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DEPARTMENT OF WATER RESOURCES

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

)	
)	
BLUE LAKES TROUT FARM,)	CASE NO.: CV-WA-2010-19823
INC.,)	
)	BLUE LAKES' MEMORANDUM IN
Petitioner/Plaintiff,)	OPPOSITION TO DEFENDANTS'
)	MOTION FOR ATTORNEY FEES
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.)	
)	

COMES NOW the Petitioner/Plaintiff, Blue Lakes Trout Farm, Inc. (hereinafter referred to as "Blue Lakes"), by and through its undersigned attorneys of record, Ringert Law Chartered, and hereby submits this *Memorandum in Opposition to Defendants' Motion for Attorney Fees*. This *Memorandum* is supported by the pleadings and records already on file with the Court.

COPY

I. INTRODUCTION

On November 12, 2010, Respondent/Defendants, Idaho Department of Water Resources and Gary Spackman, Director of the Idaho Department of Water Resources (collectively referred to as “Defendants”) filed a Motion for Attorney fees and Memorandum of Costs and Fees seeking to recover \$130.53 in costs¹ and \$4,675.00 in attorney fees against Blue Lakes. Defendants request for attorney fees is premised on the assertion that Blue Lakes’ position in this action has no reasonable basis in law or fact and the Defendants are entitled to an award of attorney fees pursuant to I.C. § 12-117. However, Blue Lakes respectfully disagrees with the assertion that its position had no reasonable basis in law or fact or that it failed to point to any facts or legal authority which would give this Court authority to issue a writ of mandate.

Blue Lakes has presented a reasonable basis in fact in the form of the affidavit and expert report of John S. Koreny which provides new and updated methods and analysis for determining the impacts of junior groundwater diversions on Blue Lakes’ water rights. Blue Lakes has further presented a reasonable basis in law in that the “law of the case” is clear that the Director has an ongoing obligation to consider such evidence. The fact that the Director is denying Blue Lakes the opportunity to present such evidence at the upcoming hearing will result in at least another irrigation season and year of injury and damage to Blue Lakes’ water rights. This Court and Defendants cannot deny that such evidence exists, is an undisputed part of the record, and that the failure to

¹ Defendants request \$130.53 in costs relating to “Brief Production and Postage.” However, such costs are not costs which are awarded as a matter of right under I.R.C.P. 54(d)(1)(C). Further, Defendants have made no showing as required under I.R.C.P. 54(d)(1)(D) that such costs should be awarded as discretionary costs because they were necessary and exceptional. Copying charges and postage are not exceptional or extraordinary costs in this case or any other legal action. Accordingly, Defendants request for costs should be denied.

consider such evidence at this time will result in another irrigation season going by without the Director complying with the direction of the Hearing Officer and District Court to consider such new or improved analysis or methods for determining the impacts of junior groundwater diversions on Blue Lakes' water rights.

II. ARGUMENT

Defendants assert that they are entitled to attorney fees pursuant to I.C. § 12-117, which provides the following:

Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party **acted without a reasonable basis in fact or law.**

I.C. § 12-117(1) (emphasis added).

Accordingly, the question becomes whether Blue Lakes' position in this matter was without a reasonable basis in fact or law. Blue Lakes submits that even though the Court entered an *Order Denying Application for Peremptory Writ of Mandate*, Blue Lakes' position did have a reasonable basis in fact and law. A contrary ruling is not itself a basis for attorneys fees, otherwise I.C. § 12-117 would be unnecessary.

A. Blue Lakes has Reasonable Basis in Fact and Law for the Director to Fulfill his Continuing and Ongoing Duty to Consider New and Improved Analysis and/or Methods for Determining Impacts of Junior Groundwater Diversions.

Blue Lakes has extensively briefed and argued the merits of its position to the Court and will rely on those arguments in support of its response to Defendants' request for attorney fees. In addition, Blue Lakes will take this opportunity to point out that the clear and undisputed facts in this proceeding and to reiterate the circumstances that Blue Lakes finds itself. The undisputed facts are

that:

1. Blue Lakes has evidence regarding the technical basis for determining the extent of injury and mitigation obligations which is new or different from the “trimline” and “spring allocation” determinations of the Director. As noted in this Court’s Order, the expert report prepared by John S. Koreny provides that the Eastern Snake Plain Aquifer Model (“ESPAM”) has been calibrated to Blue Lakes’ individual spring flow as opposed to river reaches. Mr. Koreny’s affidavit and report are in the record, have not been disputed² and are now in the hands of the Director for review and consideration pursuant to his statutory duties to administer water according to Chapter 6, Title 42 of the Idaho Code.
2. The other fact which is not in dispute in this case is that Hearing Officer (Gerald Schroeder), the District Court (Judge Melanson), IDWR’s expert (Allen Wylie) and the Director have recognized the shortcomings of the model uncertainty, trimline, and spring apportionment determinations and they have all confirmed the Director’s ongoing duty to consider new, updated or improved analysis and/or methods for determining the impact of junior ground water diversions on Blue Lakes’ water rights.

Blue Lakes has a reasonable basis in fact in the form of an affidavit and expert report of John S. Koreny which provides a new, improved and updated method for determining the impact of junior ground water diversions on Blue Lakes’ water rights. Blue Lakes has a reasonable basis in law in

² Defendants chose to challenge the Affidavit of Charles Brockway, but did not challenge or dispute the affidavit or report of John S. Koreny.

that the “law of the case” is crystal clear that the Director has an ongoing duty to consider new, updated or improved analysis and/or methods.

B. Blue Lakes has No Plain, Speedy or Adequate Remedy at Law.

With all due respect to the Court, Blue Lakes respectfully disagrees that it has a plain, speedy or adequate remedy at law. Despite the existence of evidence and the report from John S. Koreny and despite the “law of the case” being that the Director is obligated to consider new, updated or improved analysis and/or methods for determining the impact of junior groundwater diversions, Blue Lakes continues to be deprived of the right to present such evidence in a timely fashion before another irrigation season goes by and before Blue Lakes sustains further losses and use of its water rights. Blue Lakes has attempted and continues to attempt to find an avenue which would allow it to simply present the evidence before another irrigation season goes by and further injury to damage to its water rights occurs. This call has been ongoing since 2005 and if Blue Lakes is not allowed to present the evidence and report of Mr. Koreny, then Blue Lakes will go another irrigation season and another year without the Director considering such evidence. Forcing Blue Lakes to be injured and deprived of its property rights for at minimum of another year because the Director is unwilling to consider new evidence that he was directed to consider is not providing Blue Lakes with a plain, speedy or adequate remedy.

For purposes of Defendants’ request for attorney fees, it is not a question of whether the Court ultimately agrees with Blue Lakes, but rather whether Blue Lakes has a reasonable basis in fact or law. Blue Lakes submits that forcing it to endure at a minimum of another year of injury, forcing it to endure another year of loss of its property right (i.e. loss of use of its decreed water rights), when it has evidence that would provide a new, improved method for determining impacts of junior

ground water diversions on its water rights is a reasonable basis in law and fact that it does not have a plain, speedy or adequate remedy.

C. The “Law of the Case” is that the Director has an Ongoing Duty to Consider New, Improved Methods and Analysis as it becomes Available.

The fact of the matter is that despite the ongoing appeal to the Idaho Supreme Court relating to the use of the trimline and margin of error in the ground water model, the Director was proceeding with a hearing in which he was declining to consider certain evidence of Blue Lakes but he would consider certain evidence of the groundwater users. Blue Lakes respectfully disagrees that the pendency of the appeal prevents the Court from considering Blue Lakes’ request. The Director was proceeding with a hearing despite the pendency of the appeal and the mere fact that there is a pending appeal does not mean that all water administration ceases or that legal, evidentiary or other decisions of the Director are not subject to review. The direction of the Hearing Officer and District Court in this matter were for the Director to have an ongoing duty to consider new and improved methods or analysis of determining the impacts of groundwater diversion as they became available and not to simply cease all water administration and considerations until the appeal is completed. Blue Lakes has a reasonable basis in law and fact that if the Director is going to have a hearing and consider evidence during the pendency of the appeal, the Director continues to have a ongoing duty to consider new, improved evidence or methods for determining impacts of groundwater diversions as directed and confirmed by the Hearing Officer, District Court and the Director himself. Given the fact that the hearing and the consideration of evidence was to occur during the pendency of the appeal, it was reasonable to expect that the prior directives of the Hearing Office and District Court would be applicable during the pendency of the appeal.

Blue Lakes also respectfully disagrees that Judge Melanson envisioned that his *Order*

Granting in Part Motion to Enforce Orders meant that no district court would have jurisdiction to review orders or decisions of the Director during the pendency of the appeal. As previously argued by Blue Lakes, in the excerpt of that order quoted by Defendants and the Court, Judge Melanson explained that issues pertaining to the technical basis for the Director's margin of error, trimline and spring allocation determinations were not addressed by the District Court's Orders of remand, which simply required the Director to determine injury to Blue Lakes' water right no. 36-7210 and 36-4013A. Accordingly, Judge Melanson decided that his jurisdiction in response to Blue Lakes' *Motion to Enforce* his remand Orders did not include those technical issues.

However, the fact that Judge Melanson felt constrained by his remand Orders does not preclude the review of orders or decisions of the Director by all district courts. Especially given the fact that I.C. § 67-5271(2) provides for the immediate review of preliminary or procedural actions if final agency action would not provide an adequate remedy. If Judge Melanson felt constrained by his remand Orders, then definitely another district court has jurisdiction to review and consider the Director's orders and decisions. It is not as if the Director's ongoing decisions and orders are now insulated from any review and the Idaho Administrative Procedure Act is now rendered meaningless as to this Director.³ If nothing else, Blue Lakes has a reasonable basis in fact and law

³ If Judge Melanson does not have jurisdiction to review the Director's orders because he is constrained by his remand Order, and if this Court believes that it also does not have jurisdiction, then the question becomes what court, if any, does have jurisdiction to review the Director's orders and decisions? Blue Lakes recognizes that the Administrative Procedure Act provides that the immediate review of orders is only allowed in certain circumstances, but the fact that this Court has declined jurisdiction altogether means that the provisions of the Administrative Procedure Act effectively do not apply to decisions and orders of the Director because there could not be any immediate review. In other words, it is one thing for the Court to deny Blue Lakes' application because the Court determines that Blue Lakes has a plain, speedy and adequate remedy (a decision Blue Lakes respectfully disagrees with) but for the Court to decline jurisdiction altogether effectively leaves Blue Lakes with no remedy or rights under the Administrative Procedure Act.

that if Judge Melanson was constrained and precluded from considering the issues raised by Blue Lakes because of his remand Orders, then there is some other court which does have jurisdiction to review the Director's orders and decisions.

Again, Blue Lakes has evidence pertaining to new or improved methods and analysis for determining the impacts of junior groundwater diversions on its water rights, the law of the case and direction of the Hearing Office and District Court is that the Director has the ongoing duty to consider such evidence, and Blue Lakes is attempting to find a court to enforce such a duty. If it is not Judge Melanson because he is constrained by the remand Orders, then it is reasonable to suggest that it is this Court pursuant to the Idaho Administrative Procedure Act and the *Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order dated December 9, 2009* issued by this Court. While this Court denied Blue Lakes' Application for Peremptory Writ of Mandate, to which Blue Lakes respectfully disagrees, the bottom line is that there is sufficient and reasonable basis in law and fact for Blue Lakes' position and an award of attorney fees and costs under I.C. § 12-117 is not warranted.

D. Defendants Justification for Seeking Attorney Fees and Costs against Blue Lakes is Not Warranted.

Defendants assert that they do not "as a matter of course request an award of attorney's fees in water rights proceedings." However, Defendants have decided to seek fees against Blue Lakes in this matter. It worth pointing out that there have been numerous complaints, petitions and causes of action requesting writs of mandate, writs of prohibition or declaratory judgments against the Defendants in various water call proceedings that date back to 2005. This Court is well aware of many of those proceedings. Blue Lakes is not aware of Defendants previously requesting attorney fees in any other proceeding. Some of those proceedings have involved complaints and petitions

for writ of prohibition or motions for preliminary injunctions by the ground water users which have been summarily dismissed for failure to exhaust administrative remedies. *See Idaho Groundwater Appropriators, Inc. v. Idaho Department of Water Resources and David Tuthill, Jr.*, Jerome County Case No. CV 2007-526. A copy of the *Order Dismissing Application for Temporary Restraining Order, Complaint For Declaratory Relief, Writ of Prohibition and Preliminary Injunction* issued by Judge Melanson on June 12, 2007 is attached hereto as Exhibit 1. Despite the fact that Judge Melanson dismissed the action and stated that the recently issued American Falls Reservoir District No. 2 case was directly on point and the action provides a text book case in support of the need to exhaust administrative remedies, Defendants did not request attorney fees and costs against the ground water users.

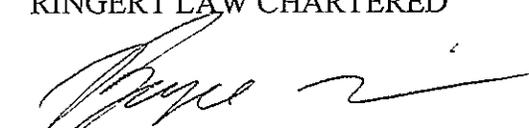
Blue Lakes recognizes that Defendants have the prerogative to decide when and if they claim attorney fees and costs in a particular action and Defendants have every right to arbitrarily single out Blue Lakes and claim attorney fees when it has not done so in similar circumstances against other water users. However, to suggest that this is the first time that a party has brought an action or sought a remedy which as been dismissed for lack of jurisdiction, or that Blue Lakes' position was more unreasonable than those brought by other water users, is misplaced and incorrect. Defendants have declined to seek attorney fees against other water users under similar circumstances and Defendants justification for seeking attorney fees against Blue Lakes is not warranted.

III. CONCLUSION

For the foregoing reasons, Blue Lakes respectfully requests that Defendants request for attorney fees and costs be denied.

Dated this 23rd day of November, 2010.

RINGERT LAW CHARTERED



S. Bryce Farris

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2010, I served a true and correct copy of the foregoing **Blue Lakes' Memorandum in Opposition to Defendants' Motion for Attorney Fees** by delivering it to the following individuals by the method indicated below, addressed as stated.

Director Gary Spackman.	() U.S. Mail, Postage Prepaid
c/o Victoria Wigle	() Facsimile
Idaho Department of Water Resources	(x) Hand Delivery
322 East Front Street	(x) E-Mail
P.O. Box 83720	
Boise, ID 83720-0098	
victoria.wigle@idwr.idaho.gov	

Garrick L. Baxter	() U.S. Mail, Postage Prepaid
Chris M. Bromley	() Facsimile
Deputy Attorney Generals	() Hand Delivery
Idaho Department of Water Resources	(x) E-Mail
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Courtesy Copies to the Following via E-Mail:

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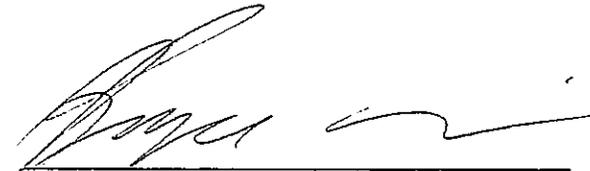
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S. Bryce Farris

ATTACHMENT 1

DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME, IDAHO

2007 JUN 12 PM 3 58

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

James Owens
DEPUTY CLERK

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

Plaintiffs

vs.

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

Defendants,

and

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

Intervenors.

Case No. CV 2007-526

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

I.

PROCEDURE

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

II.

ORDER

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

RULE 54(b) CERTIFICATE

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

JUN-13-2007 WED 09:32 AM JEROME CO JUDICIAL ANNEX
JUN-12-07 TUE 03:25 PM SRBA

FAX NO. 208 644 2609
FAX NO. 1

P. 04/09
P. 04

IT IS SO ORDERED.

Dated June 12, 2007.


HONORABLE JOHN M. MELANSON
District Judge



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

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

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

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

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1 ground water pumpers appeared in defense of the Director's
 2 application of the rules, including an argument that the
 3 surface water users must first exhaust their administrative
 4 remedies before seeking judicial review. In its opening
 5 brief on appeal IGWA argued: Moreover, the legislature
 6 already has specified the process for resolving challenges
 7 to such unlawful agency action. The proper procedure is
 8 through judicial review, pursuant to the Administrative
 9 Procedures Act, Idaho Code Section 67-5270; not a
 10 collateral attack as the plaintiffs have undertaken here.
 11 The APA also contains entire sections on agency
 12 hearing procedures, evidence, and other related matters,
 13 e.g. Idaho Code Sections 67-5242, hearing procedure; and
 14 67-5271, evidence. The Department applies these as part of
 15 its rules. The district court's approach tosses out
 16 administrative law, end quote.
 17 That's from the affidavit of Mr. Arrington,
 18 Exhibit I to the IGWA opening brief, page six.
 19 Apparently the Supreme Court agreed with IGWA,
 20 holding that administrative remedies must be exhausted
 21 before even constitutional issues can be raised before the
 22 District Court, unless there is a facial challenge. The
 23 Supreme Court held, quote: Important policy considerations
 24 underlie the requirement for exhausting administrative
 25 remedies, such as providing the opportunity for mitigating

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1 which govern the Director's response to this call.
 2 In American Falls No. 2 the court reaffirmed the
 3 long-standing general requirement that a party not seek
 4 declaratory relief until administrative remedies have been
 5 exhausted unless that party is challenging the rule's
 6 facial constitutionality. The court relied on Idaho Code
 7 Section 67-5271 and the Regan versus Kootenai County Case,
 8 140 Idaho 721, a 2004 case.
 9 In the case now before this court, IGWA, I'll
 10 refer to it as both parties have referred to it -- Idaho
 11 Ground Water Appropriators Association by its acronym --
 12 initially requested a hearing before the director. The
 13 hearing was placed on hold when the constitutional
 14 challenges to the rules of conjunctive management was
 15 raised in American Falls No. 2. Finally, because both
 16 cases involved application of the same rules, after the
 17 Supreme Court issued its ruling in American Falls No. 2,
 18 the Director issued a notice of potential curtailment on
 19 May 10, 2007, almost a month ago. Instead of re-noticing
 20 or requesting immediate hearing before the Director and
 21 arguing its claims and defenses, IGWA filed the instant
 22 action. As such, the Director has not developed a
 23 full-administrative record and ruling on the claims and
 24 defenses raised.
 25 Ironically, in American Falls No. 2, IGWA and the

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1 or curing errors without judicial intervention, deferring
 2 to the administrative processes established by the
 3 legislature and the administrative body and the sense of
 4 comity for the quasi-judicial functions of the
 5 administrative body. That's from American Falls No. 2,
 6 quoting White versus Bannock County Commissioners, 139
 7 Idaho 396, at 401 - 402.
 8 Frankly, this Court, despite the differences
 9 pointed out by the plaintiffs, has difficulty in
 10 meaningfully distinguishing American Falls No. 2 and the
 11 instant case. Although American Falls No. 2 dealt with a
 12 constitutional challenge, the underlying principles are the
 13 same, and the Supreme Court defined the scope of the
 14 exceptions to the exhaustion of administrative remedies
 15 requirement. The essence of what was at issue in American
 16 Falls No. 2 was the manner in which the Director responded
 17 to the delivery call. Although the action was argued and
 18 analyzed as a facial challenge, the Supreme Court held it
 19 was an as-applied challenge, and it held that an as-applied
 20 challenge did not provide an exception to the exhaustion of
 21 the administrative remedies requirement.
 22 The court reasoned, quote: To hold otherwise
 23 would mean that a party whose grievance presents issues of
 24 fact or misapplications of rules or policies could
 25 nonetheless bypass his administrative remedies and go

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1 straight to the courthouse by the simple expedient of
2 raising a constitutional issue. Again, from American Falls
3 No. 2, citing *Foremost Insurance versus Public Service*
4 *Commission 985, S.W. 2d 793.*
5 Although IGWA has not framed the issues in terms
6 of a constitutional challenge, it is nonetheless raising
7 issues pertaining to the perceived misapplication of rules,
8 and raising issues of fact and law, which according to the
9 holding in *American Falls No. 2*, must first be ruled on by
10 the administrative agency prior to seeking judicial review.
11 The surface water users in *American Falls No. 2*
12 raised issues pertaining to the lawfulness of the
13 Director's response to a delivery call. They simply
14 asserted that the infirmities rose to the level of
15 constitutional proportions because of the property rights
16 at stake. Ultimately, the district court in that case
17 applied a facial challenge analysis because the Director's
18 actions, although alleged to be contrary to law, were
19 consistent with the conjunctive management rules.
20 Nonetheless, the Supreme Court rejected the
21 so-called hybrid approach that is as applied in the facial
22 challenge and held that administrative remedies must first
23 be exhausted. The result of the holding is that whether a
24 party raises legal or factual issues, or alleges that such
25 issues rise to the level of an as-applied constitutional

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1 challenge, administrative remedies must first be exhausted.
2 IGWA has raised two exceptions to the exhaustion
3 of administrative remedies doctrine that were mentioned,
4 but not discussed by the Supreme Court in *American Falls*
5 *No. 2*. The first being: When the interest of justice so
6 require; and the second being: When the agency is acting
7 outside the scope of its authority. As I mentioned a
8 moment ago, IGWA was a participant in the *American Falls*
9 *No. 2* case and even advocated dismissal of the case because
10 surface water users had failed to exhaust administrative
11 remedies. The Supreme Court affirmed IGWA's position.
12 The court has difficulty finding the justice
13 required for that exception to exhaustion of administrative
14 remedies doctrine when IGWA has taken one position in one
15 proceeding and then adopted the exact opposite position in
16 a similar proceeding, involving similar issues.
17 The court has considered the justice of the
18 plaintiff's cause. The timing of the proposed curtailment
19 should not have come as a surprise. This case has been
20 going on since 2005, the curtailment was part of a
21 five-year-phased-in curtailment, and it had only been put
22 on hold as a result of the *American Falls No. 2* case.
23 Here, the plaintiff's assertion that the interests of
24 justice require the court to exercise authority over the
25 Department before exhaustion administrative remedies, is

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1 not persuasive.
2 As noted at the beginning of my comments, the
3 prior appropriation doctrine sometimes leads to a harsh
4 result, but it is just. If the court were to block this
5 action now, every proposal curtailment would first be
6 decided in the courts instead of where the legislature
7 intended: At the Idaho Department of Water Resources. We
8 would have judicial administration of water rights.
9 Perhaps if the *American Falls Case No. 2* had not
10 taken place and there was not a five-year curtailment plan
11 already in place; and IGWA was being notified of the
12 curtailment for the first time after the planting season
13 had already commenced; and if the right to a
14 pre-curtilment hearing were plainly established; and if
15 IGWA did not have the remedy of mandamus; or perhaps other
16 remedies such as the judicial review mentioned, perhaps
17 then their argument that justice requires an exception to
18 exhaustion of administrative remedies would have more
19 merit.
20 The plaintiff's claim that the Director has
21 exceeded his authority is also without merit. The fact is
22 that we do not yet know what the Director will do. The
23 question of the Director's authority must first be raised
24 in the administrative proceeding. Idaho Code Section
25 42-602 vests the Director with the authority to distribute

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1 water from all natural sources within a water district in
2 accordance with the prior appropriation doctrine. All the
3 rights at issue have been reported or adjudicated and have
4 been included within a water district.
5 As far as the operation of the ground water
6 management act, Idaho Code Section 42-237 (a), et seq., and
7 Idaho Code Section 42-602 and 607, the court will direct
8 IGWA's attention to its analysis in its own appellate brief
9 in the *American Falls No. 2* case, wherein IGWA asserted
10 that the two processes were independent of each other.
11 Specifically, quote: "The rules embody the broad concepts
12 of the act within the context of the department's
13 traditional contested case process, rather than the ground
14 water board proceeding. The board process remains
15 independently available under the act. It's in the
16 affidavit of Mr. Arrington, Exhibit I, the IGWA opening
17 brief, page 11.
18 If the plaintiffs desire a hearing and if the
19 Director fails to conduct that hearing, their remedies may
20 include mandamus, possibly judicial review. Not a request
21 that this court decide the issues that they believe should
22 have been decided in the administrative proceeding.
23 In summary, this action provides a text book case
24 in support of the need for exhaustion of administrative
25 remedies. To date the Director has not ruled on the

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

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

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

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

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

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

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

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CERTIFICATE OF MAILING

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

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By Judy Owens
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