonal variability in water flows to evaluate "the ***nature and extent of a water right at the time of its appropriation***." *IDWR Reply* at 5 (emphasis added).

The *IDWR Rehearing Brief* also fails to provide a rationale for concluding that a hearing is required after a material injury determination before administration proceeds. IDWR's persistent pattern of allowing junior ground water rights causing injury to resume and continue pumping without approved mitigation plans in place demonstrates the need for the Court to provide instruction regarding the timing of administration to ensure timely submission, review, approval, monitoring and enforcement of mitigation plans as an effective alternative to curtailment. Given the 5-year history of past administration and failed "replacement water" or attempted mitigation plans, the requested guidance from the Court is necessary to prevent future litigation.

I. The Evidence and Findings in the Record Conclusively Establish that Water Rights 36-7210 (Blue Lakes) and 36-4013A (Clear Springs) are Materially Injured by Junior Ground Water Diversions; Therefore, Remand to Determine Material Injury is Unnecessary.

A. The Director Must Administer Water Rights when there is Material Injury.

Junior water rights causing material injury to senior water rights must be administered. CM Rules 40, 42 & 43. As explained in the Spring Users' prior briefing, a finding of material injury does not require a showing that the calling senior right was continuously filled throughout the period of use at the time of appropriation, or that the senior right is never filled at the time of the call.[1] The CM Rules define material injury as: "Hindrance to or impact upon the exercise of a water right." CM Rule 10.04; *see also* I.C. § 42-237a.g; *Bower v. Moorman*, 27 Idaho 162, 175-76 (1915); *Martiny v. Wells*, 91 Idaho 215, 218-19 (1966); *Ward v. Kidd*, 87 Idaho 216 (1964). The Hearing Officer correctly summarized the material injury analysis:

> [T]he fact that a water right is filled at a seasonal high period does not lead to the conclusion that there is no material injury for the remainder of the year when there is less water flowing than the decreed right. . . . If ground water pumping ***contributes to the decline in water*** that would be applied to a beneficial use, there is material injury.

R. Vol. 16 at 3846 (emphasis added).

Junior ground water diversions deplete hydraulically connected spring flows. The undisputed evidence and findings in the record establish that junior ground water diversions have contributed to the historic decline in spring flows, as well as the annual, "seasonal" low spring flows that occur after ground water pumping begins. *See Order on Petition for Judicial Review* ("*Order*") at 11 ("Spring flows then began to decline as a result of conversion from flood

[1] In fact, the record demonstrates that spring flows were sufficient to fill 36-7210 and 36-4310A throughout their periods of use from the times of appropriation until the 1990s, and that such flows have been depleted to the point that water has recently been available only a fraction of the year. *See, e.g.*, Exs. 18 & 205 (36-7210); Exs. 128A, 156 & 158 (36-4013A).

irrigation to sprinkler irrigation as well as depletions caused by ground water pumping"); *see also* Blue Lakes *Opening Br.* at 3-17; Clear Springs *Opening Br.*, at 8-9, 12-13 & 25-27; *Spring Users Joint Reply Br.* at 11-17. There is no doubt that spring flows are lower today than they were at the times water rights 36-7210 and 36-4013 were appropriated, due in part to junior ground water pumping. Moreover, there is no dispute that these rights are not filled today, and are receiving less water today than they did when they were appropriated. There is thus no doubt that these water rights are injured by out-of-priority ground water diversions.

The Hearing Officer correctly summarized the impact of the historic decline in spring flows on water rights 36-7210 and 36-4013A:

> ***In this case the evidence indicates that the Blue Lakes 1971 right and the Clear Springs 1955 right were filled throughout the year at the decreed level at the times of appropriation.*** In the recent past they have been filled for only a portion of the years, ranging from a high of twelve months for Blue Lakes in 1977 and seven months in 1995 to lows of two months in 2004, three months in 2005, and three months in 2006. Clear Springs' 1955 right was filled year round from 1988 through 2001 and filled for six months in 2004, two months in 2005, and four months in 2006.

R. Vol. 16 at 3846-47 (emphasis added); *see also, e.g.,* Exs. 18 & 205 (Water Right # 36-7012); Exs. 128A, 156 & 158 (Water Right # 36-4013A); R. Vol. 3 at 526. Accordingly, the Hearing Officer correctly concluded that, since a "portion of the declines is attributable to ground water pumping ..., there should be a finding of injury to those water rights." R. Vol. 16 at 3846-47. IDWR's response identifies no evidence to rebut these facts and conclusions. Consequently, junior ground water diversions contributing to the material injury are subject to conjunctive administration. CM Rule 40.a. This is the law, and the law is clear.

B. The Director Cannot Re-examine the "Nature and Extent" of a Water Right under the Rubric of "Seasonal Variability."

The *IDWR Rehearing Brief* reconfirms that IDWR re-evaluates the Spring Users' rights under the rubric of "seasonal variations." Orders of the Director and prior IDWR briefing indicated that quantity element was the subject of seasonal variation examination. In its *Reply Brief*, IDWR indicates that "Season of Use" is also re-evaluated in a seasonal variation examination. IDWR suggests that "Season of Use can become an unintended driver," and that, absent a review of seasonal variation, the Director would be required to "blindly accept the Season of Use element stated on the decree." *IDWR Br.* at 5, 7. It anticipates that a material injury determination will include review of "a large record of available data on stream flows." *Id.* at 6-7. All of this is necessary, IDWR argues, "for the Director to have a complete understanding of the ***nature and extent of a water right*** at the time of its appropriation." *Id.* at 5 (emphasis added). In short, IDWR proposes an administrative scheme where the holder of the senior water right must reprove the "nature and extent" of its water rights – even though such determinations were made by the SRBA Court. Idaho Code § 42-1420 ("the decree entered in a general adjudication ***shall be conclusive as to the nature and extent*** of all water rights in the adjudicated water system") (emphasis added). As this Court ordered, such actions are contrary to Idaho law. *Order* at 23-24.

Citing to CM Rule 43.03.b, IDWR asserts that a review of seasonal variability is necessary "so as not to require replacement water at times when the surface right historically has not received a full supply." *IDWR Br.* at 6. This assertion has no merit for at least two reasons. First, CM Rule 43 deals with the Director's authority to review mitigation plans. It has nothing to do with the Director's determination of whether or not there is material injury to the decreed

senior water right. *See* CM Rule 42. In its *Reply Brief*, IDWR agrees with the Ground Water Users that "application of the futile call doctrine should only occur after a finding of material injury." *IDWR Br.* at 3. Like a futile call determination, a determination of mitigation "should only occur after a finding of material injury." Accordingly, CM Rule 434.03.b is not a component of a material injury determination, and does not come into play until after a material injury determination has been made.

Second, the testimony and the Hearing Officer's findings establish that, given the historic decline in spring flows, curtailing junior ground water rights will not deliver more water to the Spring Users than was available at the time of appropriation, when the junior rights did not exist. IDWR quantifies mitigation required of junior ground water rights as the spring flow depletion caused by those rights. Here, IDWR has based its material injury finding solely on impacts to spring discharges *caused by junior ground water diversions* (not reductions to the spring discharges caused by drought and incidental recharge). R. Vol. 1 at 46-47, ¶¶ 4-9; R. Vol. 3 at 488-89, ¶¶ 4-9; at R. Vol. 16 at 3695; *Order* at 19-21. Assuming IDWR's quantification of mitigation is accurate, mitigation or replacement water required of a junior ground water right cannot possibly provide a senior more water than was available at the time of appropriation. *See* R. Vol. 3 at 503, ¶ 72 (indicating that administration of Clear Springs' senior water rights will account for only "about one-sixth of the shortage"). Indeed, ground water rights acquired junior to 1955 and 1971 did not exist at the time Clear Springs and Blue Lakes appropriated water rights 36-4013A and 36-7210.

In the conclusion of its argument regarding seasonal variations, IDWR asks the Court to "direct the Spring Users to provide all information on the historical availability of water right nos. 36-4013A and 36-7210 to the Director for his review and consideration." *IDWR Br.* at 8.

IDWR apparently forgets that, prior to hearing, the Hearing Officer required the Spring Users to provide diversion and spring discharge records "from the time of initial licensing." *Order Re Discovery*, R. Vol. 4402. Reproducing information that is already in IDWR's record will not alter the established fact that junior ground water rights materially injure the Spring Users' rights.

C. Remand to Determine Material Injury is Unnecessary.

There are no further findings of fact that would affect a material injury finding. As such, remand on this issue is unnecessary. *See, e.g., Bonner Gen. Hosp. v. Bonner Cty.* 133 Idaho 7, 11 (1999). Moreover, as explained in the Spring Users' prior briefing, the Director has concluded that such an analysis is not possible. The Director's 2005 Order concluded that there "are no known measurements, nor any other means, for reasonably determining the intra-year variations in the discharges from the springs ... on the dates of appropriation." R. Vol. 1 at 55, ¶ 49; R. Vol. 3 at 498-99, ¶ 54. This conclusion was adopted in the *Final Order*, and no party challenged it.

IDWR cites certain testimony of the former Director during the hearing, prior to issuance of the *Final Order*, to suggest that this finding should be open to further reconsideration on remand. In fact, the former Director was simply describing his understanding that factual issues would be addressed through the hearing process; that is, the one in which he was testifying and which resulted in the *Final Order*. There was no testimony to raise doubt about the finding in the Director's 2005 Orders that it is not possible to determine intra-year spring variations at the times the Spring Users rights were appropriated.

It is already established that spring flows were higher year round at the times of appropriation than they are today, and that the annual pattern of spring flows at the time of

appropriation was likely similar to the pattern observed, at Blue Lakes for example, every year since the 1990's. It is not necessary to attempt complicated, expensive, time-consuming computer modeling or other hydrologic analysis to more precisely determine the actual spring flows throughout the year at the times of appropriation in order to know that junior ground water rights have caused historic and yearly declines in spring flows, thereby injuring water rights 36-7210 and 36-4013A.

The evidence in the record is clear that water rights 36-72102 and 36-4013A are materially injured by junior ground water diversions. As such, remand on this issue is unnecessary. Accordingly, the Court should reconsider its Order and enter a finding of material injury, consistent with the Hearing Officer's decision, who, upon review the evidence, confirmed that Blue Lakes' 1971 and Clear Springs' 1955 water rights are being materially injured. *See supra.* As such, remand is only necessary to determine the scope of administration to the injured water rights, as explained in the Spring Users' prior brief on rehearing. *Spring Users' Brief* at 13.

II. There is no Basis in Idaho Water Law to Require a Hearing Prior to Curtailment After a Material Injury Determination has been Made.

Idaho has long recognized that water administration must be timely. *See, e.g., AFRD#2 v. IDWR*, 143 Idaho 862, 874 (2007) ("a timely response is required when a delivery call is made and water is necessary to respond to that call"). IDWR's response brief provides nothing to refute this long-standing principle of priority administration. Rather, IDWR attempts to pass off this long-standing law as being unique to surface water administration only. *IDWR Br.* at 8-9.

IDWR's arguments are not compelling. IDWR bases its entire response on a statement from the *AFRD#2* decision, wherein the Supreme Court stated that the issues in *Moe v. Harger*,

10 Idaho 302 (1904), "are simply not the same." Importantly, however, the Court was addressing the argument that diversions under a junior water right are "presumed" to create "injury to a senior." 143 Idaho at 877. Here, material injury has been determined by the Director and affirmed by this Court. Contrary to IDWR's claim, the Supreme Court did not address whether or not a hearing prior to curtailment was necessary in *Moe*. There is no basis to treat surface water rights and ground water rights differently in terms of receiving a timely response to a request for administration under Idaho law. In fact, the only guideline provided by the *AFRD#2* Court was that administration must be "timely" and that "water is necessary to respond to that call." *Id.* at 874. This is consistent with the constitutional and statutory mandate to administer water rights by priority. Contrary to IDWR's implications, the Court's decision in *AFRD#2* did not silently overturn a century of water law and does not stand for the proposition that a hearing must be held prior to curtailment of junior rights causing injury to a senior. Any delay in the process clearly violates the Constitution by benefitting junior rights to the detriment of the senior water user. Moreover, nothing in Idaho's water distribution statutes requires a series of unending "contested cases" prior to actual administration of the junior right. The law is clear. Water right administration must be timely. *See Springs Users Rehearing Br.* at 14-20.

III. Guidance Should be Provided to Avoid Continued Untimely Administration.

To date, administration has been long, delayed and incomplete. *See* Blue Lake's *Opening Br.* at 25-31; Clear Springs *Opening Br.* at 39-42. The Director has failed to properly implement the procedures outlined in the CM Rules and has failed to enforce procedures to ensure mitigation plans are submitted in a timely fashion. The Director has failed to require that plans be submitted with sufficient time to hear and decide the validity of the mitigation plans before the irrigation season commences. As such, curtailment has not occurred, even though material

injury persists and even though ground water users have failed to meet their mitigation obligations. By submitting a plan at the eleventh hour or after irrigation begins in the spring, junior ground water users create the problem of turning their water rights on, out-of-priority and at their own risk, despite the fact no mitigation plan is formally approved by IDWR at that time. Providing an answer before the irrigation season is the only way both seniors and juniors will know what to expect for the year in terms of ordered curtailment or mitigation obligations.

IDWR's only response to the Spring Users' concern is to cite to a paragraph from the *AFRD#2* decision. *IDWR Br.* at 9-10. They do not provide any discussion and they do not dispute the fact that the untimely administration of water has led to continued depletions of the source and continued material injury to the Spring Users. Furthermore, the provision they cite from the *AFRD#2* decision does not justify IDWR's failure to provide timely administration. While the Supreme Court recognized that it is important for the Director to have "the necessary pertinent information," it also affirmed that "a timely response is required when a delivery call is made and water is necessary to respond to that call." 143 Idaho at 874. To date, IDWR has proven incapable of providing timely administration, resulting in continued out-of-priority diversions to the detriment of the Spring Users' water rights. As such, guidance from this Court is necessary to ensure that the delays of the past are not continued into the future.

REPLY TO GROUND WATER USERS' REHEARING BRIEF

> A difficulty in this case is that IGWA does not address a core issue – the effect of the doctrine of "first in time, first in right" in water rights. ***The end result of the arguments by IGWA is that even though junior aquifer depletions have encroached upon senior rights over the years, there is no remediation for the harm because the result is harsh***. The Spring Users have rights senior to the ground water users. Those senior rights have been damaged by depletions to the aquifer, reducing the flows from the springs. Various factors have contributed to those depletions, including weather, reduced incidental recharge and ground water pumping. ... The ground water users are in a very

> sympathetic position. They have developed substantial, beneficial businesses upon promises of inexpensive power and what was said to be an unlimited water supply that could be tapped from the ground. ***But that sympathy must be hedged by the law that senior-right holders may call against junior-right holders when the juniors cause material injury to seniors***. ... "As between appropriators, the first in time is first in right." Idaho Code section 42-106. The principle has limits, but it is a starting point that must be addressed.

R. Vol. 16 at 3695-96 (emphasis added).

The GWU's arguments continue to suffer from the same fatal flaw identified by the Hearing Officer in the administrative case. Rather than recognizing the law of prior appropriation, and applying the facts to the law, the GWU would have the Court create new law by elevating the policy of "full economic development" ahead of priority and all other considerations in water right administration. They would have the Court write a requirement into the CM Rules that the Spring Users must demonstrate that they will make the best use of the water – growing the biggest, healthiest or most fish, before authorizing administration of junior rights causing injury. They would have the Court interpret the Swan Falls Agreement to silently override a century of administrative jurisprudence by construing the Agreement to mean that IDWR must ignore material injury to non-hydropower surface water rights in the Basin. The GWU either misrepresent or ignore important aspects of the record in an attempt to justify their drastic demands. In the end, however, none of these arguments has merit and reconsideration should therefore be denied.

I. "Full Economic Development" does Not Trump the Prior Appropriation Doctrine.

> Implicit in the CMR is the acknowledgment that there will be a disparity in the ground water use curtailed and the quantity of surface water produced. ...
>
> The reasonable use of surface and ground water provisions of CMR 020.03 and the full economic development provision of the Ground Water Act ***contemplate a certain amount of balancing of the reasonable exercise of***

> ***senior priority rights against the State's policy*** of full economic development of its water resources.

Order at 36 & 37 (emphasis). These statements are clear. In these statements, the Court correctly recognizes that, whatever its level of applicability in the administrative context, the policy of "full economic development" cannot override "the reasonable exercise of senior priority rights." It cannot override the fact that there "will be a disparity in the ground water use curtailed."[2]

The GWU completely overlook these statements and seek to lift full economic development above everything else, including a water right's priority, in the administrative context. They claim, without citation to the CM Rules or case law, that the Director must make independent and individual findings relative to full economic development. *GWU Br.* at 5. Failure to do so, they claim, is reversible error. *Id.*

The GWU's arguments are fundamentally flawed and fail to recognize the standard of review under Idaho's APA. First, there is no requirement in the CM Rules for the Director to make independent and individual findings relative to full economic development. *See* CM Rule 40, 42 & 43. As such, the GWU's reliance on Idaho Code § 67-5248 and *Mercy Med. Ctr. v. Ada Cty.*, 192 P.3d 1050 (Idaho 2008), are misplaced. *See GWU Br.* at 6 & 7. Neither stands for the proposition that the Director must make independent findings relative to full economic development in conjunctive administration .

Second, the fact that full economic development does not override "the reasonable exercise of senior priority rights" is clear from the CM Rule's recognition that curtailment may be ordered even if "***a call may be denied under the futile call doctrine.***" CM Rules 20.04.

[2] The Spring Users do not waive their right to challenge the applicability of the Ground Water Act and the policy of "full economic development" apply to the Spring Users' senior surface water rights or to challenge the Director's application of the Ground Water Act and the policy of "full economic development" in future administration..

Third, the Director does not have the authority to consider the whether or not the calling water user will make the most money or grow the best crop with the water received through administration. In essence, the GWU would have the Director determine that the ground water users will put the water to a higher and better use. The Director does not have any authority to make such a finding. *Cf.* IDAHO CONST. art. XV, § 3 (all agricultural uses have the same Constitutional preference).

Furthermore, whereas the GWU assert that the model uncertainty creates a boundary outside of which a call is futile, *GWU Br.* at 6, the Director found, and the Court affirmed that the "10% margin of error factor [excluded] from administration those junior rights ***identified by the model to be causing injury***" but were "predicted by the model to provide less than 10% of the quantity curtailed to the particular spring reach," *Order* at 25 & n.5. The Court further discussed the Director's reasoning in applying the trim line to the detriment of the Spring Users' senior water rights, indicating that the Director *implemented* the trim line due to considerations of "full economic development:"

> The Director used full economic development for his implementation of the "trim-line." The application of the "trim-line" effectively reduced the scope of curtailment in the case of Blue Lakes' delivery call from 300,000 acres to 57,220 acres and in the case of Clear Springs' delivery call from 600,000 acres to 52,470 acres.

Order at 36; *see also* R. Vol. 16 at 3706 (indicating that public policy considerations "affect the Director's use of the so-called 'trim line,' a point of departure beyond which curtailment was not ordered"). In other words, according to the Court's *Order*, the Director allowed junior priority ground water rights to continue depleting the aquifer *even though modeling showed that the rights were contributing to the material injury* based on the Director's application of full economic development. These findings are clear.

As a result of the Director's application of "full economic development," only 19% of the junior ground water rights originally determined to be contributing to Blue Lake's material injury remained subject to administration. *Order* at 36. Likewise, only 8.7% of the junior ground water rights identified in the Clear Springs' call remained subject to administration. *Id.* Stated another way, due to the application of a "full economic development" consideration, more than 80% (Blue Lakes) and 91% (Clear Springs) of the junior ground water rights contributing to the material injury suffered by the Spring Users' senior water rights are ***not*** subject to administration.

The GWU ignore this drastic reduction in water rights and demand that the Director further constrict the boundary line for administration in the aquifer. *GWU Br.* at 9. As the Spring Users discussed in their *Joint Reply Brief*, at 76-79, such restriction is not supported by the law or facts.

Finally, the GWU claim that the Court's *Order* creates confusion through its discussion of "reasonableness" in the context of administration. *GWU Br.* at 8-11. Again, the GWU's assertions are in error. The GWU have cherry picked a few phrases from the Court's *Order*, and misrepresented the facts from *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), to support their claim that there is confusion for future administration across the ESPA. *Id.* No such confusion exists.

In this case, the Director concluded that the Spring Users' means of diversion were reasonable and that the use of the ESPA model was justified. The GWU challenged this conclusion. The Hearing Officer considered this evidence and concluded that "there was no credible evidence of a better result. This Hearing Officer could not defend alternate findings from the evidence presented by Dr. Brendecke, Eric Harmon, Dr. Wylie, or any other witness."

R. Vol. 16 at 3695. Essentially, the Director had made a determination that junior priority ground water rights were depleting the spring discharges and causing material injury, that administration was necessary and that the scope of curtailment would be reduced by as much as 91%. *See supra*. On challenge, the GWU failed to provide any "concrete evidence" of a "viable reasonable alternative." *Order* at 38-39. Absent any "concrete evidence," the Court is bound by the standard of review and cannot overturn the Director's determinations.

In an attempt to justify their assertions, the GWU rely on *Schodde*. That decision is inapposite here. In *Schodde*, the Supreme Court concluded that the senior's means of diversion (a water wheel) was unreasonable to prevent a dam from being constructed on the Snake River. 224 U.S. at 123-24. Here, the Director concluded that the Spring Users' means of diversion are reasonable. R. Vol. 1 at 59-60, ¶ 71; R. Vol. 3 at 509 ¶ 99; *see also* R. Vol. 14 at 3236 (Hearing Officer granted summary judgment on this issue). That finding was not challenged on appeal.

"Implicit in the CMR is the acknowledgment that there will be a disparity in the ground water use curtailed and the quantity of surface water produced." *Order*, at 36. Accordingly, the reconsideration on the place of "full economic development" in conjunctive administration is unnecessary.

II. The Director Cannot Re-adjudicate a Senior Water Right for Purposes of Conjunctive Administration.

> Simply put, a determination of material injury requires the Director to determine what portion of a senior's water deficit is caused by naturally occurring seasonal lows as opposed to the portion of the deficit that results from the exercise of junior rights. ...
>
> In effect, the lack of data regarding historical conditions and the insufficiency of the evidence regarding conditions at the time of the appropriation was construed against the Spring Users. The 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 – this in effect because a re-adjudication of the quantity element of the rights.

Order at 21 & 24.

The Court's order on this point is clear. The CM Rules do not authorize the Director to use "seasonal variations" to circumvent the well-established burdens of proof in water right administration. *Order* at 23. In fact, the CM Rules "may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; ***that is presumed by the filing of a petition containing information about the decreed right.***" *AFRD#2*, 143 Idaho at 877-78 (emphasis added). Accordingly, if, as here, there is a "lack of any historical information," *Order* at 24 (citing IDWR briefing), the Director *cannot* divine that historical information and limit administration for the benefit of junior water right holders. Such an act improperly puts the senior right holder "in the position of having to re-prove the historical beneficial use of the right. Presumably, this was already accomplished in the SRBA." *Id.* Moreover, this is in direct contradiction to the established burdens of proof under Idaho law. *AFRD#2, supra.*[3]

The law is clear. If there is a "lack of historical information," as is the case here, then the senior water right holder is "presumed" to have an "entitlement to the water" in the decreed right. *Id.* In cases with a "lack of historical information," the CM Rule's authorization to consider seasonal variations cannot be used as a tool to circumvent this presumption – as was done in this case – and create a presumption for the benefit of the junior water user. Absent

[3] According to the *Order*, if there is historical information demonstrating that seasonal variability prevented diversion of the entire decreed quantity at certain time of the year, then "to the extent junior ground water pumpers are not the cause of the seasonal lows … there is no material injury." *Order* at 19. "If ground water pumping by juniors is not the cause of the injury to the senior rights or not reducing the supply available to senior rights then curtailment should not result in providing a usable quantity of water to the senior." *Id.* In other words, "the determination is ***essentially akin*** to the application of the futile call doctrine." *Id.* (emphasis added). This is the material injury analysis described in CM Rule 42.

historical information, the Director cannot write a seasonal variation limitation into a decree that is otherwise silent on the issue. Rather, a material injury finding must be made based on the "presumed" "entitlement to the water." *AFRD#2, supra.*

"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." *AFRD#2, supra.* Juniors may assert that the call is futile.[4] In other words, the seasonal variability analysis is "essentially akin to the application of the futile call doctrine." However, like futile call, an affirmative defense that seasonal variations prevented diversion of the full water right at the time of appropriation is *not* appropriate until *after* the material injury determination. This is the essence of properly applying the burden of proof in administration. *AFRD#2, supra.* The Supreme Court's recognition that there are administrative distinctions in conjunctive administration, *AFRD#2, supra* at 875 (cited by *GWU Br.* at 14), does not override the burdens of proof affirmed by that Court, *see, supra.*

The GWU attempt to turn the burden of proof on its head by asserting that a water right may be limited due to implied seasonal variability even when there is no historical information to support such a limitation. *GWU Br.* at 15. They assert a contrary ruling will force 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" with the end result being that "material injury must be presumed." *Id.* There is no basis for such hyperbole here. The CM Rules require specific information from the calling senior. CM Rule 30.01; *AFRD#2,* 143 Idaho at 873. In fact, "nowhere do the Rules state that the senior must prove material injury before the Director will make such a finding." *Id.* Here, the Director had significant information about the Spring Users'

[4] The GWU recognize that seasonal variability can be relevant to a futile call defense. *GWU Br.* at 12, n.9.

water rights, means of diversion and water use. *See* R. Vol. 1 at 45 (Blue Lakes Order, May 19, 2005); R. Vol. 3 at 487 (Clear Springs Order, July 8, 2005). Furthermore, this requirement to provide IDWR with information does not mean that the senior has to re-prove a decreed water right, or carry the burden to prove injury. *AFRD#2, supra.*

Contrary to the GWU's claim, this process does not force the Director to "presume" material injury or to "take the Spring Users' bare allegations." There is no conclusion that a water right "creates a guaranteed water supply," filling the Spring Users' senior water rights at the maximum diversion rate. *GWU Br.* at 16. In fact, as the facts and analysis of this case demonstrate, quite the opposite is true. *See* R. Vol. 3 at 503, ¶ 72 (recognizing that the administration of junior ground water rights to fill Clear Springs senior water rights would provide up to 4.3 cfs or only "***about one-sixth of the shortage described***") (emphasis added).[5]

Absent historical information, the Director cannot use seasonal variability as a means to circumvent the established burdens of proof associated with a delivery call and force a senior to prove material injury to the senior right. Such a requirement unlawfully turns the well-established burden of proof on its head and results in a re-adjudication of the senior right.

III. The CM Rules do Not Require a Hearing Before a Material Injury Finding is Made.

Next, the GWU assert that the Director should be required to "hear evidence about water supply, diversion and use of water" before he makes a material injury determination. *GWU Br.* at 17-18. However, the CM Rules do not require such a result. Rather, the CM Rules require

[5] Surely, had the GWU's exaggerations been true, the Director would have administered to fill the entire shortage rather than just 1/6 of the deficiency. As such, the GWU's claim that the Spring Users must show that they have "at all times [] received and in fact need [the] maximum authorized rate of diversion" on their water right is irrelevant here. *GWU Br.* at 21. Likewise, the assertion the "amount of water actually used and needed is no longer relevant, at least with respect to fish farmers," is baseless hyperbole. *GWU Br.* at 21. There is no support in the record for these drastic conclusions.

that the Director make a material injury finding based upon the information provided in the petition filed by the holder of the senior water right. CM Rule 30.01; *AFRD#2*, 143 Idaho at 873. There is no need for clarification on this point, as the CM Rules are clear.

IV. The Spring Users' Senior Water Rights Are Being Materially Injured.

In their rehearing brief, the GWU again accuse the Director of making a material injury finding without sufficient evidence. *GWU Br.* at 18-23. The GWU support these claims by (1) misstating the record ("the Director did not inquire into whether Blue Lakes or Clear Springs actually need additional water that can be put to beneficial use," *id.* at 19); (2) denigrating the evidence and testimony provided ("At the hearing, Blue Lakes offered nothing more than the generic testimony of one lay witness," *id.* at 20, n.12); and (3) asserting baseless accusations about "delivery calls made by proxy" to fill power rights, *id.* at 19.[6] The GWU wrongly assert that the Court's *Order* has stripped the Director of "any duty or authority to exercise technical judgment and discretion to determine material injury in response to delivery calls by fish farmers." *Id.* at 21. None of these claims are supported by the record. All of these issues were thoroughly addressed by the Spring Users in their *Joint Reply Brief* at pages 59-67.

The Director's material injury finding is supported by evidence and testimony in the record. As the Spring Users' stated in their *Joint Reply Brief*, at page 65:

> Mr. Cope testified that the Clear Spring facility was built and operated to beneficially use the extent of Clear Springs' water rights and that additional water up to that extent would be beneficially used for fish propagation. T. Pr. at 85-90. Dr. MacMillan testified that spring flows supplying Clear Springs' water rights were so low in 2005 that raceways had to be shut down and dried up. T. Pr. at 216, lns. 10-25 & 217, lns. 1-5; *see also* Exs. 204-05 & 308 at 2. He testified that in 2006, Clear Springs was able to turn water back into the raceway and that the water was beneficially used for fish production. *Id.* at

[6] The GWU's proxy call arguments have been repeated and rejected throughout these proceedings. Such accusations are never based in any evidence or testimony in the record. The GWU's failure to cite such evidence demonstrates how tenuous the arguments really are.

> 217, lns. 21-24. Likewise, additional water could be put to beneficial use by Clear Springs. *Id.* at 218, lns. 1-5. Mr. Kaslo testified that Blue Lakes could beneficially use their decreed diversion rates and that it "absolutely [] could raise more fish." *Id.* at 279-81. Furthermore, Spring Users use this water for more that just raising fish for market. For example, water is used for research and brood facilities in the aquaculture operations at Clear Springs' Snake River Farm facility. *See* Tr. P. 199-200; 203-04 & 208-09.
>
> Supporting the Spring Users' testimony, Cindy Yenter, Watermaster for Water District 130 confirmed that additional water could be put to beneficial use. *Id.* at 494, lns. 1-4; 501, lns. 12-18; 502, lns. 5-19. Former Director Dreher also testified that he analyzed the "history development and use" of water at the facilities and "found that they had beneficially used the entire amount of the water and could, if the water was delivered to the spring, make beneficial use." *Id.* at 1395, lns. 16-23. Remarkably, IGWA did not even attempt to dispute this testimony! Yet, now it degrades this testimony as "generic testimony," *IGWA Br.* at 54, and complains that it is inadequate for IGWA's newly created standard for administration. IGWA cannot have it both ways. It cannot sit idly by and allow testimony to be given then, without providing any contrary evidence, complain that that testimony is inadequate on appeal.

This evidence contradicts the GWU's hypothesis that "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." *GWU Br.* at 21. Given the evidence in the record and the standard of review, the GWU fail to demonstrate how the Director erred on this point.

The GWU also complain that the Director is unable to order curtailment unless he is certain that the resulting increased spring discharges will be used to produce "more, larger or healthier fish." *GWU Br.* at 23-24. They claim that absent such a finding, any curtailment would violate the "law of full economic development." *Id.* at 24-25. The CM Rules define material injury as the "hindrance to or impact upon the exercise of a water right caused by the use of water by another person." CM Rule 10.14. It does not say that a senior water user must demonstrate an ability to raise better or more fish or grow better or more crops in order to

experience or show material injury. Administration is not limited by a watermaster's subjective determination of who grows the best crop, raises the biggest fish or otherwise makes the most money with the water. The watermaster has no such authority:

> The court cannot limit "the extent of beneficial use of the water right" in the sense of limiting how much (of a crop) can be produced from the use of that right, so long as there is not an enlargement of use of the water right.

Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue at 17 (In Re SRBA Case No. 39576, Subcase Nos. 36-02708 et al., Twin Falls County Dist. Ct., Fifth Jud. Dist.) ("*Facility Volume Order*").

Finally, the GWU complain that Director failed to make a finding that the Spring Users' diversions are reasonable. *GWU Br.* at 22. Again, this claim is not true. *See* R. Vol. 1 at 49-50, ¶¶ 69-71; R. Vol. 3 at 509, ¶ 99.[7] As the Hearing Officer's summary judgment order explained:

> IGWA has asserted deficient means of diversion by the Spring Users. However, there is no evidence that the diversion works are out of date or function inefficiently as they exist, following correct of a defect observed by the Director. IGWA's position in this regard is premised on the claim that the Spring Users should be required to pursue additional water by drilling, as noted, a belief expressed by persons of considerable authority. However, the partial decrees that were entered did not condition the rights to water upon pursuing it in a different manner, and there is no basis in the record to add this condition to the partial decrees. There is conjecture that the Spring Users could drill, but there are no facts establishing that they could fulfill their water rights in this manner without interfering with other rights. ***There is no genuine issue of material fact to dispute the Director's finding that the Spring Users' means of diversion are reasonable.***

R. Vol. 14 at 3237 (emphasis added);[8] *see also Spring Users' Joint Reply* at 67-71.

In short, the GWU's assertions are not supported by the record. Since the Spring Users' senior water rights are being materially injured, administration of out-of-priority junior ground water rights is appropriate and required by law.

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[7] Clear Springs corrected the issues addressed in the Director's *Order*.

[8] The Hearing Officer's summary judgment order was adopted into the Director's *Final Order*. R. Vol. 16 at 3951.

V. The Swan Falls Agreement Does Not Preclude Administration.

Finally, the GWU assert that "the Director and this Court have eliminated the benefit of the bargain that the state negotiated [in the Swan Falls Agreement] by ordering massive curtailment of water rights and reversing decades of economic development." *GWU Br.* at 27. They assert that the Swan Falls Agreement precludes the Spring Users' Call and that the State must ignore the Spring Users' material injury until minimum flows at Milner drop below 3,900 cfs. *Id.* at 25-29. Failure to do so, they claim, would "revers[e] decades of economic development." *Id.* at 27. These arguments are without merit. The applicability of the Swan Falls Agreement and State water plans was thoroughly addressed in the *Spring Users Joint Reply Brief*, at pages 41-50. The issue was analyzed by the Court. *Order* at 40-42. Nothing in the GWU's brief supports a reconsideration of the Court's decision.

Furthermore, it should be noted that the GWU have never cited any statute, case or regulation to support their claim that the Swan Falls Agreement and State Water Plan amended the prior appropriation doctrine to allow junior ground water diversions to materially injure senior surface water rights without recourse. Their only support for this drastic departure from the law is a plea that "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." *Id.* Nothing in the Swan Falls Agreement or State Water Plans seeks to overturn the long-standing tenant of Idaho water law that first in time is first in right. *See, e.g.,* IDAHO CONST. art. XV, § 3 ("Priority of appropriations shall give the better right as between those using the water"); I.C. § 42-106.[9] Indeed, the State Water Plan could never be used to

[9] Following execution of the Swan Falls Agreement, Idaho Statutes were amended to subordinate hydropower rights *See* Idaho Code § 42-203B. This is the only impact on administration from the Swan Falls Agreement.

amend law –its application is limited to the **un**appropriated waters of the State. Idaho Code § 42-1734A(1). Paragraph 14 of the Swan Falls Agreement confirms the limitations of that agreement:

> This Agreement ***shall not be construed to limit or interfere with the authority and duty*** of the Idaho Department of Water Resources ["IDWR"] or the Idaho Water Resource Board ["IWRB"] to enforce and administer any of the laws of the state which it is authorized to enforce and administer.

Ex. 437 at 8, ¶ 14 (emphasis added).

The GWU cite nothing to support their contention that "the state clearly anticipated that spring flows would decline" and that senior water rights would be injured as a result of the Swan Falls Agreement. *GWU Br.* at 26. The contention that spring users could not continue to rely on "artificially-inflated flows," *id.*, is irrelevant here, where the Hearing Officer, Director and Court have consistently held that the material injury in this case is limited to the impacts to spring discharges caused by junior ground water diversions (and not reductions in incidental recharge). R. Vol. 1 at 46-47, ¶¶ 4-9; R. Vol. 3 at 488-89, ¶¶ 4-9; at R. Vol. 16 at 3695; *Order* at 19-21.

Since the Court properly recognized that the Swan Falls Agreement did not prevent administration in this case, reconsideration is unnecessary.

CONCLUSION

The evidence is clear. Water Rights 36-7210 and 36-4013A are materially injured by junior groundwater pumping. Therefore, conjunctive administration is plainly required and remand is only necessary to determine the scope of that administration. The Spring Users' petition should be granted accordingly. Furthermore, the Court should clarify that a pre-curtailment hearing is not required and should provide guidance to IDWR so that the untimely administration of the past will not persist into the future.

The GWU's argument to avoid administration altogether by exalting "full economic development" above all other considerations, including the Constitution's mandate "first in time, first in right", should be rejected. Their complaints that the material injury evidenced in the record is insufficient are without merit. Their claim that material injury should be ignored based on the Swan Falls Agreement is also unsupported. In the end, the GWU's petition for reconsideration is not supported by the law or facts in the record and should be denied.

DATED this 18th day of September, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of September, 2009, I served true and correct copies of the **BLUE LAKES TROUT FARM, INC.'S AND CLEAR SPRINGS FOODS, INC.'S JOINT REPLY IN SUPPORT OF JOINT PETITION FOR REHEARING AND IN OPPOSITION TO GROUND WATER USERS' REHEARING BRIEF** upon the following by the method indicated:

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Courtesy Copy to Judge's Chambers: Snake River Basin Adjudication 253 3rd Ave. N. P.O. Box 2707 Twin Falls, ID 83303-2707	____ U.S. Mail, Postage Prepaid __✓__ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
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