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Attorneys for Respondents

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

A & B IRRIGATION DISTRICT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents, and THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREEMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C.	**Case No. CV 2009-647** **AFFIDAVIT OF CHRIS M. BROMLEY**

NEVILLE, SCOTT C. NEVILLE, AND STAND D. NEVILLE,

Intervenors.

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA

STATE OF IDAHO)
) ss.
County of Ada)

CHRIS M. BROMLEY, being first duly sworn upon oath, deposes and says:

1. I am one of the Deputy Attorneys General of record for the Respondent, Idaho Department of Water Resources. I am over the age of 18 and state the following based upon my own personal knowledge.

2. Attached hereto as Exhibit A is a true and correct copy of *Order on Petitions for Rehearing*, CV-2008-444 (December 4, 2009).

3. Attached hereto as Exhibit B is a true and correct copy of *Order Granting in Part Motion to Enforce Orders; Order Setting Status Conference*, CV-2008-444 (May 11, 2010).

4. Attached hereto as Exhibit C is a true and correct copy of *Order Denying Petition for Peremptory Writ of Mandate*, CV-2010-19823 (October 29, 2010).

5. Attached hereto as Exhibit D is a true and correct copy of *Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*, CV-2008-551 (March 4, 2010).

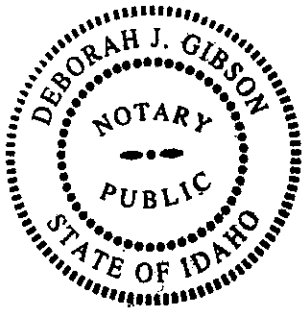
6. Attached hereto as Exhibit E is a true and correct copy of *Amended Order on Petitions for Rehearing; Denying Surface Water Coalition's Motion for Clarification*, CV-2008-551 (September 9, 2010).

DATED this 4th day of February, 2011

CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources

SUBSCRIBED AND SWORN TO BEFORE ME this 4th day of February, 2011.

(s e a l)



NOTARY PUBLIC for Idaho
Residing at: Parma, Idaho
My Commission Expires: 8/10/2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 4th day of February, 2011.

Document Served: **Affidavit of Chris M. Bromley**

Deputy Clerk Minidoka County District Court 715 G. Street. P.O. Box 368 Rupert, ID 83350 santos.garza@co.minidoka.id.us	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
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CHRIS M. BROMLEY
Deputy Attorney General

EXHIBIT A

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.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

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

Cross-Petitioners,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.

Cross-Petitioner,

vs.

RANGEN, INC.

Cross-Petitioner,

Filed pursuant to I.R.C.P. 5(c)(1) on December 4, 2009 at 4:50 P.M.
John Melanson
District Judge, Pro Tem

Case No. 2008-0000444

ORDER ON PETITIONS FOR REHEARING

[1] Director David Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

vs.

GARY SPACKMAN,[1] 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 RIGHTS NOS. 36-04013A, 36-04013B, and 36-07148.

(Clear Springs Delivery Call)

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

(Blue Lakes Delivery Call)

Appearances:

John K. Simpson, Travis L. Thompson, Paul Arrington, of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for Clear Springs Foods, Inc.

Daniel K. Steenson, Charles L. Honsinger, S. Bryce Farris, Jon Gould, of Ringert Law, Chartered, Boise, Idaho, attorneys for Blue Lakes Trout Farm, Inc.

Randall C. Budge, Candice M. McHugh, Thomas J. Budge, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District.

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for Gary Spackman, in his capacity as Interim Director of the Idaho Department of Water Resources.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

J. Justin May, of May Sudweeks & Browning, LLP, Boise, Idaho, attorney for Rangen, Inc.

I.
PROCEDURAL BACKGROUND AND FACTS

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR," or "Department") issued in response to two separate delivery calls. This Court issued its *Order on Petition for Judicial Review* in this matter on June 19, 2009 ("June 19, 2009 *Order*"). On July 10, 2009, Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. (collectively "Spring Users") filed a *Joint Petition for Rehearing*. On July 13, 2009, the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively "Ground Water Users") also filed a *Petition for Rehearing*.

The facts and procedural history of this case are explained in detail in the Court's June 19, 2009 *Order*. The nature of the case, course of proceedings, and relevant facts are therefore incorporated herein by reference.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held September 29, 2009. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, the matter is deemed fully submitted for decision on the next business day, or September 30, 2009.

III.
APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as

to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) not supported by substantial evidence on the record as a whole; or,

(e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code § 67-5279(4); *Barron v. IDWR,* 135 Idaho 414, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[2] *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.* 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in

[2] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934,939 (1993).

Idaho Code Section § 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline*, 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct.App. 1996).

IV.
ISSUES PRESENTED

A. Issues Raised by Spring Users.

The Spring Users raise a number of issues on rehearing. The Court characterizes those issues as follows:

1. Whether the evidence and findings in the record establish that Blue Lakes' water right 36-7210 and Clear Springs' water right 36-4013A are injured by junior ground water diversions?

2. Whether the Court properly remanded the case to the Director to apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury analysis?

3. Whether Idaho law requires a hearing to be held prior to the regulation of junior priority ground water rights in an organized water district after a determination of material injury?

4. Whether this Court, after holding that the Director abused his discretion, should remand this case to the Director with instructions for timely administration?

B. **Issues Raised by Ground Water Users.**

The Ground Water Users also raise a number of issues on rehearing. The Court characterizes those issues as follows:

1. Whether the Court properly treated the Director's analysis of seasonal variation as a material injury issue, rather than a futile call issue?

2. Whether the Director had sufficient evidence to support a finding of material injury?

3. Whether the Director correctly applied the law of full economic development?

4. Whether the Spring Users' delivery call can preclude development consistent with Swan Falls Agreement and State Water Plan?

V.
ANALYSIS AND DISCUSSION

A. Seasonal Variations, Material Injury, Futile Call and Water Rights 36-7210 (Blue Lakes) and 36-4013A (Clear Springs).

The Spring Users assert that evidence and findings in the record conclusively establish that water right nos. 36-7210 and 36-4013A are materially injured by ground water diversions and that this Court should not remand the case to the Director for application of the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury analysis. Specifically, the Spring Users assert that the Director's material injury analysis is flawed because it takes into account seasonal variations. However, as this Court previously explained, if curtailment occurs, seasonal low flows will still be present and curtailment of juniors will not result in eliminating these seasonal lows. It is undisputed that the spring flows

fluctuate between highs and lows on a seasonal basis and between years from factors other than ground water pumping. R. Vol. 16 at 3707-08. Therefore, as this Court explained, if all ground water pumping by juniors was eliminated, those seasonal variations would still exist. Under these circumstances, it follows that the senior spring water users appropriated their rights subject to seasonal fluctuations which existed prior to the subsequent ground water appropriations by juniors. As former Director Dreher testified, "If you curtailed all ground water on the plain there would be instances during the year when some, not necessarily all, but when some of the full quantity of the springs rights would not be met." TR. at 1376. As such, it becomes futile to curtail the juniors in an attempt to increase seasonal lows in order to fill the quantities decreed.

Much has been made by the parties of this Court's statement in the June 19, 2009 *Order* that a material injury analysis under this particular set of circumstances is akin to application of the futile call doctrine. The Court's intent was not to rule that the two principles are the same, only that they can be analogous and share some of the same characteristics. To the extent they share the same factors, which party should bear the burden of proof? As this Court explained:

> 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. **Both the material injury analysis under the CMR and the futile call doctrine require the director to exclude any water deficit attributable to such seasonal variations.** Juniors cannot be curtailed to provide water that a senior would not have received anyway due to seasonal variations; nor can juniors be required to provide replacement water for such amounts.

June 19, 2009 *Order*, p. 21-22. The Court used this analogy in order to explain why the application of a material injury analysis is not a re-adjudication of a decreed water right, provided the appropriate burden of proof is applied. As explained by our Supreme Court, the CMR do not shift the burden of proof to make the senior re-prove or re-adjudicate his water right:

> 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.

American Falls Reservoir District No. 2 v. IDWR, 143 Idaho 862, 877-878, 154 P.3d 433, 448-449 (2007). Thus, when the material injury analysis includes what is also fundamentally a determination requisite to a futile call analysis, the junior must bear the burden of proof on that issue, just as the junior would bear that burden in a futile call analysis. Otherwise, the senior is essentially put in a position of re- proving the historical use of the right. In this case, the lack of available historical flow data was improperly construed by the Director against the senior.

The Court has a difficult time reconciling the argument that the concepts of material injury and futile call do not share overlapping characteristics in some circumstances. The concept of material injury takes into account a broad range of circumstances. *See* CMR 042.01. One of the circumstances considered by the Director in this case was that although the rights of the senior spring users and junior ground pumpers are hydraulically connected, ground water pumping by junior right holders was not responsible for all of the seasonal lows, nor was such pumping materially injuring said rights. As a result, the Director found that the senior is not entitled to replacement water or administration of ground water rights to satisfy senior rights affected by seasonal lows. However, this Court views this determination to be similar to the determination made in a futile call. In one instance, as occurred in this case, the burden of proof was placed on the senior making the call to establish the extent of material injury. But, in the context of a traditional futile call analysis, the burden of poof would be on the junior defending against the call. Yet, the inquiry in both cases is essentially the same and both cases originate in the same way – a call for administration by a senior. It would be inconsistent to allocate the burden of proof differently in the two cases. In this Court's view, requiring the senior to re-prove beneficial use at the time of the appropriation is suspiciously close to revisiting the adjudication process.

Accordingly, the case must be remanded in order to permit the Director to apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination.

B. The Director Did Not Err in his Application of the Full Economic Development or Public Interest Analysis.

The Ground Water Users ask this Court to remand to the Director to reconsider his application of the policy of full economic development. The Ground Water Users argue that the Director incorrectly based his determination of full economic development on the ESPA model's margin of error; therefore, remand is necessary to require the Director to make specific findings concerning the "broad scope of curtailment."

Reviewing the Director's analysis of full economic development within the context of the proper standard of review, this Court held in its June 19, 2009, *Order* that the Director's determination was reasonable and not an abuse of discretion. Indeed, this Court gave great deference to the Director's determination of "reasonableness" under the Conjunctive Management Rules (CMR). Such a determination of "reasonableness" required the Director to balance the State's policy of full economic development, the exercise of senior priority rights, and the public interest. A determination of full economic development, as contemplated by the CMR and Idaho Code § 42-226, is not an analysis of the "highest and best" use of the water or the "best economic return" from the use of the water. Rather, full economic development denotes expansive utilization of the aquifer, and does not necessarily dictate a preference of a more profitable or popular water use over another. Applying the balancing test, the Director made findings that the Spring Users were employing reasonable diversion practices and that the amount of undeveloped water or "dead storage" in the aquifer was reasonable under the circumstances.

The Director made such determinations based on the evidence presented. Such evidence included current and proposed alternative methods of diversion for the Spring Users, the ESPA model results, and argument from the Ground Water Users that the scope of curtailment under the model violated the policy of full economic development. Further, the Director was presented with evidence that alternative methods (aside from the ground water model) existed to perhaps narrow the scope of curtailment. However, the *results* of such methods were not presented at the hearing.

The Ground Water Users argue that some may interpret the Court's June 19, 2009 *Order* to stand for the proposition that the Director's authority to limit administration by priority is dependant upon the existence of "viable reasonable alternatives." Such an interpretation would be misguided. In this case, the Director was provided with results

from the ESPA model, and while alternative methods existed to narrow the scope of curtailment, neither side presented the results of such methodology. Thus, the Director did not abuse his discretion by utilizing the results of the model when applying the policy of full economic development. This does not mean that in future cases, the Director may *only* limit administration by priority *if* alternative methods are presented. More accurately, the Court's holding signifies that the Director has discretion to consider and weigh the evidence. Because no alternative methods to the ESPA model (perhaps in the form of curtailment based on proximity to the spring complex) were presented to the Director, he could not consider such alternatives. Therefore, the Director did not abuse his discretion by relying upon the model when applying the policy of full economic development.

While the Ground Water Users urge this Court to remand to the Director for a more "independent" analysis of full economic development, the Director previously made that determination based on the evidence and argument presented at the hearing. The Director balanced the reasonable use of the senior Spring Users against the State's policy of full economic development, within his discretion. Again, while there may be dispute over the Director's ultimate conclusion, the Director arrived at his decision based on the evidence presented. No viable alternative methods to the ESPA were presented at the hearing. The Director's determination was reasonable based on the information and argument presented and as such, this Court will not substitute its judgment for that of the Director. Accordingly, based upon the applicable standard of review, the Court cannot conclude that the Director abused his discretion or acted arbitrarily or capriciously in his determination.

C. The Swan Falls Agreement and the State Water Plan Are Not Conclusive of Full Economic Development in Responding to Individual Delivery Calls.

The Ground Water Users request that this Court reconsider its determination that the Swan Falls Agreement and the State Water Plan are not conclusive of full economic development in individual delivery calls. As stated in the Court's June 19, 2009 *Order*, neither the Swan Falls Agreement nor the State Water Plan establish minimum flows for specific sub-reaches or spring complexes. The Swan Falls Agreement and the State

Water Plan establish minimum flows to be met at Murphy Gauge, which is located on the main stem of the Snake River well below Thousand Springs. As discussed in this Court's decision, the Swan Falls Agreement contemplated management of the aquifer on a large scale or macro level. This is illustrated by the possibility that reaches farther upstream (such as those in this case) may be depleted; even while the minimum flows at Murphy are met. The Court has reviewed its decision on this issue and declines to amend its previous conclusion.

D. Because the Director's Orders Provide for a Hearing, the Director Erred by Not Providing a Hearing After Making a Determination of Material Injury.

The Spring Users argue that the Director is not required to hold a hearing before issuing an order of curtailment of junior ground water rights in an organized water district after a determination of material injury is made. In support of this argument, the Spring Users rely on an Idaho Supreme Court case, *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).[3] In its June 19, 2009 *Order*, this Court held that because the Director's orders in response to the delivery calls provided for a hearing should one be requested, the Director erred by not holding a hearing when the Ground Water Users requested one. The Court also held that such a hearing would be consistent with the requirements of due process. Further, as the Court mentioned, holding such a hearing is practical, in that it can be held in conjunction with the hearing conducted on the mitigation plan, thereby eliminating delay and further injury to senior users.

The Spring Users assert and this Court agrees that I.C. § 42-607 does not expressly require a hearing prior to curtailment of junior water users in an organized water district. The CMR also set forth different procedures when a call is made against water users in an organized water district (CMR 040); against water users in a ground water management area (CMR 041); and against water users not in an organized water district, ground water management area or a water district where the regulation of ground water has not been included as a function of the water district (CMR 030). For responses to delivery calls not in an organized water district, ground water management area or a

[3] The facts in *Nettleton* are distinguishable from the facts in this case. *Nettleton* addressed unadjudicated beneficial use water rights in an organized water district, and was issued prior to the adoption of the Conjunctive Management Rules. It is ambiguous as to its broader application.

water district where the regulation of ground water has not been included as a function of the water district, CMR 030 requires the filing of a petition for a contested case and service upon all known respondents. CMR 030.02. For responses to delivery calls in a ground water management area CMR 041 requires the filing of a petition and a "fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area." CMR 041.01. b. However, in organized water districts no such similar procedures are required. Rather, CMR 040 provides for regulation through the water master upon a finding that material injury is occurring. CMR 040.01.a. and b.

However, as explained in the June 19, 2009 *Order*, the CMR require a hearing after junior water users submit a mitigation plan and prior to the approval of such a plan. However, neither I.C. § 42-607 nor the CMR preclude the Director from providing for a hearing after the material injury determination and prior to curtailment. In this case, the Director issued two orders in response to the delivery calls initiated by Clear Springs and Blue Lakes. Both sides took issue with at least a portion of the Director's material injury determination. Each order included language that explicitly provided for a hearing, which was *consistent* with the requirements of due process because it allowed each side the opportunity to be heard. To the extent that the Court's the June 19, 2009 *Order* can be read to hold that constitutional due process *requires* that the Director hold a hearing after the material injury determination is made, that portion of the opinion is withdrawn.

Therefore, this Court affirms its earlier decision that the Director erred by failing to hold a hearing as provided in his orders.

VI.
CONCLUSION

The Court has reviewed its June 19, 2009 *Order*, and concludes as follows:

1. The case is **remanded** so that the Director may apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination as explained herein. Although the CMR do not specify timing for

the filing of mitigation plans, in order to avoid prejudice to either side, it is imperative that any mitigation plan submitted in response to a material injury determination be approved (after a hearing, in accordance with the CMR and this Court's decisions) prior to allowing juniors subject to administration to commence water use.

2. While the Court has ruled that the Director has abused his discretion and exceeded his authority by failing to hold a timely hearing on proposed mitigation plans and ordering replacement water without holding a timely hearing and failing to order curtailment after finding the mitigation plans inadequate, there is no practical remedy to cure those errors at this point in these proceedings. The issues presented have been heard by two different Directors, a Hearing Officer, and finally, this Court.

3. In all other respects, the decision of the Director is **affirmed.**

IT IS SO ORDERED.

Dated: Dec. 4, 2009

John M. Melanson
District Judge, *Pro Tem*

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 4th day of December, the Court filed this foregoing instrument pursuant to I.R.C.P. 5(e)(1) and on the 7th day of December, 2009, pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Order on Petitions for Rehearing to the parties listed below via US Mail postage prepaid:

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CLERK OF THE DISTRICT COURT

BY: _____
Deputy Clerk

EXHIBIT B

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. BLUE LAKES TROUT FARM, INC., Cross-Petitioner, vs. IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT and MAGIC VALLEY GROUND WATER DISTRICT, Cross-Petitioner, vs. IDAHO DAIRYMEN'S ASSOCIATION, INC. Cross-Petitioner, vs. RANGEN, INC.	Case No. 2008-0000444 ORDER GRANTING IN PART MOTION TO ENFORCE ORDERS; ORDER SETTING STATUS CONFERENCE

[1] Director David Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director. I.R.C.P. 25 (d) and (e).

Cross-Petitioner,

vs.

GARY SPACKMAN,[1] in his capacity as Director of the Idaho Department of Water Resources, and THE DEPARTMENT OF WATER RESOURCES,

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-0413A, 36-04013B, and 36-07148.

(Clear Springs Delivery Call)

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

(Blue Lakes Delivery Call)

I.
PROCEDURAL BACKGROUND AND FACTS

On June 19, 2009, this Court issued its *Order on Petition for Judicial Review* ("June 19, 2009 *Order*") in the above-captioned matter. In the June 19, 2009 *Order*, this Court concluded:

> This case is **remanded** so that the Director may apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury analysis.

The remand applied to Blue Lakes' water right no. 36-7210 and Clear Springs' water right no. 36-4013A. The parties to this matter filed petitions for rehearing and this Court

issued its ***Order on Petitions for Rehearing*** on December 4, 2009 ("December 4, 2009 *Order*"). This Court again ordered that the case be remanded to the Director to apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury analysis of water rights 36-7210 and 36-4013A.

On December 22, 2009, during proceedings on mitigation plans filed by ground water users in this case, the Director issued an *Order Granting Motion to Limit Scope of Hearing.* In this *Order*, the Director precluded Blue Lakes from presenting evidence during the mitigation plan hearing relating to the Director's previous determination of material injury. The Director summarily denied Blue Lakes' *Petition for Reconsideration.*

On April 12, 2010, Blue Lakes filed a *Motion to Enforce Orders* in the above-captioned matter, seeking enforcement of this Court's December 4, 2009 ***Order*** and June 19, 2009 ***Order***. In its *Motion*, Blue Lakes asserted that the Director has not complied with this Court's previous ***Orders*** on remand. Further, Blue Lakes argued that the Director has a duty to utilize the best available science and consider the information presented by Blue Lakes during the mitigation plan hearing. On April 22, 2010, IDWR filed a *Response to Blue Lakes Trout Farms Inc. 's Motion to Enforce Orders.* On April 26, 2010, the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District and Magic Valley Ground Water District also filed a *Response to Blue Lake Trout Farm, Inc. 's Motion to Enforce Orders.* On May 6, 2009, Clear Springs filed a *Reply in Support of Blue Lakes Trout Farm, Inc. 's Motion to Enforce Orders.*

Upon remand, this Court did not contemplate that the Director would hold a hearing or take new evidence when applying the proper burdens of proof and evidentiary standards. Rather, the scope of the Court's ***Orders*** on remand is narrow -- the Director must consider the evidence presented below and apply the correct burdens and standards when considering seasonable variations as part of a material injury analysis. At the hearing on the *Motion to Enforce Orders*, IDWR represented that the Director is in the process of moving forward on this issue. As such, the Director shall forthwith comply with this Court's previous ***Orders*** on remand, unless a party requests and is granted a stay.

However, the Director is not obligated to take additional evidence in order to apply the correct burdens of proof and evidentiary standards on remand. The evidence Blue Lakes seeks to introduce at the mitigation plan hearing is outside the scope of this Court's previous ***Orders*** on remand. This Court's ***Orders*** are currently on appeal to the Idaho Supreme Court and under Idaho Appellate Rule 13(b) (13), this Court has jurisdiction to "take any action or enter any order required for the enforcement of any judgment, order or decree." While this Court has jurisdiction to enforce its ***Orders*** on remand, this Court does not have jurisdiction to order action be taken outside the scope of the prior ***Orders***. The prior ***Orders*** affirmed the Director's use of the trimline and the spring allocation determinations. Accordingly, neither is within the scope of the prior ***Orders*** on remand. The determination of what evidence the Director may or may not consider in conjunction with a mitigation plan hearing is also beyond the scope of this Court's prior ***Orders***.

II.
ORDER

Therefore, based on the foregoing, the following are hereby ORDERED:

1. The Director shall forthwith comply with this Court's earlier ***Orders*** on remand and apply the proper burdens of proof and evidentiary standards when considering seasonable variations as part of a material injury analysis for water right nos. 36-7210 and 36-4013A.
2. A status conference is scheduled for the above-captioned matter at **1:30 p.m. (Mountain Time), Monday, June 14, 2010, at the Idaho Water Center, 322 East Front Street, 6th Floor Conference Rooms C & D, and at the Snake River Basin Adjudication Courthouse, 235 – 3rd Avenue North, Twin Falls, Idaho. The Court will preside from the Idaho Water Center; however, the two locations will be linked via video teleconferencing allowing full participation from either location. Parties may also participate by telephone by dialing the number 918-583-3445 and when prompted entering the code 406128.**

IT IS SO ORDERED.

Dated May 11, 2010

JOHN M. MELANSON
District Judge, *Pro Tem.*

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 11th day of May 2010, pursuant to Rule 77(d) I.R.C.P., I have filed this day and caused to be delivered a true and correct copy of the within and foregoing instrument: Order Granting in Part Motion to Enforce Orders to the parties listed below via US Mail postage prepaid:

Garrick Baxter
Chris Bromley
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

Randy Budge
Candace McHugh
RACINE OLSON
P.O. Box 1391
Pocatello, ID 83204-1391

Michael Creamer
GIVENS PURSLEY
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Boise, ID 83701-2720

John Simpson
Travis Thompson
BARKER ROSHOLT & SIMPSON
P.O. Box 485
Twin Falls, ID 83303-0485

Daniel Steenson
RINGERT CLARK
P.O. Box 2773
Boise, ID 83701-2773

Josephine Beeman
BEEMAN & ASSOCIATES
409 W. Jefferson
Boise, ID 83702

Justin May
MAY SUDWEEKS & BROWNING
1419 W. Washington
Boise, ID 83702

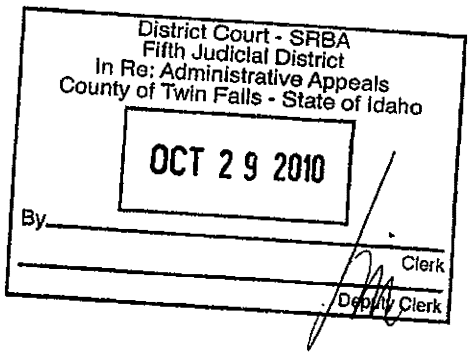
CLERK OF THE DISTRICT COURT

BY _____
Deputy Clerk

EXHIBIT C

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BLUE LAKES TROUT FARM, INC., **Petitioner / Plaintiff,** **vs.** **GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES,** **Respondents / Defendants,** **and** **CLEAR SPRINGS FOODS, INC., and THE IDAHO GROUND WATER APPROPRIATORS, INC.,** **Intervenors,**	**CASE NO.: CV WA 2010-19823** **ORDER DENYING PETITION FOR PEREMPTORY WRIT OF MANDATE**



I.
FACTS AND PROCEDURAL BACKGROUND

The facts and procedural background set forth in this Court's *Order Denying Petition for Alternative Writ of Mandate* issued in the above-captioned matter on October 8, 2010, are expressly incorporated herein by reference. In addition, on October 12, 2010, Petitioner Blue Lakes Trout Farms, Inc. ("Blue Lakes") filed an *Application for Peremptory Writ of Mandate*, requesting that this Court compel the Respondents "to consider updated, improved and/or new data, analysis and methods for determining the

impact of junior ground water diversions on Plaintiff's water rights, and to allow Plaintiff to present such evidence in any proceeding before IDWR related to Plaintiff's water delivery call." Clear Springs Foods, Inc. ("Clear Springs") subsequently intervened in support of the *Application* and the Idaho Ground Water Appropriators, Inc. ("IGWA") intervened in opposition to the *Application.*

On October 28, 2010, Respondents filed their *Answer* to Petitioner's *Verified Complaint, Declaratory Judgment Action and Petition for Writ of Mandate* ("*Complaint*"), along with a *Memorandum in Opposition to Application for Peremptory Writ of Mandate*. A hearing on Petitioner's *Application* was held before this Court on October 28, 2010. In its *Application* Petitioner requested immediate and expedited consideration of this matter by the Court as the parties have a November 5, 2010 deadline in the underlying proceeding which may be affected by the decision of this Court. As such, at oral argument this Court instructed the parties that a written ruling would be released in short order.

II.
DISCUSSION

A. Standard of Review.

A decision to issue a writ of mandate is committed to the discretion of the court. I.R.C.P. 74(b). Whether a party is seeking an alternative writ or a peremptory writ the standard is the same: "[T]he party seeking a writ of mandate must establish a 'clear legal right' to the relief sought. Additionally, the writ of mandate will not issue where the petitioner has 'a plain, speedy and adequate remedy in the ordinary course of law." *Ackerman v. Bonneville County*, 140 Idaho 307, 311, 92 P.3d 557, 561 (Ct. App. 2004) (citing *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704, 706 (1997)).

B. Peremptory Writ of Mandate.

Blue Lakes assigns error to the Director's decision, contained in his *Order Limiting Scope of Hearing*, that Blue Lakes is precluded from addressing issues in the underlying proceeding related to the 10% model uncertainty, the trim-line, or other issues related to the use or application of the ground water model. Blue Lakes argues that the

Director's ruling in this regard wrongfully prohibits it from presenting evidence that provides a better technical basis for determining the extent of injury and mitigation obligations than the "trimline" and "spring allocation" determinations of the Director.[1] In support of its argument, Blue Lakes asserts that certain of the district court's previous orders in Gooding County Case No. 2008-444 authorize and/or require the Director to entertain the presentation of such evidence. For the following reasons, this Court denies Blue Lakes' *Application.*

i. Blue Lakes has a plain, speedy and adequate remedy at law.

The issuance of a peremptory writ of mandate in this matter would be improper under the above-mentioned standard of review because Blue Lakes has a plain, speedy and adequate remedy at law. In *State v. District Court,* 143 Idaho 695, 698, 152 P.3d 566, 569 (2007), the Idaho Supreme Court directed that "A right of appeal is regarded as a plain, speedy and adequate remedy at law in the absence of a showing of exceptional circumstances or of the inadequacy of an appeal to protect existing rights."

In this case, the ability of Blue Lakes to seek judicial review of decisions made by the Director in the underlying proceeding is provided for by Idaho's Administrative Procedure Act ("IDAPA"). I.C. §§ 67-5201, *et seq.*; *See also,* I.C. § 42-1701A. The Court has made clear that it never was the intention or meaning either of the common law or the statute that issuance of writs should take the place of appeals. *Smith v. Young,* 71 Idaho 31, 34, 225 P.2d 446, 468 (1950). Supplanting the judicial review process provided for in IDAPA by issuing a peremptory writ of mandate in this matter to overrule an interlocutory determination by the Director would therefore be improper.

As such, the Court finds Blue Lakes' argument that it has no remedy at law unpersuasive. Once a final decision of the Director is issued in the underlying proceeding, Blue Lakes will be entitled to take advantage of those rights afforded to aggrieved parties under IDAPA, including the right to seek judicial review. Although Blue Lakes presumably contends that its rights under IDAPA are not adequate because it must wait for a final determination of the Director, this Court is precluded from testing

[1] Specifically, Blue Lakes seeks to present evidence by way of an expert report prepared by its expert John S. Koreny that the Eastern Snake Plain Aquifer Model ("ESPAM") has been calibrated to Blue Lakes' individual spring flow as opposed to river reaches.

the adequacy of a remedy on inconvenience grounds alone. *See e.g., Rufener v. Shaud*, 98 Idaho 823, 825, 573 P.2d 142, 144 (holding, "the adequacy of a remedy is not to be tested by the convenience or inconvenience of the parties to a particular case. If such a rule were to obtain, the law of appeals might as well be abrogated at once").

Furthermore, the Idaho Supreme Court has instructed that a writ of mandate "will not lie to control discretionary acts of courts acting within their jurisdiction." *State v. District Court,* 143 Idaho 695, 698, 152 P.3d 566, 569 (2007). The determination by the Director to limit the scope of the hearing pending before him on remand after taking into account the limited issue remanded to him in Gooding County Case No. 2008-444, and the issues presently pending before the Idaho Supreme Court on appeal, was discretionary in nature as opposed to ministerial. The remedy sought in this matter does not result from the Director refusing to perform his statutory duty of administering water rights. Rather, the dispute results from a disagreement over how the Director is performing his duty. In *Musser v.* Higginson, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994), the Idaho Supreme Court held "the director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water." As such, utilizing a writ of mandate to overrule the Director's determination in this matter would be an inappropriate attempt to control a discretionary action of the Director.

ii. This Court lacks jurisdiction to issue the requested writ of mandate.

The Court finds that the subject matter of the peremptory writ of mandate, namely evidence relating to the use of the trimline, the margin of error in the ground water model and other issues related to the application of the ground water model are intertwined with, or are the same issues raised in Gooding County Case 2008-444, which is currently on appeal to the Idaho Supreme Court. This Court is unable to parse the issues as narrowly as argued by Blue Lakes. As to the remanded portion of Gooding County Case 2008-444, the case was remanded by Judge Melanson for a limited purpose only – to apply the appropriate burdens of proof and evidentiary standards when considering seasonal variation as part of a material injury determination.

Following remand in Gooding County Case 2008-444, Blue Lakes filed a *Motion to Enforce Order* in that matter before then district court Judge John Melanson. Blue Lakes' *Motion* sought, among other things, to have the district court order the Director to permit Blue Lakes to present the same evidence which it now seeks this Court to order the Director to consider. Judge Melanson concluded that he did not have jurisdiction to modify his order under Idaho Appellate Rule 13:

> Upon remand, this Court did not contemplate that the Director would hold a hearing or take new evidence when applying the proper burdens of proof and evidentiary standards. Rather, the scope of the Court's *Orders* on remand is narrow – the Director must consider the evidence presented below and apply the correct burdens and standards when considering seasonable variations as part of a material injury analysis.
>
> ...
>
> However, the Director is not obligated to take additional evidence in order to apply the correct burdens of proof and evidentiary standards on remand. The evidence Blue Lakes seeks to introduce at the mitigation plan hearing is outside the scope of this Court's previous *Orders* on remand. This Court's *Orders* are currently on appeal to the Idaho Supreme Court and under Idaho Appellate Rule 13(b)(13), this Court has jurisdiction to "take any action or enter any order required for the enforcement of any judgment, order or decree." While this Court has jurisdiction to enforce its *Orders* on remand, this Court does not have jurisdiction to order action be taken outside the scope of the prior *Orders*. The prior *Orders* affirmed the Director's use of the trimline and the spring allocation determinations. Accordingly, neither is within the scope of the prior *Orders* on remand. The Determination of what evidence the director may or may not consider in conjunction with a mitigation plan hearing is also beyond the scope of this Court's prior *Orders*.

Gooding County Case No. 2008-444, *Order Granting in Part Motion to Enforce Orders*, pp.3–4 (May 12, 2010).

The filing of a separate action seeking the exact same relief which Judge Melanson concluded that he did not have jurisdiction over does not resolve the jurisdictional problems. In essence, Blue Lakes is asking this Court to modify Judge Melanson's Orders. Judge Melanson's ruling is not only the law of the case, but this Court concurs with the ruling. According, this Court concludes consistent with Judge Melanson that Idaho Appellate Rule 13 does not provide an exception to this Court which would allow it to issue the writ of mandate ordering the Department to address issues which are the same, or intertwined with, those presently pending on appeal.

III.

Therefore, IT IS HEREBY ORDERED that Blue Lakes' Application for Peremptory Writ of Mandate **is denied.**

Dated October 29, 2010.

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING PETITION FOR PEREMPTORY WRIT OF MANDATE was mailed on October 29, 2010, with sufficient first-class postage to the following:

GARY SPACKMAN
Represented by:
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PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

GARY SPACKMAN
Represented by:
BROMLEY, CHRIS M
DEPUTY ATTORNEY GENERAL
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IDAHO GROUND WATER
Represented by:
BUDGE, THOMAS J
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IDAHO GROUND WATER
Represented by:
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BLUE LAKES TROUT FARM INC
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BLUE LAKES TROUT FARM INC
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TWIN FALLS, ID 83303-0485
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DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

 Deputy Clerk

EXHIBIT D

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

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, UNITED STATES OF AMERICA BUREAU OF RECLAMATION, Petitioners, vs. IDAHO DAIRYMEN'S ASSOCIATION, INC., Cross-Petitioner, vs. GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources,[1] and THE DEPARTMENT OF WATER RESOURCES, Respondents. IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE	Case No. 2008-000551 ORDER STAYING DECISION ON PETITION FOR REHEARING PENDING ISSUANCE OF REVISED FINAL ORDER

[1] Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director, I.R.C.P. 25 (d) and (e).

BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.

I.

PROCEDURAL BACKGROUND AND FACTS

On July 24, 2009, this Court issued its ***Order on Petition for Judicial Review*** in the above-captioned matter. In its ***Order***, this Court held that the Director of the Idaho Department of Water Resources ("Director" or "IDWR") abused discretion by issuing two *Final Orders* in response to Hearing Officer Schroeder's *Recommended Order* of April 29, 2008. Specifically, this Court held that the Director failed to apply new methodologies for determining material injury to reasonable in-season demand and reasonable carryover. On August 13, 2009, the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District timely filed a *Petition for Rehearing* on the Court's July 24, 2009 ***Order***. On August 14, 2009, the City of Pocatello also timely filed a *Petition for Rehearing*.

In its *Response Brief on Rehearing*, and at oral argument on the petitions for rehearing on February 23, 2010, IDWR stated that there is sufficient information for the Director to issue an order determining material injury to reasonable in-season demand and reasonable carryover, without conducting a hearing or requiring additional information from the parties. However, IDWR requested thirty to sixty days to develop a new methodology, apply that methodology to the facts on the record, and issue an order in accordance with this Court's previous holding. IDWR proposed that this Court hold in abeyance its decision on rehearing, until the Director issues the new order and the time for filing a motion for reconsideration and a petition for judicial review of the order has expired.

It is this Court's understanding that all parties were in agreement as to the Court holding in abeyance a final order on **all of the issues** presented on rehearing. As such, at

this time, the Court will not issue a final decision on rehearing. However, in the event this Court misunderstood the respective positions of the parties, the parties have seven (7) days to file a notice with the Court, indicating any objection to holding in abeyance a final order on all of the issues presented on rehearing.

II.

ORDER

Therefore, based on the foregoing, the following are hereby ORDERED:

1. The Director of IDWR shall issue a *Final Order* determining material injury to reasonable in-season demand and reasonable carryover by **March 31, 2010.**
2. Pursuant to I.A.R. 13(b)(14), this Court shall hold in abeyance any final decision on rehearing until such an order is issued and the time periods for filing a motion for reconsideration and petition for judicial review of the new order have expired.
3. Parties have seven (7) days from the entry of this ***Order*** to submit a notice to this Court, indicating any objection to the Court holding in abeyance a final order on rehearing.

IT IS SO ORDERED.

Dated March 4, 2010

JOHN M. MELANSON
District Judge, *Pro Tem.*

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 4 of March 2010, pursuant to Rule 5(e)(1) the District Court filed in chambers the foregoing instrument and further pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Order Staying Decision on Petition for Rehearing...to the parties listed below via the U.S. Postal Service, postage prepaid:

John Simpson
P.O. Box 2139
Boise, ID 83701-2139

John Rosholt
Travis Thompson
BARKER ROSHOLT & SIMPSON
P.O. Box 485
Twin Falls, ID 83303-0485

C. Tom Arkoosh
CAPITOL LAW GROUP
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Kent Fletcher
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Rupert, ID 83350-0396

David Gehlert
U.S. Dept. of Natural Resources
1961 South Street, 8th Floor
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Chris Bromley
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Boise, ID 83701-2720

Randy Budge
Candace McHugh
RACINE OLSON
P.O. Box 1391
Pocatello, ID 83204-1391

Dated: March 4, 2010

Cynthia R. Eagle-Ervin, Deputy Clerk

Notice of Orders
Certificate of Mailing
IRCP 77(d)

EXHIBIT E

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

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, UNITED STATES OF AMERICA BUREAU OF RECLAMATION, Petitioners, vs. IDAHO DAIRYMEN'S ASSOCIATION, INC., Cross-Petitioner, vs. GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources,[1] and THE DEPARTMENT OF WATER RESOURCES, Respondents. IN THE MATTER OF DISTRIBUTION	Case No. 2008-000551 AMENDED ORDER ON PETITIONS FOR REHEARING; ORDER DENYING SURFACE WATER COALITION'S MOTION FOR CLARIFICATION

[1] Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director, I.R.C.P. 25 (d) and (e).

OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.	)

Appearances:

C. Thomas Arkoosh, of Capitol Law Group, PLLC, Gooding, Idaho, attorney for American Falls Reservoir District #2.

W. Kent Fletcher, of Fletcher Law Office, Burley, Idaho, attorney for Minidoka Irrigation District.

John A. Rosholt, John K. Simpson, and Travis L. Thompson, of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources and Gary Spackman.

John C. Cruden, Acting Assistant Attorney General, and David Gehlert, of the United States Department of Justice, Denver, Colorado, attorneys for the United States Bureau of Reclamation.

Randall C. Budge, Candice M. McHugh, Thomas J. Budge, and Scott J. Smith, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators, Inc.

A. Dean Tranmer, of the City of Pocatello Attorney's Office, Pocatello, Idaho, attorney for the City of Pocatello.

Sarah A. Klahn, of White and Jankowski, LLP, Denver, Colorado, attorney for the City of Pocatello.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

I.
PROCEDURAL BACKGROUND AND FACTS

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR," or "Department") issued in response to a delivery call filed by the Petitioner Surface Water Coalition ("SWC") on January 14, 2005. This Court issued its ***Order on Petition for Judicial Review*** in this matter on July 24, 2009 ("July 24, 2009 ***Order***"). In the ***Order***, this Court held, among other things, that the Director failed to apply new methodologies for determining material injury to reasonable in-season demand and reasonable carryover, that the Director exceeded authority by failing to follow procedural steps for mitigation plans as set forth in the Rules for Conjunctive Management ("CMR"), and that the Director exceeded authority by determining that full headgate delivery for Twin Falls Canal Company should be calculated at 5/8 of an inch per acre. In the ***Order***, this Court remanded this matter to the Director so that he may determine the methodology for reasonable in-season demand and carryover.

On August 13, 2009, the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively "Ground Water Users") timely filed a *Petition for Rehearing*. On August 14, 2009, the City of Pocatello also timely filed a *Petition for Rehearing*.

On August 23, 2010, this Court issued its initial ***Order on Petitions for Rehearing*** ("***Rehearing Order***"). On August 26, 2010, IDWR filed a *Motion to Clarify or Motion For Reconsideration of Order on Petitions for Rehearing* ("*Motion to Clarify or Reconsider*"). On September 2, 2010, the SWC filed a *Motion for Clarification*.

The facts and procedural history of this case are explained in detail in the Court's July 24, 2009 ***Order***. The nature of the case, course of proceedings, and relevant facts are therefore incorporated herein by reference.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held February 22, 2010. The parties did not request the opportunity to submit additional briefing and the

Court does not require any additional briefing in this matter. Therefore, the matter was initially deemed fully submitted for decision on the next business day, or February 23, 2010.

However, pursuant to I.A.R. 13(b)(14), this Court issued an ***Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*** in this matter on March 4, 2010. In the ***Order***, this Court ordered a stay of the decision on rehearing until the Director issued a final order determining the methodology for determining material injury to reasonable in-season demand and reasonable carryover, and the time period for filing motions for reconsideration and petitions for judicial review of the order on remand had expired.

On June 23, 2010, the Director issued a *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Methodology Order*").[2] On June 24, 2010, the Director issued a *Final Order Regarding April 2010 Forecast Supply Methodology Steps 3 & 4 and Order on Reconsideration* ("*As-Applied Order*"). Parties to this matter have filed petitions for judicial review of these two orders. As such, this Court lifted the stay of the issuance of this ***Order on Petitions for Rehearing*** on August 6, 2010. Therefore, the matter is deemed fully submitted for decision on the next business day, or August 9, 2010.

III.

APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code §42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code §67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code §67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) not supported by substantial evidence on the record as a whole; or,

(e) arbitrary, capricious, or an abuse of discretion.

Idaho Code §67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code §67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code §67-5279(4); *Barron v. IDWR,* 135 Idaho 414, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[3] *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.* 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section §67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2P.3d 738 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline,* 134 Idaho 449, 4 P.3d 561 (2000).

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[3] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934,939 (1993).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct.App. 1996).

IV.
ISSUES PRESENTED

A. Issues Raised by the Ground Water Users

The Ground Water Users raise a number of issues on rehearing. The Court characterizes those issues as follows:

1. Whether the Court should clarify that the Director must decide the issue on the methodology for determining material injury and reasonable carryover based exclusively upon facts and evidence contained in the current record without holding any additional hearings on this issue?

2. Whether the Court should clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full recommended amount?

3. Whether due process allows for junior groundwater users to be physically curtailed while the hearing process is proceeding under a proposed mitigation plan and before a final order has been entered?

B. Issues Raised by the City of Pocatello

1. Whether the Court should clarify that any remaining hearings on mitigation plans presented by the Ground Water Users should not revisit the determination of injury made by Hearing Officer Schroeder in 2008?

V.
ANALYSIS AND DECISION

A. Hearing Prior to the Director's Methodology Decision

In its July 24, 2009 ***Order***, this Court held that the Director abused discretion by issuing two *Final Orders* in response to the Hearing Officer's *Recommended Order*. The Hearing Officer found that adjustments should be made to the methodology for determining material injury to reasonable in-season demand and reasonable carryover. However, the Director did not make such adjustments in the *Final Order* of September 5, 2008. Rather, the Director issued a separate *Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* on June 30, 2009, well after the proceedings on this petition for judicial review had commenced. Therefore, this Court remanded this matter to the Director to issue a final methodology order.

In their petition for rehearing, the Ground Water Users urged this Court to clarify whether the Director may hold additional hearings prior to the issuance of a final methodology order on remand. This Court did not contemplate that the Director would take additional evidence prior to issuing the *Methodology Order* on remand. Further, the Director issued the *Methodology Order* without conducting a hearing. The Director properly relied upon the facts contained in the record in order to formulate the methodology for determining reasonable in-season demand and reasonable carryover. As such, this issue has been resolved by the proceedings on remand.

B. Director's Authority to Determine Beneficial Use of Recommended Right in the Context of a Delivery Call Proceeding

The Ground Water Users urge this Court to clarify its holding in the July 24, 2009 ***Order*** that the Director abused his authority in determining that full headgate delivery for Twin Falls Canal Company ("TFCC") should be calculated at 5/8 of an inch, instead of 3/4 of an inch per acre. As a result, this Court will take this opportunity to clarify its conclusion that the Director abused his authority in this regard.

An in-depth analysis addressing the Director's ability to make the determination, in the context of a delivery call proceeding, that the quantity decreed in the senior user's water right exceeds that the quantity being put to beneficial use by the senior user at the time of the delivery was recently set forth in a ***Memorandum Decision and Order on Petition For Judicial Review*** issued by Judge Wildman in Minidoka County Case No. CV 2009-000647 on May 4, 2010 ("***Memorandum Decision***"). In that case, the Court held that, in order to give the proper presumptive weight to a decree, any finding by the Director in the context of a delivery call proceeding that the quantity decreed exceeds the amount being put to beneficial use by the senior user must be supported by clear and convincing evidence. Rather than repeat the analysis of this issue, this *Order* expressly incorporates herein by reference the ***Memorandum's Decision's*** analysis, located on pages 24-38.

In this case, this Court held in its July 24, 2009 ***Order*** that the Director exceeded his authority in determining that full headgate delivery for TFCC should be calculated at 5/8 of an inch instead of 3/4 of an inch per acre. Of significance to this Court's decision was that TFCC's water right was recommended by the Director in the SRBA with a quantity element based on 3/4 inch per acre. The Ground Water Users objected to the recommendation, asserting that the quantity should be based on 5/8 inch per acre. While the objection was still pending, the SRBA District Court ordered interim administration for the basin, which included TFCC's water right.[4] However, in the delivery call proceeding, the Director concluded that TFCC had failed to establish that it was entitled to the 3/4 inch per acre headgate delivery (the quantity recommended by the Director in the SRBA) because conflicting evidence demonstrated that TFCC could only put 5/8 of an inch per acre to beneficial use. The Director exceeded his authority in this respect because he did not apply the proper evidentiary standard or burdens of proof when

[4] Idaho Code Section 42-1417 provides for interim administration based on a director's recommendation. The concern expressed in the prior decision stems from the Court ordering interim administration based on a Director's Report, as opposed to a partial decree, where there are pending objections to the Director's recommendation. As a result, the parties litigate substantive elements (such as quantity) in the administration proceedings as opposed to in the SRBA. On rehearing, the Court acknowledges that, for purposes of interim administration, the recommendation should be treated the same as a partial decree. Accordingly, once interim administration is ordered, the same principles that apply to responding to a delivery call made by a holder of a decreed right apply equally to a delivery call made by the holder of a recommended right. Therefore, a discussion of those principles is necessary.

determining that TFCC was entitled to an amount of water less than what was recommended in the SRBA.

In *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 873, 154 P.3d 433, 444 (2007) ("*AFRD #2*"), the Idaho Supreme Court held that the CMR incorporate the proper presumptions, burdens of proof, evidentiary standards, and time parameters of the prior appropriation doctrine as established by Idaho law. The Court directed that the CMR could not "be read as containing a burden-shifting provision to make the petitioner reprove or re-adjudicate the right which he already has." *Id.* at 877–78, 154 P.3d at 448–49. It further directed that "the presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *Id.* at 878, 154 P.3d at 449.

The Ground Water Users are correct that a decreed or recommended amount is not conclusive evidence of the quantity of water that the senior is putting to beneficial use at the time of the delivery call. *See e.g. State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997) (providing that, in the context of the SRBA, the Director was not obligated to accept a prior decree as conclusive proof of a water right because water rights can be lost or reduced, based on evidence that the water right has been forfeited). This Court recognizes that there may be instances where a senior is not putting the full recommended or decreed quantity to beneficial use at the time of the delivery call. In such instances, the Director has the ability under the CMR (particularly CMR 42), to examine a number of factors to determine whether the delivery of the full recommended or decreed quantity of water to the senior user would result in the failure of the senior to put the full recommended or decreed quantity to beneficial use. Yet, in each of these instances, pursuant to the well-established burdens of proof and evidentiary standards, the Director shall not require the senior to re-prove his right. *AFRD #2*, 143 Idaho at 877–78, 154 P.3d at 448–49. As explained by Judge Wildman in the ***Memorandum Decision***, if the Director determines in the context of a delivery call proceeding that a decreed (or recommended) amount exceeds the amount being put to beneficial use by the senior at the time of the delivery call, that decision must be made

based upon a standard of clear and convincing evidence.[5] *See Memorandum Decision*, p. 35; *Cantlin v. Carter* 88 Idaho 179, 397 P.2d 761 (1964); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Moe v. Harger*, 10 Idaho 302, 7 P. 645 (1904).

In this case, the Director, in the context of the delivery call proceeding, concluded, based on conflicting evidence, that TFCC was entitled to less than the recommended quantity. No reference was made, however, to the evidentiary standard applied. Therefore, the Director erred by failing to apply the correct presumptions and burden of proof in making the determination under the CMR that TFCC was entitled to less than the recommended quantity. However, in its August 26, 2010 *Motion to Clarify*, IDWR represented that, upon remand, the Director applied the 3/4 inch per acre for TFCC. *See also Methodology Order* at 11. As such, this issue has been resolved by the proceedings on remand.

C. Due Process and Curtailment Prior to Approval of Mitigation Plan

The Ground Water Users assert that due process requires that junior ground water users not be physically curtailed until after a hearing on a proposed mitigation plan. At the hearing on the petitions for rehearing, the SWC argued that the Director must immediately curtail junior water users, upon a determination of material injury, and only allow out-of-priority diversions once a mitigation plan is approved. The SWC asserts that nothing in CMR 43 allows the Director to suspend curtailment while considering the approval of a submitted mitigation plan. In essence, the SWC argues that the burden of a delay in holding a hearing to approve a mitigation plan should be placed on the junior water users, not the seniors.

The CMR provide an opportunity for junior water users to submit a mitigation plan after a determination of material injury, in order to prevent further injury and/or

[5] Otherwise, the risk of underestimating the quantity required by the senior, if less than the decreed or recommended quantity, impermissibly rests with the senior. For purposes of applying the respective burdens and presumptions, this Court has difficulty distinguishing between a circumstance where a senior's water right is permanently reduced, based on a determination of partial forfeiture as a result of waste or non-use, or temporarily reduced within the confines of an irrigation season incident to a delivery call based on essentially the same reasons. The property interest in a water right is more than what is simply reflected on paper; rather, it's the right to have the water delivered if available. Accordingly, whether the right is reduced on a permanent basis or on a temporary basis incident to a delivery call, the property interest is nonetheless reduced. Accordingly, the same burdens and presumptions should apply, prior to reducing a senior's right below the quantity supplied in the decree or recommendation.

compensate a senior user. Further, CMR 43 provides an opportunity for the Director to hold a hearing on that mitigation plan as determined necessary. A reasonable interpretation of the CMR reveals that curtailment of junior water rights should not occur until after the Director has an opportunity to review any mitigation plan submitted and conduct a hearing on such a plan if necessary, in accordance with the procedures set out in CMR 43. Curtailing junior water users pending the outcome of such a hearing circumvents the purpose of issuing mitigation plans in the first place.

In its July 24, 2009 ***Order***, this Court held that the Director abused discretion by not holding a proper mitigation hearing, or issuing a proper order on material injury to reasonable in-season demand and reasonable carryover. This Court recognizes that the CMR are being applied for the first time in recent delivery calls, which has resulted in much delay for all of the parties involved. However, in the future, mitigation plan hearings should occur within a reasonable time after the submission of a mitigation plan and should not result in the type of delay experienced in this case. *See AFRD #2*, 143 Idaho at 874, 154 P.3d at 445 ("a timely response is required when a delivery call is made and water is necessary to respond to that call").

Finally, the City of Pocatello urges this Court to declare that the matter of material injury shall not be addressed in future mitigation plan hearings in this case. As stated in the July 24, 2009 ***Order***, pursuant to CMR 43, once the Director makes a finding of material injury and upon receipt of a mitigation plan, the Director may hold a hearing on such a mitigation plan in order to determine whether the proposed plan in fact mitigates the senior user's injury. The City of Pocatello is concerned that future mitigation plan hearings will be a venue for parties to dispute the initial material injury determination. In future delivery calls, it may be practical for the Director to hold a hearing on the determination of material injury in conjunction with a mitigation plan hearing, in order to eliminate delay and further injury to senior users.[6] However, in this case, a hearing on material injury was held in 2008. As such, it is unnecessary for the Director to revisit the issue of material injury in future mitigation plan hearings.

[6] *See* Gooding County Case No. 2008-444 ***Order on Petitions for Rehearing*** (December 4, 2009) at 11-12.

VI.
CONCLUSION

The Court has reviewed its July 24, 2009 ***Order***, its August 23, 2010 ***Rehearing Order***, IDWR's *Motion to Clarify or Reconsider*, and the SWC's *Motion for Clarification*, and concludes as follows:

1. The Director abused discretion by failing to determine a methodology for determining material injury to reasonable in-season demand and reasonable carryover. However, the Director has complied with this Court's order on remand, and has since issued a *Methodology Order*. The time period for filing petitions for judicial review of the Director's *Methodology Order* on remand has expired. As a result, during a status conference on August 6, 2010, this Court announced its intention to lift the ***Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*** issued by this Court on March 4, 2010. As such, IT IS HEREBY ORDERED that the above-mentioned stay is hereby lifted.

2. While the Court has ruled that the Director abused his discretion and exceeded his authority by failing to follow procedural steps for mitigation plans as set forth in the CMR, and for failing to apply the correct presumptions and burden of proof in making the determination under the CMR that TFCC was entitled to less than the quantity recommended, there is no practical remedy to cure those errors at this point in the proceedings, and the Director has, upon remand, calculated 3/4 inch per acre as TFCC's full headgate delivery.

3. Consistent with this Court's July 24, 2009 ***Order***, in all other respects, the Director's September 5, 2008 *Order* is **affirmed.**

4. The SWC's *Motion for Clarification* requested that this Court clarify whether the presumptions and burdens set forth in the Court's ***Rehearing Order*** applied to all SWC rights (other than TFCC). In addition, the SWC requested that this Court clarify whether such presumptions and burdens apply to the Director's "minimum full supply" or

"baseline" analysis. However, these issues were not raised by any party on rehearing. As such, this Court will not address them further. Therefore, the SWC's *Motion for Clarification* is **denied.**

IT IS SO ORDERED.

Dated: Sept. 9, 2010

John M. Melanson
District Judge, *Pro Tem*

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 9th of September, pursuant to Rule 5(e)(1) the District Court filed in chambers the foregoing instrument and further pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Amended Order on Petitions for Rehearing to the parties listed below via the U.S. Postal Service, postage prepaid:

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Dated: Sept. 9. 2010

Cynthia R. Eagle-Ervin, Deputy Clerk

Notice of Orders
Certificate of Mailing
IRCP 77(d)