

RECEIVED
OCT 19 2016
DEPARTMENT OF
WATER RESOURCES

Scott L. Campbell, ISB No. 2251
Matthew J. McGee, ISB No. 7979
Sarah A. McCormack, ISB No. 9683
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
slc@moffatt.com
mjm@moffatt.com
sam@moffatt.com
16845.0030

Attorneys for Sun Valley Company

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

SUN VALLEY COMPANY,

Petitioner,

vs.

GARY SPACKMAN, Director of the Idaho
Department of Water Resources,

Respondent.

Docket No.

**SECOND AMENDED PETITION
FOR DECLARATORY RULING
REGARDING CREATION OF
ESPA GROUND WATER
MANAGEMENT AREA**

I. PETITION

1. Sun Valley Company ("Sun Valley"), by and through undersigned
counsel, files this Second Amended Petition for Declaratory Ruling ("Petition") pursuant to

Idaho Code Section 67-5232 and the Idaho Department of Water Resources Rules of Procedure, IDAPA 37.01.01.400.

2. On July 11, 2016, Sun Valley received a letter dated July 7, 2016, from Gary Spackman, Director of the Idaho Department of Water Resources (the “Letter”). A true and correct copy of the Letter is attached hereto as **Exhibit 1**. The Letter provides that the Department “is considering creating a ground water management area for the Easter Snake Plain Aquifer (ESPA),” and invites “[p]otentially affected water users” to attend one or more of ten (10) meetings scheduled across Eastern Idaho between July 25, 2016 and July 28, 2016.

3. The Letter provides that after the meetings, the Director will decide whether a ground water management area (“GWMA”) should be created.

4. The Letter states that Idaho Code Section 42-233b authorizes the creation of GWMAs, which are defined as “. . . any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area.”

5. The Letter notes that Idaho Code Section 42-233a defines a critical ground water area as “. . . any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.”

6. The Letter states that Idaho Code Section 42-233b identifies “several potential tools available to the Director” within a GWMA to manage the ESPA. Specifically, the Letter states that Idaho Code Section 42-233b authorizes the Director to:

- (a) approve a ground water management plan to “manage ground water withdrawals on the aquifer and hydraulically connected sources to ensure a reasonably safe supply of ground water”;
- (b) consider new appropriations only after determining availability;
- (c) require water right holders within the GWMA to report withdrawals of ground water and other information;
- (d) require junior users to cease diversions “[i]f the Director determines the ground water is insufficient to meet the needs of water right holders.”

7. The Letter then describes the current water administration paradigm as involving “disjointed water calls and mitigation plans,” “sporadic curtailment orders and associated mitigation,” and “sporadic water right administration,” and asserts that management utilizing a GWMA may bring consistency to administration to achieve aquifer stabilization, although the Letter does not identify the means to achieve such goal, except by reference to the foregoing “potential tools.”

8. The proposed GWMA area includes the ESPA, which “is the aquifer underlying the Eastern Snake Plain.” *Rangen, Inc. v. Idaho Dep’t of Water Res. (In re Distrib. of Water to Water Right Nos. 36-02551 & 36-07694 (Rangen, Inc.) IDWR Docket CM-DC-2011-004)*, 367 P.3d 193, 197 (Idaho 2016). The ESPA is approximately 170 miles long and 60 miles wide, and has been designated as an area having a common ground water supply (“ACGWS”). *See id.* (citing IDAPA 37.03.11.050). The ground water in the ESPA is hydraulically connected to the Snake River and tributary springs. *Id.* The ESPA “is composed predominantly of fractured quaternary basalt, which is generally characterized by high hydraulic conductivity.” *Id.*

Discharge from the ESPA “to hydraulically connected surface water sources is largely dependent on ground water elevations and hydraulic conductance.” *Id.*

9. In addition to the ESPA ACGWS, the Director proposes to include 22 basins within the ESPA GWMA, including portions of Basin Nos. 21, 22, 23, 25, 27, 29, 31, 32, 33, 34, 35, 36, 37, 41, 43, 45, 47, and 51. *See* Letter at 3 (listing 22 tributary basins). The Letter asserts that the Department needs to consider “the areal extent of the ground water management area,” and states that the listed tributary basins are the basins that the Department’s technical information suggests impact water stored in the ESPA. The Letter also invited water users from those basins to participate in the public meetings.

10. “The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011).

11. “[T]he Idaho Legislature has authorized the Director ‘to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.’ The Director has done so in the Conjunctive Management Rules (CM Rules), which were approved by the Legislature and became effective on October 7, 1994.” *In re A&B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2012) (quoting IDAHO CODE § 42-603).

12. The CM Rules “give the Director the tools by which to determine ‘how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others].’” *Am. Falls*

Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) (quoting *A&B Irrigation Dist.*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997)).

13. The CM Rules “govern the distribution of water from ground water sources and areas having a common ground water supply.” IDAPA 37.03.11.020.01.

14. The CM Rules “provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in . . . designating such areas as ground water management areas as provided in Section 42-233b, Idaho Code.” IDAPA 37.03.11.020.06.

15. “The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area.” IDAPA 37.03.11.050.01(d).

16. Additionally, upon the proper initiation of a contested case by a senior water right holder, and following consideration of such contested case under the Department’s Rules of Procedure, the Director may, by order, “. . . [d]esignate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights.” IDAPA 37.03.11.030.

17. Sun Valley owns water rights in Water District No. 37. Sun Valley owns water rights within the Big Wood River Ground Water Management Area, designated as such by the Director on June 28, 1991. Sun Valley does not own water rights in the ESPA area of common ground water supply.

18. Pursuant to Idaho Code Section 67-5232(1), Sun Valley hereby petitions the Department for a declaratory ruling as to the applicability of Idaho Code Section 42-233b to Basin 37 in the context of any proposed ESPA GWMA. Specifically, and without limitation, Sun Valley seeks a declaratory ruling that:

(a) Because the Groundwater Act, the CM Rules promulgated by the Department and approved by the Legislature, and the common law set forth by Idaho trial and appellate courts derived therefrom, apply to determining areas of the state having a common ground water supply, creating and expanding water districts, and creating GWMA's, in exercising authority under Idaho Code Sections 42-233a and 42-233b, the Director cannot act in derogation of these legal constraints.

(b) Any attempt by the Director or the Department to expand the boundaries of the ESPA area of common ground water supply to include the entirety of Basin 37 by designating Basin 37 as part of an ESPA GWMA outside the context of a formal rulemaking or contested case proceeding is in contravention of the Groundwater Act, the CM Rules, and the common law set forth by Idaho trial and appellate courts derived therefrom.

(c) The proposal to designate an ESPA GWMA inclusive of Water District No. 37 is contrary to prior decisions of the Director regarding GWMA designations related to the ESPA.

(d) Idaho Code Section 42-233b does not grant the Director authority to include other ground water basins, including Basin 37, within an ESPA GWMA.

(e) The proposal to designate an ESPA GWMA inclusive of Basin 37 for purposes of the administration of water rights therein without a procedurally proper determination of an area having a common ground water supply in Basin 37 is an invalid collateral attack upon the findings and conclusions in Judge Wildman's Memorandum Decision and Order in the matter of *Sun Valley Co. v. Spackman*, Case No. CV-WA-2015-14500 (Apr. 22, 2016). A true and correct copy of Judge Wildman's Memorandum Decision and Order is attached hereto as **Exhibit 2**.

(f) The Director does not have authority to designate a new GWMA inclusive of Basin 37 without conducting a hearing or rulemaking in accordance with the Department's Rules of Procedure and the applicable provisions of the Idaho Administrative Procedures Act.

(g) A "critical ground water area," and a "ground water management area," as defined in Idaho Code Sections 42-233a and 42-233b respectively, are each, as a matter of law, an "area having a common ground water supply," as defined in the CM Rules, IDAPA 37.03.11.010.01.

(h) Except for within the boundaries of the ESPA set forth in CM Rule 50, which have already been determined, the Director must determine areas of the state that have a common ground water supply before designating such areas ground water management areas.

(i) Except for the boundaries of the ESPA set forth in CM Rule 50, which have already been determined, the Director must conduct a rulemaking or comply with the provisions of the CM Rules in order to determine areas of the state that have a common ground water supply.

(j) The Director may not create an ESPA GWMA that geographically overlaps the existing Big Wood River GWMA.

(k) The Director has the statutory authority to approve a ground water management plan, but does not have the authority to generate or create a ground water management plan.

(l) Under Idaho Code Section 42-233b, a ground water management plan for the ESPA should provide for managing the effects of ground water withdrawals from the ESPA (a) on the ESPA, and (b) on hydraulically connected sources of water, but it cannot provide for managing the effects of ground water withdrawals from any other source.

(m) Under Idaho Code Section 42-233b, if the Director makes a “determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area” any order issued by the Director to water right holders to “cease or reduce withdrawal of water” must include water rights for domestic purposes.

19. In addition, pursuant to Idaho Code Section 67-5232(1), Sun Valley hereby petitions the Department for a declaratory ruling as to the applicability of IDAPA 04.11.01.420-425 to Department proceedings. Specifically, and without limitation, Sun Valley seeks a declaratory ruling that IDAPA 04.11.01.420-425 apply to Department proceedings because the Department failed to include in the Rules of Procedure of the Idaho Department of Water Resources “a finding that states the reasons why the relevant portion of the attorney general’s rules were inapplicable to the agency under the circumstances.” IDAHO CODE § 67-5220(5)(b).

II. POINTS AND AUTHORITIES

Pursuant to IDAPA 37.01.01.400.01(c) and 37.01.01.400.02, Sun Valley may set forth the statutes, orders, rules, or other controlling law upon which Sun Valley relies. The following points and authorities, and discussion thereof, support each of the foregoing requested declarations, and Sun Valley respectfully requests an order from the Director confirming each.

A. The Director's Authority Is Limited.

The Department, as an administrative agency, has no authority other than that given to it by the Legislature. See *Wash. Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). “Administrative agencies are ‘creature[s] of statute’ and, therefore, are ‘limited to the power and authority granted [them] by the Legislature.’” *Henderson v. Eclipse Traffic Control*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009) (quoting *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996)). Such authority “is primary and exclusive in the absence of a clearly manifested expression to the contrary.” *Roberts v. Idaho Trans. Dep’t*, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991). An agency “may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered.” *Id.*

An administrative agency “exercises limited jurisdiction, and nothing is presumed in favor of its jurisdiction.” *Henderson*, 147 Idaho at 632, 213 P.3d at 722; see also *United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977). An agency’s authority and jurisdiction is “dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves” *Wash. Water Power Co.*, 99 Idaho at 879, 591 P.2d 126. If the provisions of governing rules or statutes are not met and complied with, no authority or jurisdiction exists. *Id.* (citing *Arrow Transp. Co. v. Idaho Pub. Util. Comm’n*, 85 Idaho 307, 379

P.2d 422 (1963)). Acts taken by an agency without statutory authority or jurisdiction are void and must be set aside. *See Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27; *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012).

The Director's authority is granted and defined in Title 42 of the Idaho Code, the Idaho Administrative Procedure Act, Idaho Code Section 67-5201, *et seq.* (the "Act"), and the administrative rules promulgated in accordance therewith. However, these grants of power also properly limit jurisdiction and authority in order to comport with due process standards to protect the rights and interests of citizens. In response to a due process challenge relating to the impact of the Department's administration of an appellant's "constitutional use" water right, the Idaho Supreme Court upheld the Department's actions and recognized that "[t]he requirement of procedural due process is satisfied by the statutory scheme of Title 42 of the Idaho Code." *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977).

To that end, all Department proceedings and hearings must be conducted in accordance with the Idaho Administrative Procedure Act. IDAHO CODE § 42-1701A. Compliance with Title 42, the Idaho Administrative Procedure Act, and the rules promulgated thereunder ensure that appropriate procedural protections are afforded to the property interests of all water right owners. The Director has specific responsibility "[t]o promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department." IDAHO CODE § 42-1805(8); *see also* IDAHO CODE § 42-603.

Valuable property rights are at issue. "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law" *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). Procedural due process is afforded to all parties subject to the

Department's jurisdiction by virtue of compliance with Title 42 of Idaho Code and the Act. *See Nettleton, supra*. Under the Act, the Department has promulgated, and the Legislature has reviewed, the Procedural Rules and the CM Rules that supplement and implement the statutory requirements for the administration of ground water rights, pursuant to Title 42 of Idaho Code, particularly Idaho Code Section 42-233(b). *See also* IDAHO CODE §§ 67-5224; 67-5291.

The Department has no authority or jurisdiction to proceed with the creation of an ESPA GWMA that extends beyond the boundaries of the ESPA ACGWS. Even if it did, absent compliance with the clearly articulated rulemaking or contested case procedures of the Procedural Rules and the CM Rules, such action would be, and in this case is, *ultra vires*, and contravenes Sun Valley's due process rights and the procedures the Legislature and the Department have deemed mandatory. *See Henderson v. Eclipse Traffic Control*, 147 Idaho at 634-35, 213 P.3d at 724-25; *Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27. The Director threatens to exceed his authority. That is the source of this petition. The Director must follow the statutes and rules that define the Legislature's grant of authority.

B. Idaho Code Section 42-233b Does Not Grant the Director Authority to Include Other Ground Water Basins Within an ESPA GWMA.

The Director contends he has the authority to create a single GWMA that comprises not only the ESPA ACGWS, but also 22 tributary basins. *See* Letter at 2-3. An evaluation of the plain language of the statute at issue, and interpreting the statute *in pari materia* with the remainder of the Groundwater Act, demonstrates that his contention is erroneous.

First, the Director's authority under Section 42-233b to determine a GWMA makes no reference to tributary ground water basins, and indeed uses the singular term "ground water basin." Although the term "ground water basin" is not defined in the statute or the Groundwater Act, a review of the plain language and a common understanding of the term

reflects a much narrower view of the scope of a GWMA than what the Director proposes.

Second, the Director presumably relies upon the term “hydraulically connected sources of water” in the second paragraph of Section 42-233b to support the inclusion of tributary ground water basins within a GWMA. As addressed below, upon evaluation, that provision concerning ground water management plans for a given GWMA actually demonstrates a geographic and hydraulic scope for a GWMA that is much more limited than that contemplated by the Director.

1. A GWMA is comprised of a single ground water basin, not multiple ground water basins.

Idaho Code Section 42-233b defines a “ground water management area” as “any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area.”

IDAHO CODE § 42-233b. That definition limits the “aerial extent” of the GWMA, as the Director has termed it, exclusively to a singular “ground water basin.” A GWMA can be a single ground water basin, or part of a single ground water basin, but a GWMA cannot be multiple basins.

Fundamental concepts of hydrology support that conclusion. The term, ground water basin, consists of two separate concepts: “ground water” and “basin.” Idaho Code Section 42-230 defines “ground water” as, “all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.” IDAHO CODE § 42-230(a). This definition confirms that ground water exists in any “geological structure in which it is standing or moving.”

The Idaho Ground Water Act and the remainder of the Idaho Code do not define “basin.” Consequently, other sources must be considered. One defines “basin” as:

A region in which the strata or layers of rock dip in all directions toward a central point. Thus, it is any hollow or trough in the

earth's crust, whether filled with water or not. A river basin is the total area drained by a river and its tributaries.

C.C. LEE, PH.D., ENVIRONMENTAL ENGINEERING DICTIONARY 56 (Government Institutes, Inc. 3d ed. 1998). Another defines "basin" as "[t]he drainage area of a lake or stream, such as a river basin." U.S. ARMY CORPS OF ENGINEERS, E.M. 1110-2-1201, Reservoir Water Quality Analysis, 2 (U.S. Dep't of Army, Jun. 30, 1987). Still another defines a "groundwater basin" as "the subsurface volume through which groundwater flows towards a specific discharge zone. It is surrounded by ground water divides." C.W. FETTER, APPLIED HYDROGEOLOGY, Univ. of Wiscon.-Oshkosh, 9 (Macmillan College Publishing Co., Inc., 3rd ed., 1994). Based on these definitions, the Director cannot legitimately determine that a proposed ESPA ground water basin includes "tributary basins," as suggested in the Letter.

No language in Idaho Code Section 42-233b says that a "ground water basin" includes basins other than the ground water basin under consideration, regardless of whether the other basins may discharge some supply into that ground water basin. State agency authority arises only from specific statutory language enacted by the Legislature, not otherwise.

The regulatory authority granted by Idaho Code Section 42-233b to determine a GWMA is limited to identifying a singular "ground water basin." The Director's letter describing "tributary basins" alone evidences a fundamental mischaracterization of the statute, and gross overreach. The regulatory authority for determining and designating a GWMA does not reference, define, or describe any circumstances where a GWMA "extends into tributary basins," nor does it reference water sources tributary to the ground water basin at issue. *See* Letter at 3. Likewise, the statute does not provide regulatory authority over any ground water basins or tributary surface water sources that contribute water to the designated ground water basin. Because the Director's regulatory power to determine a GWMA derives solely from the

language of the statute, expanding the regulatory reach beyond the area described in the statute fails to meet the constitutional standards of due process. *See Arrow Transp. Co., supra; A&B Irrigation Dist. v. Idaho Dep't of Water Res., supra.* Here, the Director of the Department has no authority to include “tributary basins” in the proposed ESPA Ground Water Management Area. If he proceeds to take such action, his determination will constitute a void, “ultra vires” act. *See id.*

2. A plan approved under Idaho Code Section 42-233b can only manage the effects of ground water withdrawals from the ESPA.

As the foregoing illustrates, a GWMA is a ground water basin, and not a collection of separate tributary basins *and* a specific ground water basin. Likewise, Idaho Code Section 42-233b provides no authority to impose regulation of water rights in Basin 37 by including the Big Wood and Little Wood River Basins within the proposed ESPA GWMA. Those basins should therefore not be included.

The second paragraph of Idaho Code Section 42-233b uses language that, out of context, might be twisted to provide arguable authority to the Director to manage a GWMA that includes tributary ground water basins. The language states:

When a ground water management area is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the *effects of ground water withdrawals on the aquifer* from which withdrawals are made and *on any other hydraulically connected sources of water.*

IDAHO CODE § 42-233b (emphasis added).¹

¹ It is noteworthy that this second paragraph of Section 42-233b says nothing about the process of “designation of a ground water management area.” It describes what the management plan “shall provide.” Only the first paragraph of the statute circumscribes the designation

A review of the statutory language contemplates the management of one thing—the effects of ground water withdrawals from “*the* aquifer.” Those effects are measured or evaluated in two places—the aquifer from which the withdrawal was made, and sources of water hydraulically connected to the designated aquifer. In long form, the plan authorized by Section 42-233b can provide for managing the *effects on the aquifer* of ground water *withdrawals from the aquifer*, and can also provide for managing the *effects on other hydraulically connected sources of water* by *withdrawals from the aquifer*.

This language does not state or reasonably imply that a ground water management plan can provide for managing the effects of ground water withdrawals from ground water basins outside the ESPA boundaries. At most, the language implies the management plan could provide for managing the effects of ground water withdrawals on other sources of water, hydraulically connected to the designated aquifer from which the withdrawals are made. In short, any management plan may only provide for managing effects of withdrawals from the designated aquifer and the effects of those aquifer withdrawals upon water sources that are hydraulically connected to the designated aquifer.

Logically, ground water withdrawals from the ESPA can only affect “hydraulically connected sources of water” that are fed by the ESPA. This conclusion stems from fundamentals of hydrology. Ground water withdrawals from the ESPA could not affect

process. So, the Director cannot reasonably rely upon the phrase “hydraulically connected sources of water” in the second paragraph to conclude he has power to determine that “tributary basins” belong in the proposed ESPA GWMA.

Furthermore, the second paragraph of Section 42-233b does not grant the Director authority to create a ground water management plan. Instead, the statute gives the Director only the authority to approve a ground water management plan. Sun Valley also seeks a declaratory ruling on this point from the Director.

tributary basins that provide flow to the ESPA, because those tributary basins are up gradient. No amount of ground water withdrawal from the ESPA could affect ground water levels in those basins. Additionally, Idaho Code Section 42-233b uses the single term, “the aquifer.” This connotes that the Director is empowered to manage only one aquifer per GWMA designation.

Unless the Director intends to redefine what *the aquifer* is—which he cannot do unilaterally—a ground water management plan in an ESPA GWMA must manage the effects of ground water withdrawals from the ESPA, as the plain language of the statute provides. This is important for two reasons. First, as set forth above, the management of ground water withdrawals from any aquifer other than the ESPA—such as the Big Wood River ground water basin—is not contemplated. Second, if a ground water withdrawal from the ESPA causes no effects in an upgradient tributary ground water basin such as the Big Wood River ground water basin, then such tributary basin should not be part of a plan and does not belong in the GWMA at all.²

Idaho Code Section 42-233b circumscribes the Director’s authority to regulate use of ground water withdrawals within the “ground water basin” designated as a “ground water management area.” Consequently, the Director has no authority to administratively regulate ground water withdrawals in any ground water basin outside of the designated basin. The regulatory authority granted by Idaho Code Section 42-233b does not include “managing the effects of ground water withdrawal on the [ESPA]” from “any hydraulically connected sources of water.” Such an interpretation completely ignores the statutory phrase, “effects . . . on hydraulically connected sources of water.”

² The analysis that the statutory language contemplates is strikingly similar to the analysis in which the Director must engage to determine an ACGWS and create or enlarge existing water districts. See IDAHO CODE § 42-237a.g; IDAPA 37.03.11.031.

The regulatory authority granted by the statute does not provide for management of withdrawals in “hydraulically connected sources of water” such as the Big Wood River ground water basin. The statute grants governmental power to manage the effects on those “hydraulically connected sources of water” resulting from withdrawals from the ESPA. Again, because the Director’s regulatory powers derive solely from the language of the statute, expanding the regulatory reach beyond the singular ground water basin described in the statute fails to meet the constitutional standards of due process.

C. IDWR’s Inclusion of Tributary Basins in the Proposed ESPA Ground Water Management Area Would Conflict with the SRBA Final Decree.

The Snake River Basin Adjudication (“SRBA”) generated more litigation than anyone predicted when the Idaho Legislature enacted Idaho Code Sections 42-1401, *et seq.* Fortunately, the SRBA District Court entered its Final Decree on August 25, 2014, thereby concluding virtually all of that litigation. The finality and integrity of that Final Decree would be attacked by the inclusion of “tributary basins” in a proposed ESPA GWMA.

This conclusion stems from analysis of Idaho Supreme Court authority and the SRBA Adjudication statutes. In *Rangen v. IDWR* (2016 Opinion No. 33), Docket Nos. 42775/42836, the Idaho Supreme Court evaluated the effect of Idaho Code Section 42-1420. It stated:

Except for certain enumerated exceptions inapplicable here, “[t]he decree entered in a general adjudication *shall be conclusive* as to the nature and extent of all water rights in the adjudicated water system.” IDAHO CODE § 42-1420 (emphasis added).

Where the partial decrees indicate that Rangen’s rights are surface water rights, that finding is conclusive in Rangen’s delivery call.

Slip op. at 11.

The Idaho Supreme Court has recognized:

A decree is important to the continued efficient administration of a water right. The watermaster *must look to the decree for instructions as to the source of the water*. *Stethem v. Skinner*, 11 Idaho 374, 479, 82 P. 451, 452 (1905). If the provisions define a water right, *it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree*. I.C. § 42-607 (1997).

State v. Nelson, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) (emphasis added).

This admonition applies here. Virtually all of the potentially impacted water rights in the Big Wood and Little Wood River Basins have been claimed and decreed with specific water right numbers.³ The prefix number designates the specific water basin selected by the Department as the identifier for the water rights in that basin.

Significantly, the Department, when it was a party to the SRBA, moved to reconsider certain orders by the SRBA District Court prohibiting the filing of a Director's Report that does not consist of the three parts described in Idaho Code Section 42-1411. *See* SRBA Case No. 39576, Order Re: Idaho Department of Water Resources' Motion to Reconsider; and Order Establishing Adjudication Reporting Areas, General Sequence and Test Reporting Areas at 1 (May 19, 1992) ("May 19, 1992 Order"), a true and correct copy of which is attached hereto as **Exhibit 3**. In doing so, the Director stated that "[a]dministrative boundaries for sub-basins for the entire state of Idaho were established by IDWR in the late 1960's." *See* SRBA Case No. 39576, Director's Brief in Support of Motion to Reconsider Orders at 6 (Feb. 14, 1992), a true and correct copy of which is attached hereto as **Exhibit 4**. They were established "for ease and efficiency in the administration of Idaho's water resources." *Id.* at 7. Since that time, those administrative basins have been used for administration, "and will continue to be used after the

³ Those water rights not decreed in the SRBA have been licensed by the Department with water right numbers indicating the same water basin prefix, i.e., 37.

conclusion of the SRBA for administration of rights determined in the SRBA, as well as for IDWR's other duties." *Id.* at 8. The Director stated that "[a]lteration of these boundaries would not only seriously impede IDWR's efforts in carrying out its duties in the SRBA, but would seriously disrupt IDWR's many other ongoing responsibilities in regulating and administering Idaho's waters." *Id.* The SRBA Court accepted this designation of separate hydrological basins and the sequencing of Director's Reports proposed by the Director. *See* May 19, 1992 Order at 2-5.

This fact is significant because of the statutory mandates of Idaho Code Section 42-1409. It required claimants for water rights in the SRBA to file a notice of claim on the Department's standard form. IDAHO CODE § 42-1409(4). The standard claim form required the claimant to include the source of water and the number of the water right, unless the right was "founded upon judicial decree not on file with the department" IDAHO CODE § 42-1409(1)(b) & (e). *See also* IDAPA 37.03.01.060.02(c) & (o) (requiring the identification of source and basis of claim, including the assigned water right number).

The water right number identified the right in the Director's Report, the subsequent partial decree, and all pleadings involving the water right in any contested subcase. In fact, the water right number was used to identify the subcase for that right in the SRBA. And, each partial decree identifies individual water rights with the basin-specific prefix number.

Consequently, since the decree is conclusive and provides the instructions for administration, the judicial determination of the water basin for each water right cannot be contested by the Director. *See State v. Nelson, supra.* As a result, the Director has no basis to determine that a water right decreed in a separate tributary basin can be administered as part of the ESPA ground water basin merely by designating a GWMA under Idaho Code

Section 42-233b. The tributary basin must be treated and administered separately, because of the conclusive effect of the SRBA Final Decree.

D. The Conjunctive Management Rules Supplement Section 42-233b and Clarify the Limitations on the Director's Authority.

In the Director's letter, he recites Idaho Code Sections 42-233a and 42-233b as the Idaho statutory provisions that grant him authority to create an ESPA GWMA. Importantly, the Director also notes that, in the exercise of such authority, "[o]ne of the issues needing consideration will be the areal extent of the groundwater management area." He then proceeds to list 22 tributary basins that the Department's technical information suggests may "impact[] water stored in the ESPA." The Director lists "several potential tools" available to address management of the ESPA (and possibly 22 additional basins), but the Director does not identify the Department's Conjunctive Management Rules.

"The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011).

[T]he Idaho Legislature has authorized the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." The Director has done so in the Conjunctive Management Rules (CM Rules), which were approved by the Legislature and became effective on October 7, 1994.

In re A&B Irrigation Dist., 155 Idaho 640, 650, 315 P.3d 828, 838 (2012) (quoting IDAHO CODE § 42-603). The CM Rules "give the Director the tools by which to determine 'how the various ground and surface water sources are interconnected, and how, when, where and to what extent

the diversion and use of water from one source impacts [others].” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007) (quoting *A&B Irrigation Dist.*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997)).

The Director’s authority to create the proposed ESPA GWMA, and limitations related to his power, are set forth within Idaho Code Section 42-233b and within the CM Rules. Administrative rules should be “construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement.” *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001). “IDAPA rules and regulations are traditionally afforded the same effect of law as statutes.” *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908, 104 P.3d 946, 950 (2004); *see also Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2003) (“A rule or regulation of a public administrative body ordinarily has the same force and effect of law and is an integral part of the statute under which it is made just as though it were prescribed in terms therein.”).

The CM Rules repeatedly and expressly provide that they apply to GWMA. The CM Rules “apply to *all situations* in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights.” IDAPA 37.03.11.020.01 (emphasis added). The CM Rules “govern the distribution of water from ground water sources and areas having a common ground water supply.” *Id.* Even more explicitly, the CM Rules “provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in . . . designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code.” IDAPA 37.03.11.020.06 (emphasis added).

Although Idaho Code Section 42-233b provides the Director with the authority to designate a GWMA, that authority has explicit limitations. In this case, in addition to the express language of that statute, the CM Rules provide applicable limitations.

1. The Director does not have the authority to create the proposed ESPA GWMA.

The Director should not create a GWMA where all water rights have been adjudicated and are the proper subject of a newly created or modified water district, pursuant to Idaho Code Section 42-604. The CM Rules demonstrate this limitation. First, directly on point, CM Rule 50 provides: that:

The Eastern Snake Plain area of common ground water supply *will* be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, *when the rights to the diversion and use of water from the aquifer have been adjudicated, or will* be designated a ground water management area.

IDAPA 37.03.11.050.01(d) (emphasis added).

The CM Rules provide that, upon the complete adjudication of ground water rights in the ESPA, a water district *will* be created or the ESPA ACGWS *will* be incorporated into an existing or expanded water district. The only condition before mandatory creation or incorporation is adjudication of ESPA water rights. A GWMA only was to be created, in the event necessary, before “the rights to the diversion and use of water from the aquifer have been adjudicated.” The disjunctive “or” following the statement requiring creation or expansion of a water district upon adjudication of the aquifer demands that conclusion. A GWMA is a pre-adjudication administrative tool not applicable to the areas contemplated in the proposed ESPA GWMA.

In proposing and adopting the CM Rules, the Department contemplated an “either/or” approach to water districts and GWMAs, dependent entirely upon the status of adjudication of water rights within the basin. Comparing CM Rule 30.05 and CM Rule 30.06 reveals that adjudication of the water rights at issue is the lynchpin. If “the water rights have been adjudicated,” the Department may treat the delivery call as a petition to create a new water district. IDAPA 37.03.11.030.05. If “the water rights have not been adjudicated,” the Department may treat the delivery call as a petition for designation of a GWMA. IDAPA 37.03.11.030.06.

Also, CM Rule 30.07(h) demonstrates that the designation of a GWMA should only occur if ground water supply is insufficient “and modification of an existing water district or creation of a new water district cannot be readily accomplished *due to the need to first obtain an adjudication of the water rights.*” IDAPA 37.03.11.030.07(h) (emphasis added). Water rights within the proposed ESPA GWMA have been adjudicated. The CM Rules do not contemplate the creation of a post-adjudication GWMA. Duly created or modified water districts supplant the legal authority to create a GWMA.

CM Rule 41 provides further evidence of this conclusion. It requires the Director to “utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule” when he enters an order upon a delivery call in a GWMA. IDAPA 37.03.11.041. Under CM Rule 40, relating to delivery calls within organized water districts, there is no similar requirement because the water rights within a water district have been adjudicated; those within a GWMA have not. Again, a GWMA is a pre-adjudication administrative tool. It does not apply to the areas described in the proposed ESPA GWMA.

Indeed, that is exactly how the Department has interpreted the issue in the past. *See* Section II.E. *infra*.

The CM Rules supplement Idaho Code Section 42-233b. They are integral to a complete understanding of the Department's administration of Idaho waters. The CM Rules clearly provide that a GWMA is a pre-adjudication tool to be replaced by water districts. Consequently, the proposed ESPA GWMA is not authorized under Idaho law.

2. Even if the Director has the authority to create the proposed ESPA GWMA, he must comply with the procedural requirements of the CM Rules and the Department's Procedural Rules.

As discussed *supra*, the CM Rules provide the tools to determine how various water sources are interconnected, and how, when, where, and to what extent the diversion and use of water from one source impacts others. *See AFRD No. 2, supra*. The Director's proposed ESPA GWMA clearly contemplates the interconnection of various sources of water, and an evaluation of the CM Rules in the context of the ground water management statutes cited by the Director is therefore appropriate. Administrative rules and regulations are interpreted the same way as statutes. *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011). Interpretation of administrative rules should begin with an examination of the literal words of the rule, and such should be given their plain, obvious, and rational meanings. *Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 242, 141 P.3d 1108, 1111 (2006). Again, the "*language should be construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement.*" *Mason v. Donnelly Club*, 135 Idaho at 586, 21 P.3d at 908 (emphasis added).

Under the CM Rules, an "area having a common ground water supply" ("ACGWS") is defined as:

A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.

IDAPA 37.03.11.010.01.

Two requirements must be satisfied. First, the ACGWS must be a ground water source. Second, the diversion of ground water from the source must affect water supply in the source or affect the flow of water in a surface water source.

A “ground water management area” is defined as “any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area.” IDAHO CODE § 42-233b.

And, a “critical ground water area” is defined as:

any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

IDAHO CODE § 42-233a.

Legally, a GWMA must be co-equal with an ACGWS, because it necessarily satisfies each requirement to constitute an ACGWS. First, for the purposes of water use and administration, a “ground water basin” is a “ground water source.”⁴ Second, evaluation of the sufficiency of “ground water to provide a reasonably safe supply,” based on current or projected

⁴ In theory, a “basin” might not be a “source,” but that would suggest the water within the basin was not the subject of appropriation and beneficial use. If a basin is not a source of water subject to diversion and use, neither the statutes nor the rules at issue here would apply.

withdrawals from a ground water basin, *see* § 42-233a, clearly contemplates that diversion from the basin “affects the ground water supply available to the holders of other ground water rights.” *See* IDAPA 37.03.11.010.01. It is self-evident that a GWMA must be an ACGWS.

Because a GWMA is an ACGWS, designation of an ESPA GWMA that includes tributary basins falling outside the boundaries of the existing ESPA ACGWS requires compliance with the CM Rules. Again, the CM Rules so provide. *See* IDAPA 37.03.11.020.06 (“These rules provide the basis for the designation of *areas of the state that have a common ground water supply* and the procedures that will be followed in . . . *designating such areas as ground water management areas* as provided in Section 42-233(b), Idaho Code.”) (emphasis added).

In particular, because a GWMA is an ACGWS, in order to designate a GWMA, the Director must first determine the applicable ACGWS. To do that, the Director must conduct a rulemaking, as CM Rule 50 demonstrates. In the alternative, and upon an appropriate petition by a water user pursuant to CM Rule 30, the Director must comply with CM Rule 31, which provides guidance and criteria concerning determinations of an ACGWS. Importantly, CM Rule 31 states that the Director’s ACGWS findings “shall be included in the Order issued pursuant to Rule Subsection 030.07.” IDAPA 37.03.11.031.05. Also, CM Rule 30.07 requires consideration of a contested case under the Department’s Rules of Procedure prior to entering such an order. IDAPA 37.03.11.030.07.

In sum, the Director may not, as suggested in his Letter, simply decide whether an ESPA GWMA, inclusive of 22 tributary basins, should be created “[a]fter hearing from water users at the public meetings and considering the issues.” Even if it were appropriate to create the contemplated ESPA GWMA, which it is not, the Director must hold a contested case hearing

upon petition by a party or a rulemaking in accordance with the Idaho Administrative Procedures Act concerning the boundaries of any ACGWS that will comprise such a GWMA, and otherwise comply with the CM Rules. Only then will the Director have the authority to designate an ACGWS as a GWMA (if at all), subject to governance in accordance with Idaho Code Section 42-233b.

3. The Director may not ignore his obligation to determine an ACGWS by citing Idaho Code Section 42-233b.

The foregoing limitations on the Director's authority under Section 42-233b and the CM Rules are supported by Judge Wildman's Memorandum Decision and Order in the matter of *Sun Valley Co. v. Spackman*, Case No. CV-WA-2015-14500 (Apr. 22, 2016) (the "Memorandum Decision"). Consequently, the Director's proposal to include Basin 37 in an enormous ESPA GWMA, without a procedurally proper determination of an ACGWS, would be an invalid collateral attack upon the findings and conclusions of the Memorandum Decision.

In that decision, the Court reversed the Director's denial of a motion to dismiss based on the calling party's failure to file a compliant petition under the CM Rules. *See* Memorandum Decision at 12-14. Among other problems with the delivery call, the calling party had failed to describe an ACGWS, as required by CM Rule 30. *See id.* The Director acknowledged that he must determine an ACGWS in order to resolve the water delivery call, but asserted he could do so under CM Rule 40, and denied the motion to dismiss. *See id.* at 8. Here, the Director has proposed an ESPA GWMA, suggesting he may create it after simply considering concerns expressed at open public meetings. In contrast to his position in *Sun Valley Co. v. Spackman*, the Director now refuses to acknowledge that he must determine an ACGWS as part of his proposed action. He does not account for the due process concerns associated with

unilaterally subjecting those within the untested and unmeasured boundaries of a proposed ESPA GWMA to curtailment.

By pointing to a different statute, the Director does not change his obligation to formally determine an ACGWS. The determination of an ACGWS was of primary importance to Judge Wildman. He stated:

Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. In the Court's estimation, determining the applicable area of common ground water supply is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water.

. . . .

The area of common ground water supply in a surface to ground water call defines the world of juniors whose rights to use ground water may be curtailed. It is paramount that junior users who may be found to be within that area be given proper notice and the opportunity to be heard.

Memorandum Decision at 9.

The fact that the proposed ESPA GWMA is not a surface to ground water delivery call made by a senior has no significance. Idaho Code Section 42-233b grants the Director curtailment authority, and subjects water users within a GWMA to additional regulatory oversight by the Department. In order to subject water users to the Director's jurisdiction and oversight in the foregoing water delivery call proceedings, Judge Wildman held that the law requires a formal pleading and determination to identify an ACGWS relative to the Big Wood and Little Wood River. The Director's attempt to simply designate a GWMA that includes, very generally, the Big Wood and Little Wood River basins is an improper collateral attack upon that holding. The Director must abide by the formalities required under Idaho law to identify and

designate an ACGWS relative to the proposed ESPA GWMA, before administering water users' withdrawal of water from the Big Wood and Little Wood River basins pursuant to Idaho Code Section 42-233b.

Commensurate with fundamental fairness and due process, if the Director intends to create a GWMA comprised of an ACGWS that includes the Big Wood River basin, the Raft River basin, the Palisades basin, and numerous others, ground water users in each basin are entitled to more than a roadshow of public meetings and a brief comment period. While there can be no dispute that informal proceedings are generally contemplated and authorized under the Idaho Administrative Procedures Act and the Department's Procedural Rules, "an agency cannot unilaterally decide to utilize informal procedures to the exclusion of formal proceedings."

Laughy v. Idaho Dep't of Transp., 149 Idaho 867, 872, 243 P.3d 1055, 1060 (2010). Here, the CM Rules do not contemplate informal proceedings to decide the boundaries of a GWMA, which is an ACGWS. They require either a contested case proceeding in accordance with the Department's Procedural Rules, *see* CM Rules 30.7 and 31, or alternatively, as CM Rule 50 illustrates, a formal rulemaking.

E. The Proposal to Designate an ESPA GWMA Inclusive of Water District No. 37 is Contrary to Prior Decisions of the Director Regarding GWMA Designations Related to the ESPA.

Idaho Code Section 42-233b was created to provide for the designation of ground water management areas as an alternative to the designation of the more serious critical ground water areas, and to allow the Director to approve permits on a controlled basis in these areas. *See* S. 7842, 47th Leg. (Idaho 1982) (statement of purpose). Through the designation of GWMA's, the Director has the power to manage the distribution of ground water resources in times of drought or decline in existing ground water. IDAHO CODE § 42-237a. Department

precedent in designating GWMA's establishes that the Director uses this power to limit or deny applications for ground water in areas where ground water is limited.

Water districts serve a similar purpose to designated GWMA's in that they allow the Director to control the distribution of water from natural water sources within an area needing management. *See* IDAHO CODE § 42-602. The procedure for establishing a water district differs from the procedure for designating a GWMA, but the result is the same; measured control and administration of water rights in a designated area. The Director describes the two as follows:

The Director has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights and yet allow full economic development of the state's underground water resources in the public interest. *See* Idaho Code §§ 42-226, 42-237a.g, and 42-602.

The Director has the general responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, as provided in chapter 6, title 42, Idaho Code and IDWR regulations.

Final Order Modifying the Boundaries of the American Falls Ground Water Management Area (Aug. 29, 2003) at 2, a copy of which is attached hereto as **Exhibit 5**. Because of the similarity in function, GWMA's are not meant to overlap water districts. This is made clear in the modification of the American Falls GWMA.

The American Falls GMWA was designated by Order on August 3, 2001, pursuant to Idaho Code Section 42-233b. *See* Order Designating the American Falls Ground Water Management Area (Aug. 3, 2001), a copy of which is attached hereto as **Exhibit 6**. The Twin Falls Canal Company and the North Side Canal Company submitted a written request asking for the Director to promptly designate a GWMA for Basin 35 pursuant to Idaho Code

Section 42-233(b). *Id.* at 1. The Department considered the request to be a petition for creation of a GWMA, including all of Basin 35, in accordance with Rule of Procedure, IDAPA 37.03.11030.06. *Id.* However, the Department considered the action to designate the GWMA for this portion of the ESPA as “a result of the Director’s independent initiative and . . . not . . . in response to the petition of the canal companies.” *Id.*

Two years later, the Director issued a Final Order Modifying the Boundaries of the American Falls GWMA because Water District Nos. 120 and 130 were established and these districts covered portions of the GWMA in Administrative Basins 35, 36, 41, and 43. *See August 29, 2003 Final Order* at 1. The Director stated that the GWMA was no longer needed in these portions because it covered Water District Nos. 120 and 130 and its “continued existence within the Water District boundaries may cause confusion in the administration of water rights.”

Id. The Director went on to say:

The establishment of Water District Nos. 120 and 130, which includes the area within the boundaries of the American Falls GWMA over the ESPA located in Administrative Basins 35, 36, 41, and 43, provides the Director with the more comprehensive water administration authorities available under chapter 6, title 42, Idaho Code. These authorities together with the “Rules for Conjunctive Management of Surface and Ground Water Resources” (IDAPA 37.03.11) make it unnecessary to retain the current boundaries of the American Falls GWMA.

Id. at 2.

The Department’s attempt to designate an ESPA GWMA that overlaps established water districts is contrary to the Department’s past position. The existence of a water district avoids the need for a GWMA and the existence of a GWMA within a water district will only confuse the administration of water rights in the areas. The water administration authorities

already in place give the Department the authority to manage water use, and no additional administration procedure is required.

F. Any Order to “Cease or Reduce Withdrawal of Water” Under Idaho Code Section 42-233b Must Include Water Rights for Domestic Purposes.

The Idaho Legislature enacted the Idaho Ground Water Act in 1951. *See* 1951 Idaho Sess. 423. This significant legislation provided, for the first time in Idaho, a comprehensive framework for regulation of the use of ground water. Part of this framework included the specific admonition of Idaho Code Section 42-229. It states:

The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of the application permit and license procedure as provided in this act; provided however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of sections 42-201 -- 42-225, Idaho Code, may be completed under the provisions of said sections and rights to use of ground water may be thereby acquired. But *the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act.*

(Emphasis added.)

This language affirmatively answers any question of the inclusion of domestic water rights in any “cease or reduce withdrawal of water” order under Idaho Code Section 42-233b.

Without question, Idaho Code Section 42-227 “specifically excepted” excavation and use of ground water for domestic purposes from “the permit requirement under section 42-229, Idaho Code.” IDAHO CODE § 42-227. However, this exception does not extinguish the requirements of appropriation of the water by diversion and application to a

beneficial use. In fact, the last sentence of Idaho Code Section 42-227 states, “Rights to ground water for such domestic purposes may be acquired by withdrawal and use.” IDAHO CODE § 42-227.

Consequently, any domestic use water rights that were decreed in the SRBA constitute water rights subject to administration under the mandate of Idaho Code Section 42-229 (“administration of all rights to the use of ground water . . . shall . . . be governed by the provisions of this act.”). They all were judicially confirmed as water rights created under the constitutional method of appropriation: “withdrawal and (beneficial) use.” IDAHO CODE § 42-229.

Here, there are as many as 10,724 decreed domestic ground water rights within the Director’s proposed ESPA GWMA. *See* Exhibit B to the Declaration of Leni Patton. In sum, decreed domestic ground water rights in the implicated administrative basins collectively have a diversion rate of 498.117 cfs for domestic use, as well as 214.557 cfs for stockwater. *See id.* A conversion of these decreed domestic ground water rights from instantaneous flow rates to annual acre-feet reveals potential decreed water use on the order of 515,950 acre-feet of ground water annually. That sum is significant.

If the Director proceeds to create the proposed ESPA GWMA—which he should not—these decreed domestic use water rights must be subject to any order under Section 42-233b to “cease or reduce withdrawal of water,” just like every other type of decreed or licensed water right. Idaho Code Section 42-233b mandates this result.

The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, *shall order* those water right holders on a time priority basis, within the area determined by the director [the GWMA], to cease or reduce withdrawal of water until

such time as the director determines there is sufficient ground water

IDAHO CODE § 42-233b (emphasis added).

This language does not exempt domestic use water rights. Consequently, if the director issues an order based on insufficiency of water, decreed or licensed domestic use water rights within the proposed ESPA GWMA must “cease or reduce withdrawal of water” along with all other water rights, upon “a time priority basis.” The plain language of the Idaho Ground Water Act mandates this result.

G. IDAPA 04.11.01.420-425 Apply to Department Proceedings.


Idaho Code Section 67-5220(5)(b) requires that an agency promulgating “its own procedures shall include in the rule adopting its own procedures *a finding that states the reasons why* the relevant portion of the attorney general’s rules were inapplicable to the agency under the circumstances.” IDAHO CODE § 67-5220(5)(b) (emphasis added). No such finding stating the reasons why the relevant portion of the rules were inapplicable is included within the Department’s Procedural Rules. *See* IDAPA 37.01.01.050. Accordingly, IDAPA 04.11.01.423 indeed does apply to the Department. *See* IDAHO CODE § 67-5220(5)(a).


III. CONCLUSION

For the foregoing reasons, Sun Valley respectfully requests a declaration by the Director in conformance with the requested relief set forth in the Petition.

DATED this 19th day of October, 2016.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Scott L. Campbell – Of the Firm
Attorneys for Sun Valley Company

By 
Matthew J. McGee – Of the Firm
Attorneys for Sun Valley Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of October, 2016, I caused a true and correct copy of the foregoing **SECOND AMENDED PETITION FOR DECLARATORY RULING REGARDING CREATION OF ESPA GROUND WATER MANAGEMENT AREA** to be served by the method indicated below, and addressed to the following:

Gary Spackman
Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front St.
P.O. Box 83720
Boise, ID 83720-0098

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Courtesy copies have also been provided by the method indicated below and addressed to the following:

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, ID 83318
Facsimile (208) 878-2548
*Attorneys for American Falls Reservoir
District #2 and Minidoka Irrigation District
Intervenor Surface Water Coalition*

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

John K. Simpson
Travis L. Thompson
Paul L. Arrington
BARKER RSHOLT & SIMPSON LLP
163 Second Ave. W.
P.O. Box 63
Twin Falls, ID 83303-0063
Facsimile (208) 735-2444
*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
Canal Company
Intervenor Surface Water Coalition*

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
380 S. 4th St., Suite 103
Boise, ID 83702
Facsimile (208) 287-0864
Attorneys for Intervenor City of Bellevue

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

Joseph F. James
BROWN & JAMES
130 4th Ave. W.
Gooding, ID 83330
Facsimile (208) 934-4101
*Attorneys for Intervenor Big Wood & Little
Wood Water Users Association*

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

Michael C. Creamer
GIVENS PURSLEY LLP
601 W. Bannock St. (83702)
P.O. Box 2720
Boise, ID 83701-2720
Facsimile (208) 388-1300
Attorneys for Intervenor City of Hailey

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

A. Dean Tranmer
POCATELLO CITY ATTORNEY'S OFFICE
911 N. 7th Ave. (83201)
P.O. Box 4169
Pocatello, ID 83205
Facsimile (208) 239-6986
Attorneys for Intervenor City of Pocatello

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

Sarah A. Klahn
Mitra M. Pemberton
WHITE & JANKOWSKI, LLP
511 16th St., Suite 500
Denver, CO 80202
Facsimile (303) 825-5632
Attorneys for Intervenor City of Pocatello

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

Randall C. Budge
Thomas J. Budge
RACINE OLSON NYE BUDGE & BAILEY
CHARTERED
201 E. Center St. (83201)
P.O. Box 1391
Pocatello, ID 83204-1391
Facsimile (208) 232-6109
*Attorneys for Intervenor Idaho Ground Water
Appropriators, Inc.*

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

Dylan B. Lawrence
J. Will Varin
VARIN WARDWELL LLC
242 N. 8th St., Suite 220
P.O. Box 1676
Boise, ID 83701-1676
Facsimile (866) 717-1758
*Attorneys for Intervenor Water District 37-B
Ground Water Association*

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile


Scott L. Campbell

EXHIBIT 1



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
RECEIVED for

JUL 11 2016

MOFFATT, THOMAS, BARRETT,
ROCK & FIELDS, CHTD.

July 7, 2016

Dear Interested Party:

The Idaho Department of Water Resources ("IDWR") is considering creating a ground water management area for the Eastern Snake Plain Aquifer (ESPA). Potentially affected water users are invited to participate in upcoming public meetings to discuss the possible creation of a ground water management area for the ESPA. A schedule of the public meetings is printed at the end of this letter. A separate schedule is also enclosed.

At the public meetings: (1) the Idaho Department of Water Resources will present hydrologic data and information; (2) IDWR will discuss the legal standards for the creation of a ground water management area; and (3) potentially affected water users and interested persons and entities may interact with IDWR and express their views. After hearing from water users at the public meetings and considering the issues, I will decide whether a ground water management area should be created.

The Idaho Department of Water Resources has documented declining ESPA levels, Snake River flows, and spring discharges, particularly since the turn of this century. Holders of senior priority water rights have filed several calls for priority delivery of water. IDWR has conducted hearings, and has rendered decisions resulting in orders of curtailment of junior priority water rights and associated mitigation obligations.

A comprehensive hydrogeologic model of the aquifer has been developed and used for various purposes, including responding to water delivery calls and evaluating aquifer stabilization efforts. IDWR continues to develop data and track conditions in the ESPA.

To briefly summarize, after an extended period of increasing aquifer levels and spring discharge, ground water levels and water volume in the ESPA have been declining since about the mid 1950s. Spring discharges from the ESPA have also declined. From 1912 to 1952 the ESPA gained an estimated 17 million acre-feet of storage. Between 1952 and 2013 the aquifer lost an estimated 11 million acre-feet. There have been periods of recovery (increased aquifer levels and spring discharge) since 1952, but each subsequent recovery peak is lower than the previous peak and each declining trough is lower than the previous trough.

These trends are disturbing. It is clear that the aquifer storage has declined substantially from peak levels. Discharges from springs delivering water from the aquifer have correspondingly declined as ground water elevations in the ESPA and total water stored in the ESPA have declined.

The ESPA is a vital source of water for the State of Idaho. Its value cannot be overstated. Unless the trend that has existed since 1952 is at least arrested, the current declines in aquifer storage and spring discharge will continue. Multiple causes for the declines in aquifer storage and spring discharge include: (1) changing climate patterns; (2) increasing surface water irrigation efficiencies resulting in less incidental recharge; (3) the development of approximately one million acres of land irrigated by ground water within the ESPA; and (4) the development of a significant number of additional irrigated acres in areas that have historically contributed water to the ESPA. Water users and the Water Resources Board are undertaking efforts to enhance recharge and reduce ground water pumping to counter the declines. However, future conditions, including climate and water use practices are unknown.

Idaho Code Section 42-233b authorizes the creation of ground water management areas. It defines a ground water management area as: "... any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area."

Idaho Code Section 42-233a defines a critical ground water area as: "... any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources."

The holders of senior priority water rights who filed numerous water delivery calls with IDWR have asserted that the ESPA presently does not have sufficient ground water to provide a reasonably safe supply. Without dispute, unless the trend that has existed since 1952 is at least arrested, the current conditions will be exacerbated. The question is whether the ESPA is approaching the conditions of a critical ground water area (not having sufficient ground water to provide a reasonably safe supply).

Section 42-233b identifies several potential tools available to the Director within a ground water management area to properly manage the resource:

1. Approve a ground water management plan for the area. A ground water management plan would manage ground water withdrawals on the aquifer and hydraulically connected sources to ensure a reasonably safe supply of ground water. Components of a recently completed settlement agreement between the Surface Water Coalition and the Idaho Ground Water Appropriators may be a template for an initial management plan.
2. Consider new appropriations of water only after determining that sufficient water is available. This would be consistent with current practices.

3. Require all water right holders within the area to report withdrawals of ground water and other necessary information. Many users of water from the ESPA currently or soon must measure and report their diversions of ground water.
4. If the Director determines the ground water is insufficient to meet the needs of water right holders, junior users may be required to cease diversions.

The formation of a ground water management area would have distinct advantages:

1. Rather than only administering existing disjointed water calls and mitigation plans, the Department can consider the aquifer as a whole. In contrast, under conjunctive administration the Department can only administer to individual water delivery calls. Delivery calls are manifest symptoms of a larger problem with the ESPA. The problem is the widespread and long term decline of the aquifer storage volume by over 11 million acre-feet and associated reduction in spring discharges. A ground water management area focuses treatment on the problem, not just the symptoms.
2. Conjunctive management by water right priority results in sporadic curtailment orders and associated mitigation only in years when the water supply is insufficient to satisfy the senior priority water rights. In years when the supply is sufficient, there is no curtailment or mitigation. In years when the supply is deficient, the curtailment/mitigation obligations can be very large. Sporadic water right administration does not consistently address the chronic degradation of the ESPA. Management through a ground water management area designation may better assure that the aquifer stabilization measures are achieved.

One of the issues needing consideration will be the areal extent of the ground water management area. The Department's technical information suggests that the area that impacts water stored in the ESPA and spring discharge extends into tributary basins:

Clover Creek	Birch Creek	Palisades	Bannock Creek
Thorn Creek	Medicine Lodge Creek	Willow Creek	Rock Creek
Big Wood River	Beaver Creek	Blackfoot River	Raft River
Little Wood River	Camas Creek	Ross Fork	Goose Creek
Big Lost River	Henry's Fork	Portneuf River	Big Cottonwood Creek
Little Lost River	Teton River		

Water users in those areas are invited to participate.

The Department will conduct a series of informational meetings to further inform water users of the concerns leading to this effort and to hear from them:

Meeting Date and Time	Meeting Location
July 25, 2016 at 8:30 a.m.	Minnie Moore Room, Community Campus Building 1050 Fox Acres Road Hailey, Idaho 83333
July 25, 2016 at 2:30 p.m.	Butte County High School Auditorium 120 N. Water Street Arco, Idaho 83213
July 25, 2016 at 7:00 p.m.	West Jefferson High School Auditorium 1260 East 1500 North Terreton, Idaho 83450
July 26, 2016 at 8:30 a.m.	AmericInn Lodge & Suites 1098 Golden Beauty Drive Rexburg, Idaho 83440
July 26, 2016 at 2:00 p.m.	Blackfoot Senior Center 20 East Pacific Blackfoot, Idaho 83221
July 26, 2016 at 7:00 p.m.	Best Western 1415 Bench Road Pocatello, Idaho 83201
July 27, 2016 at 9:00 a.m.	Marsh Valley Senior Center 21 S. Main Street Downey, Idaho 83234
July 27, 2016 at 3:00 p.m.	Raft River High School Auditorium 55 1 st West Malta, Idaho 83342
July 27, 2016 at 7:30 p.m.	Best Western/Burley Inn & Convention Center 800 N. Overland Avenue Burley, Idaho 83318
July 28, 2016 at 9:00 a.m.	Jerome Middle School 520 10 th Avenue West Jerome, Idaho 83338

The meetings will include a presentation on the aquifer by Department Staff, discussion of the Director's role and decision process, and an opportunity to hear from water users.

Sincerely,


Gary Spackman
Director



IDAHO DEPARTMENT OF WATER RESOURCES

SCHEDULE OF PUBLIC WATER MEETINGS FOR PROPOSED GROUND WATER MANAGEMENT AREA IN THE EASTERN SNAKE PLAIN AQUIFER

Meeting Date and Time	Meeting Location
July 25, 2016 at 8:30 a.m.	Minnie Moore Room, Community Campus Building 1050 Fox Acres Road Hailey, Idaho 83333
July 25, 2016 at 2:30 p.m.	Butte County High School Auditorium 120 N. Water Street Arco, Idaho 83213
July 25, 2016 at 7:00 p.m.	West Jefferson High School Auditorium 1260 East 1500 North Terreton, Idaho 83450
July 26, 2016 at 8:30 a.m.	AmericInn Lodge & Suites 1098 Golden Beauty Drive Rexburg, Idaho 83440
July 26, 2016 at 2:00 p.m.	Blackfoot Senior Center 20 East Pacific Blackfoot, Idaho 83221
July 26, 2016 at 7:00 p.m.	Best Western 1415 Bench Road Pocatello, Idaho 83201
July 27, 2016 at 9:00 a.m.	Marsh Valley Senior Center 21 S. Main Street Downey, Idaho 83234
July 27, 2016 at 3:00 p.m.	Raft River High School Auditorium 55 1 st West Malta, Idaho 83342
July 27, 2016 at 7:30 p.m.	Best Western/Burley Inn & Convention Center 800 N. Overland Avenue Burley, Idaho 83318
July 28, 2016 at 9:00 a.m.	Jerome Middle School 520 10 th Avenue West Jerome, Idaho 83338

EXHIBIT 2

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

SUN VALLEY COMPANY, a Wyoming corporation,

Petitioner,

vs.

GARY SPACKMAN in his official capacity as the
Director of the Idaho Department of Water Resources;
and the IDAHO DEPARTMENT OF WATER
RESOURCES,

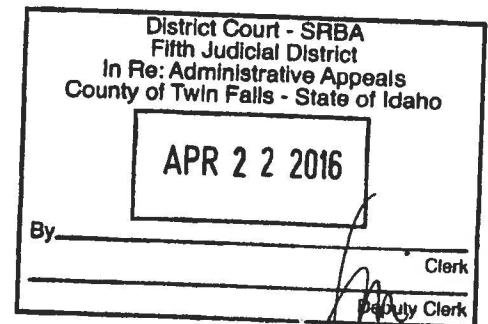
Respondents,

and

CITY OF KETCHUM, CITY OF FAIRFIELD,
WATER DISTRICT 37-B GROUNDWATER
GROUP, BIG WOOD & LITTLE WOOD WATER
USERS ASSOCIATION, SOUTH VALLEY
GROUND WATER DISTRICT, ANIMAL
SHELTER OF WOOD RIVER VALLEY, DENNIS J.
CARD and MAUREEN E. MCCANTY, EDWARD
A LAWSON, FLYING HEART RANCH II
SUBDIVISION OWNERS ASSOCIATION, INC.,
HELIOS DEVELOPMENT, LLC, SOUTHERN
COMFORT HOMEOWNER'S ASSOCIATION,
THE VILLAGE GREEN AT THE VALLEY CLUB
HOMEOWNERS ASSOCIATION, INC., AIRPORT
WEST BUSINESS PARK OWNERS ASSN INC.,
ANNE L. WINGATE TRUST, AQUARIUS SAW
LLC, ASPEN HOLLOW HOMEOWNERS, DON R.
and JUDY H. ATKINSON, BARRIE FAMILY
PARTNERS, BELLEVUE FARMS LANDOWNERS
ASSN, BLAINE COUNTY RECREATION
DISTRICT, BLAINE COUNTY SCHOOL
DISTRICT #61, HENRY and JANNE BURDICK,
LYNN H. CAMPION, CLEAR CREEK LLC,
CLIFFSIDE HOMEOWNERS ASSN INC, THE
COMMUNITY SCHOOL INC, JAMES P. and JOAN

Case No. CV-WA-2015-
14500

**MEMORANDUM
DECISION AND ORDER**



CONGER, DANIEL T. MANOOGIAN)
REVOCABLE TRUST, DONNA F. TUTTLE)
TRUST, DAN S. FAIRMAN MD and MELYNDA)
KIM STANDLEE FAIRMAN, JAMES K. and)
SANDRA D. FIGGE, FLOWERS BENCH LLC,)
ELIZABETH K. GRAY, R. THOMAS GOODRICH)
and REBECCA LEA PATTON, GREENHORN)
OWNERS ASSN INC, GRIFFIN RANCH)
HOMEOWNERS ASSN and GRIFFIN RANCH PUD)
SUBDIVISION HOMEOWNERS ASSN INC,)
GULCH TRUST, IDAHO RANCH LLC, THE)
JONES TRUST, LOUISA JANE H. JUDGE, RALPH)
R. LAPHAM, LAURA L. LUCERE, CHARLES L.)
MATTHIESEN, MID VALLEY WATER CO LCC,)
MARGO PECK, PIONEER RESIDENTIAL &)
RECREATIONAL PROPERTIES LLC, RALPH W.)
& KANDI L. GIRTON 1999 REVOCABLE TRUST,)
RED CLIFFS HOMEOWNERS ASSOCIATION, F.)
ALFREDO REGO, RESTATED MC MAHAN 1986)
REVOCABLE TRUST, RHYTHM RANCH)
HOMEOWNERS ASSN, RIVER ROCK RANCH)
LP, ROBERT ROHE, MARION R. and ROBERT M.)
ROSENTHAL, SAGE WILLOW LLC, SALIGAO)
LLC, KIRIL SOKOLOFF, STONEGATE)
HOMEOWNERS ASSN INC, SANDOR and TERI)
SZOMBATHY, THE BARKER LIVING TRUST,)
CAROL BURDZY THIELEN, TOBY B. LAMBERT)
LIVING TRUST, VERNON IRREVOCABLE)
TRUST, CHARLES & COLLEEN WEAVER,)
THOMAS W. WEISEL, MATS and SONYA)
WILANDER, MICHAEL E. WILLARD, LINDA D.)
WOODCOCK, STARLITE HOMEOWNERS)
ASSOCIATION, GOLDEN EAGLE RANCH)
HOMEOWNERS ASSN INC, TIMBERVIEW)
TERRACE HOMEOWNERS ASSN, and)
HEATHERLANDS HOMEOWNERS)
ASSOCIATION INC.,)

Intervenors.)

IN THE MATTER OF DISTRIBUTION OF WATER)
TO WATER RIGHTS HELD BY MEMBERS OF)
THE BIG WOOD & LITTLE WOOD WATER)
USERS ASSOCIATION DIVERTING FROM THE)
BIG WOOD AND LITTLE WOOD RIVERS)

I.
STATEMENT OF THE CASE

A. Nature of the case.

This case originated when the Sun Valley Company ("Sun Valley") filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). Under review is the Director's *Order Denying Sun Valley Company's Motion to Dismiss* issued on July 22, 2015 ("*Final Order*"). The *Final Order* denies Sun Valley's request to dismiss two requests for administration submitted by members of the Big Wood and Little Wood Water Users Association ("Association"). Sun Valley asserts that the *Final Order* is contrary to law and requests that the Court set it aside and remand with instructions to dismiss the requests for administration.

B. Course of proceedings and statement of facts.

This case involves a demand for the priority administration of water. The seniors are Association members located in water district 37. R., pp.1-5; LW R., pp.1-5.¹ They hold approximately 80 senior water rights that divert from the Big Wood and Little Wood Rivers. *Id.* In two letters to the Director dated February 23, 2015, the seniors assert they are short water due to junior use. *Id.* They demand priority administration of their surface water rights and hydrologically connected ground water rights within water district 37. *Id.* The Director informed the seniors he would treat the requests for administration as delivery calls under the CM Rules and proceeded to initiate two contested case proceedings.² R., p.6; LW R., p.6. The first, designated IDWR docket number CM-DC-2015-001, involves those seniors that divert from the Big Wood River. *Id.* The second, designated IDWR docket number CM-DC-2015-002, involves those diverting from the Little Wood River. *Id.*

The Director identified junior water users he determined may be affected by one or both of the calls. R., p.12. He proceeded to serve notice of the filing of the calls on those juniors. *Id.*

¹ Two agency records make the record in this matter. The first arises out of IDWR Docket No. CM-DC-2015-001, relating to the requests for priority administration of water rights diverting from the Big Wood River. The citation "R., p. __" refers to that agency record. The second arises out of IDWR Docket No. CM-DC-2015-002, relating to the requests for priority administration of water rights diverting from the Little Wood River. The citation "LW R., p. __" refers to that agency record.

² The term "CM Rules" refers to Idaho's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

The notice invited the juniors to participate in contested case proceedings and warned that if they did not they “may still be legally bound by the results of the contested case proceedings.” *Id.*

On June 25, 2015, Sun Valley moved the Director to dismiss the calls for their failure to comply with applicable filing requirements. *Id.* at 382-402. Among other things, it argued that Rule 30 of the CM Rules governs the calls and that the seniors did not satisfy the filing requirements of that Rule. *Id.* In his *Final Order*, the Director denied Sun Valley’s *Motion*. *Id.* at 888-898. He held the calls are governed by Rule 40 of the CM Rules and that the seniors’ letters meet the filing requirements of that Rule. *Id.* Sun Valley subsequently filed a *Motion* asking the Director to review and revise his *Final Order*. *Id.* at 963-977. The Director denied the *Motion* on October 16, 2015. Supp. R., pp.84-88.

Meanwhile, on August 19, 2015, Sun Valley filed a *Petition for Judicial Review*, asserting that the Director’s *Final Order* is contrary to law. The case was reassigned by the clerk of the court to this Court on August 28, 2015. On September 29, the Court entered an *Order* permitting the Intervenors to appear as parties to this proceeding. Although the administrative proceedings pertaining to the calls have not concluded, the Director entered an *Order* designating the *Final Order* as final and subject to judicial review on October 15, 2015. Supp. R., pp.71-74. This was done pursuant to the joint motion and stipulation of the parties. *Id.* at 9-13; 72. Sun Valley subsequently filed an *Amended* and *Second Amended Petition for Judicial Review*. A hearing on the *Second Amended Petition* was held before this Court on March 3, 2016. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day, or March 4, 2016.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it 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. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). 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. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner 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).

III.

ANALYSIS

A. Introductory analysis.

The issue before the Court is whether the Director properly denied Sun Valley's *Motion to Dismiss*. To address the issue the Court must determine what set of procedures govern the calls. The CM Rules provide the "procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001. The Rules do not provide a single set of procedures uniform to all calls. Rather, they provide three sets of procedures, the application of which turns on the circumstances surrounding the call. These are set forth in Rule 30, 40 and 41 respectively. Rule 41 can be dispensed with for the purposes of this decision as it applies to calls made by senior ground water right holders. IDAPA 37.03.11.041.01. That leaves the Court to evaluate Rule 30 and Rule 40.

Neither Rule squarely applies to the circumstances of the Association's calls. Rule 30 presumes that the call is made "against the holders of junior-priority ground water rights within areas of the state not in organized water districts. . . ." IDAPA 37.03.11.030. That is not the case here. There are numerous organized water districts in IDWR Basin 37, including water district 37, 37B, 37N, 37O and 37U. Rule 40 presupposes that the call is made against "the holders of junior-priority ground water rights from *areas having a common ground water supply* in an organized water district." IDAPA 37.03.11.040 (emphasis added). Again, that is not the

case here. All parties agree that the potentially affected juniors are *not* in an area of the state designated as having a common ground water supply. Thus, while the CM Rules purport to “apply to all situations in the state” where junior ground water use causes material injury to a senior, an argument can be made that one situation is unaccounted for. IDAPA 37.03.11.020.01. That situation, which is present here, is where juniors potentially subject to a call are in organized water districts, but are not within an area of the state designated as having a common ground water supply.

How did this happen? At the time the CM Rules were promulgated, most ground water rights in the state had not been incorporated into water districts.³ As a result, the CM Rules made some assumptions on how this would occur and the resulting effect. The Rules presume the boundary of a water district which encompasses ground water rights will be co-extensive with the boundary of an area of the state designated as having a common ground water supply.⁴ This presumption pervades the Rules. Were this presumption true, the procedures set forth in Rule 30 and Rule 40 would interact flawlessly with one another. Where affected ground water rights are not in an organized water district, the Rules assume that area of the state has not been designated as having a common ground water supply. In that situation, Rule 30 clearly applies. On the other hand, where affected ground water rights are in an organized water district, the Rules presume the water district has been designated as an area of the state having a common ground water supply. In that situation, Rule 40 applies. However, for reasons that are not before the Court the presumption that the boundary of a water district will be co-extensive with the boundary of an area of common ground water supply has not materialized.

³ See e.g., I.C. § 42-604 (providing that the statutory criteria for the creation of water districts “shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof”).

⁴ There is some basis in law for this assumption. In many instances ground water rights, once decreed, are incorporated into an existing water district. That existing water district would have been formed originally to effectuate the administration of solely surface water rights on a given surface water source. To incorporate ground water rights into the district, the Director is required to make the determination that the ground water rights are hydraulically connected to the surface water source. I.C. § 42-237a.g. Further, if the Director determines that no hydraulic connection to the surface source exists then incorporate such rights into a separate water district. *Id.* Therefore, the assumption could be made that once ground water rights are incorporated into an existing water district, the boundary of that district will be co-extensive with the area of the state having a common ground water supply relative to the surface water source that acted as the basis for the original formation of the district. However, for reasons set forth herein, this assumption has not materialized in reality.

An example is illustrative. Consider the Eastern Snake Plain Aquifer (“ESPA”). Through the rulemaking process, the ESPA was designated as an area of the state having a common ground water supply relative to the Snake River. IDAPA 37.03.11.050. It is the only area of the state to have been designated as having a common ground water supply under the CM Rules. *Id.* A contemporary review of the boundary of the ESPA area of common ground water supply reveals that it is not coextensive with the boundary of any single water district. To the contrary, it encompasses many water districts (i.e., water district 110, 120, 130, etc.). There are even water districts, such as water district 37, that straddle the boundary of the ESPA area of common ground water supply. R., p.126. That the ESPA area of common ground water supply encompasses many water districts and partially encompasses others is not a possibility envisioned by the CM Rules.

That such is the case is evidenced by the Rules themselves. The ESPA area of common ground water supply was created well before ground water rights in that area were incorporated into water districts. The CM Rules contemplated that those ground water rights would eventually be incorporated into a single water district co-extensive with the ESPA area of common ground water supply:

The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated

IDAPA 37.03.11.050.01.d. This has not occurred. Although adjudicated, ground water rights located in the ESPA area of common ground water supply have been incorporated into many waters districts, the boundaries of which appear to bear no relation to the boundary of the area of common ground water supply.⁵ Therefore, although the CM Rules presumed the boundary of the ESPA area of common ground water supply would be co-extensive with a single water district, this presumption is not reflected by reality.

The ESPA example is representative of a larger trend. The CM Rules’ assumption that the boundary of a water district will reflect the boundary of an area designated as having a common ground water supply is not materializing. Water district 37 – the district in which the

⁵ Ground water rights incorporated into a water district must share a common ground water supply. However, not all ground water rights within the area of common ground water supply have been incorporated in to the water district. As such, the area of common ground water supply extends beyond the boundaries of the water district.

seniors in this case reside – is representative of this trend. The southern portion the district is within the boundary of the ESPA area of common ground water supply. *Id.* at 125. The northern portion of the district is not. *Id.* at 126. It lies in an area of the state that has not been designated as having a common ground water supply. *Id.* The district is inclusive of both surface and ground water rights, all of which are hydraulically connected to the Big Wood and Little Wood Rivers. However, no party argues that the boundary of water district 37 is one and the same with that area of the state having a common ground water supply relative to those rivers. The consensus appears to be that that area is larger than water district 37 and, like the ESPA area of common ground water supply, encompasses multiple water districts.

In this case, the Director denied Sun Valley's *Motion to Dismiss* because he determined the Association's calls are governed by Rule 40. He arrived at that decision by applying the simple dichotomy that Rule 40 applies when affected juniors are in organized water districts and Rule 30 applies when they are not. Applying that dichotomy would suffice if, as the Rules presume, the boundary of a water district is co-extensive with that of the area of common ground water supply. This introductory analysis establishes that is not the case, and it should be noted that the Director does not even argue that such is the case. As will be shown below, the fact that juniors are in organized water districts is not necessarily relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water. Much more relevant, in fact critical, to processing such a call is identifying that area of the state which has a common ground water supply relative to the senior's surface water source and the junior ground water users located therein. Since it is Rule 30 that provides the procedures and criteria for making this determination, the Court, for the reasons sets forth herein, holds that the Director's determination that Rule 40 governs the calls must be reversed and remanded.

B. Rule 30 of the CM Rules sets forth the procedures governing the Association's calls and, in conjunction with Rule 31, provides the procedures and criteria for determining that area of the state having a common ground water supply relative to the Big Wood and Little Wood Rivers.

All parties agree that an area of common ground water supply applicable to the Big Wood and Little Wood Rivers must be determined. They disagree how this should happen and as to the rules and procedures that should govern. An area having a common ground water supply is defined in pertinent part as “[a] ground water source within which the diversion and use

of ground water or changes in ground water recharge affect the flow of water in a surface water source.” IDAPA 37.03.11.010.01. Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. In the Court’s estimation, determining the applicable area of common ground water supply is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water.

There is only one area of the state that has been determined as having an area of common ground water supply under the CM Rules. That area is the ESPA area of common ground water supply. IDAPA 37.03.11.050. Some parties argue that the fact the seniors are located within the ESPA area of common ground water supply has some legal significance. It does not. While it is true a portion of water district 37 is located within the ESPA area of common ground water supply, the ESPA area of common ground water supply is not relevant to the instant calls. It defines an area of the state having a common ground water supply relative to the Snake River. The seniors do not divert from the Snake River, but rather from the Big Wood and Little Wood Rivers. Therefore, to process the Association’s calls, a determination must be made identifying an area of the state that has a common ground water supply relative to the Big Wood and Little Wood Rivers and the junior ground water users located therein.

By their terms, the CM Rules “provide the basis for the designation of areas of the state that have a common ground water supply” IDAPA 37.03.11.020.06. The Director argues that this determination may be made under Rule 40. Sun Valley and the Water District 37-B Groundwater Group argue the determination must be made under Rule 30. The Court agrees with the latter.

- i. **Rule 30 provides procedures and processes necessary to safeguard juniors’ due process rights when determining an area of common ground water supply.**

The area of common ground water supply in a surface to ground water call defines the world of juniors whose rights to use ground water may be curtailed. It is paramount that junior users who may be found to be within that area be given proper notice and the opportunity to be heard. Rule 30 of the CM Rules provides the procedural safeguards necessary to ensure these

basic due process rights. Where, as here, the senior seeks to curtail juniors in an area of the state that has not been determined as having a common ground water supply, Rule 30 requires the senior to include certain information in his petition. IDAPA 37.03.11.030.01. The senior must allege the area he believes to be the area of common ground water supply relative to his water source. IDAPA 37.03.11.030.01.d. The senior must then identify the junior users within that area he alleges are causing material injury (i.e., respondents). IDAPA 37.03.11.030.01.b. To ensure proper notice, Rule 30 requires the senior to serve his petition on those respondents. IDAPA 37.03.11.030.02. To ensure an opportunity to be heard, it requires the Director to initiate a contested case proceeding under the Department's Rules of Procedure. *Id.* These safeguards provide juniors proper notice of the alleged area of common ground water supply as well as the opportunity to be heard and present evidence in opposition to the petitioner's allegations.

Rule 40 lacks these procedural safeguards. It does not require the senior to allege the area of common ground water supply nor to identify juniors alleged to be within that area causing injury. It does not require the senior to serve his petition on junior users nor the Director to initiate a contested case proceeding. The reason Rule 40 lacks these safeguards is that it presupposes the area of common ground water supply applicable to the call has already been determined. IDAPA 37.03.11.040. It contemplates a process of administration that is more efficient than that set forth in Rule 30. *Id.* The process contemplated is similar to the administration of surface water rights within a water district by a watermaster. *Id.* Since Rule 40 assumes the world of juniors subject to curtailment is already determined and known, it does not include the same procedural safeguards set forth in Rule 30. Therefore, the Court finds that Rule 30 provides the procedures and processes necessary to safeguard juniors' due process rights. It follows that when a call is made by a senior surface water user against junior ground water users in an area of the state that has not been determined to be an area having a common ground water supply, the procedures set forth in Rule 30 must be applied to govern the call.

ii. Rule 30 provides the Director the authority to determine an area of common ground water supply.

In addition to providing procedural safeguards, it is Rule 30 of the CM Rules that provides the Director with the express authority to determine an area of common ground water supply. It provides that following consideration of a contested case, the Director may enter an

order determining “an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district.” IDAPA 37.03.11.030.07.c. Rule 40 provides no such authority, as it presupposes that determination has already been made. That such a determination must be made under Rule 30 is further evidenced by Rule 31. That Rule sets forth the criteria for determining whether an area of the State may be designated as having a common ground water supply. IDAPA 37.03.11.031.03. Critically, it instructs that the Director’s findings with respect to those criteria must “be included in the Order issued pursuant to Rule [30].” IDAPA 37.03.11.031.05. Therefore, the Court finds that it is Rule 30 that provides the Director the authority to determine an area of common ground water supply. It follows the procedures set forth in Rule 30 must be applied to govern the calls.

The Court rejects the Director’s arguments that a determination of an area of common ground water supply can be made under Rule 40. There are simply no procedures, criteria or authorization under that Rule for making such a determination. The Director applied Rule 40 due to the fact that the juniors here are in organized water districts. However, applying the dichotomy that Rule 40 applies when juniors are in an organized water district and Rule 30 applies when they are not does not provide the critical information needed to process a surface to ground water call under the circumstances present here. Most notably, the fact that junior water right holders are in organized water districts does not address the issue of which areas of the state may be subject to curtailment as a result of a given call. It is the designation of an area of common ground water supply relative to the senior’s surface water source that answers this question. Since the procedures and criteria for making this determination are associated with Rule 30, it is Rule 30 that must govern a call where a senior surface water user seeks to curtail junior ground water users in an area of the state that has not been designated as an area having a common ground water supply.

Finally, Rule 30 addresses when administration is to occur pursuant to Rule 40. It provides that “[u]pon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.” IDAPA 37.03.11.030.09 (emphasis added). Clearly the first prerequisite to Rule 40 administration is the determination of an area of common ground water

supply.⁶ This prerequisite is expressly addressed in Rule 30 and Rule 30 provides the only mechanism for making such a determination. The application of Rule 40 presumes that the determination has already been made.

C. The requests for administration submitted to the Director by the Association do not satisfy the filing and service requirements set forth in Rule 30.

Having determined that Rule 30 governs the Association's calls, the Court turns to evaluating whether their requests for administration satisfy that Rule's filing and service requirements. The Court finds they do not. Rule 30 requires a senior making a delivery call to include at least the following information in his petition:

- a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water.
- b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records.
- c. All information, measurements, data or study results available to the petitioner to support the claim of material injury.
- d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated.

IDAPA 37.03.11.030.01.

In this case, the seniors submitted letters to the Director seeking administration on February 23, 2015. R., pp.1-5; LW R. pp.1-5. A review of those letters reveals that they lack much of the information expressly required by Rule 30. Among other things, absent is a description of the area having a common ground water supply within which the seniors seek administration. Likewise absent is the identification of the "names, addresses and description" of the respondents the seniors allege are causing the material injury. Therefore, the Court finds that the seniors' letters fail to satisfy the filing requirements set forth in Rule 30.

⁶ Thereafter, the other prerequisite is to incorporate the rights into an existing water district or into a new water district. See also I.C. § 42-237a.g.

More troubling, however, is the fact that the letters were not served by the seniors on the juniors they seek to curtail. This lack of service violates Rule 30, which expressly requires that “[t]he petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, ‘Rules of Procedures of the Department of Water Resources.’” IDAPA 37.03.11.030.02. It also raises issues regarding due process of law. The Director engaged in correspondence with counsel for the seniors regarding the calls, including a request for further information and clarification, before junior users had notice the calls had been filed. R., p.6; LW R. p.6. The seniors filed their *First Amended Petitions for Administration* in response to that correspondence before any notice of the filing of the original letters had been provided to juniors. R., pp.7-9; LW R. pp.7-9. Again, when the seniors submitted their *First Amended Petitions for Administration* to the Director they did not serve them on the juniors.

The Director attempted to address the notice and service concerns by taking it upon himself to provide notice of the calls to juniors. On March 20, 2015, he sent out a letter to certain junior users informing them of the filing of the calls and inviting them to participate in contested case proceedings. R., p.12. Since the seniors did not identify respondents in their petitions, the Director was placed in the unenviable position of unilaterally determining whom to serve with the letter. To do this, the Department undertook the exercise of identifying those junior water right users in those areas of the state it believed may be affected by one or both of the calls. *Id.* These included junior ground water users in water district 37 and water district 37B. *Id.*

At the time, no explanation was given as to how the Director determined whom to serve, or as to what areas of the State may be affected by the calls. Nor was an explanation given as to why junior water users in other organized water districts within IDWR Basin 37 (i.e., water district 37N, 37O and 37U) were not served. However, the exercise undertaken by the Director leads Sun Valley and other juniors⁷ to assert that he has already prejudged the area of common ground water supply relative to the Big Wood and Little Wood Rivers to be the boundaries of water district 37 and 37B. They assert this determination was made without notice to them and without an opportunity for them to present evidence and be heard on the issue. The Director denies these allegations, but the Court understands the concerns of the juniors. To them, the

⁷ Specifically, the City of Fairfield, the City of Ketchum and the Water District 37B Ground Water Association.

Director appears as having determined issues relevant to the contested case proceedings before they were noticed or joined to the proceedings. These include determining that area of the state having a common ground water supply relative to the seniors' sources and which juniors are properly identified as respondents. The Director, as the decision maker, should not have been placed in the position of appearing to have made these kinds of determinations prior to the juniors having been given notice of the calls. The reason Rule 30 requires the calling senior to identify and serve the respondents he seeks to curtail is so that the Director is not placed in the position of appearing to prejudice any issues relevant to the contested case proceeding.

Therefore, the Court finds that the seniors failed to satisfy both the filing and service requirements of Rule 30 to the prejudice of the substantial rights of Sun Valley, the Cities of Fairfield and Ketchum, and the Water District 37B Ground Water Association. These include the right to have the seniors comply with the mandatory filing and service requirements of Rule 30. *See e.g., Jasso v. Camas County*, 151 Idaho 790, 796, 264 P.3d 897, 903 (2011) (holding that due process rights are substantial rights). Since the seniors' requests for administration fail to meet these mandatory requirements of Rule 30, the Director's decision to deny Sun Valley's motion to dismiss is in violation of the CM Rules and violates the substantial rights of the juniors. As a result, the *Final Order* must be reversed and remanded. I.C. §§ 67-5279(3) and (4).

D. The Court rejects the South Valley Groundwater District's argument.

Intervenor South Valley Groundwater District argues that neither Rule 30 nor Rule 40 of the CM Rules may be applied to the Association's calls. It asks this Court to take the following action:

The Court should remand to the Director to initiate a comprehensive proceeding to determine which ground water rights in Basin 37 are in an Area of Common Ground Water Supply that would be subject to the Association's delivery call, rather than simply assuming that only ground water rights in Water District 37 are subject to the call and that all ground water outside Water District 37 are not. Once that determination has been made in a properly convened contested case or, as in the ESPA by regulation, then the delivery call can commence or resume.

South Valley Ground Water District Reply Brief, p.9.

There are several problems with this argument. First, although it asks this Court to remand this proceeding to the Director to initiate a comprehensive proceeding, it does not

identify the rules, procedures or criteria that should govern. It simply asserts that neither Rule 30 nor Rule 40 may be applied, but does not proffer any alternative set of rules, procedures or criteria to be applied. Second, the District raises this argument for the first time in a reply brief.⁸ It is the only party to take the position that neither Rule 30 nor Rule 40 may be applied. Yet, by raising the issue for the first time in a reply brief, the South Valley Groundwater District has not allowed any other party to respond to this position. For this reason, issues raised for the first time in a reply brief are not addressed by reviewing courts on appeal. *See e.g., State v. Raudenbaugh*, 124 Idaho 758, 763, 864 P.2d 595, 601 (1993) (raising an issue for the first time in a reply brief “does not allow for full consideration of the issue, and we will not address it”); *Henman v. State*, 132 Idaho 49, 51, 966 P.2d 49, 51 (Ct. App. 1998) (“Issues raised for the first time in a reply brief will not be addressed on appeal”). The Court therefore rejects the South Valley Groundwater District’s argument and holds that the procedures set forth in Rule 30 govern the Association’s calls.

E. The Court does not reach issues concerning the propriety of the Director’s request for staff memoranda or his decision to conduct a site visit.

Sun Valley raises issues concerning the propriety of the Director’s requests for the preparation of certain staff memoranda in this matter, as well as his decision to conduct a site visit of certain property. The Court need not reach these issues. For the reasons set forth above, the Director’s decision to deny Sun Valley’s motion to dismiss is reversed and remanded. The issues are therefore moot. The Court also finds that the issues regarding the propriety of the Director’s requests for staff memoranda are not properly before the Court. The Director issued a *Request for Staff Memoranda* in the underlying administrative proceedings on June 12, 2015. R., pp.334-344. Various parties moved the Director to modify and/or withdraw the *Request*. *Id.* at 435-451; 616-635. The Director entered *Orders* denying those motions on July 22, 2015. *Id.* at 870-879; 899-908. Unlike his *Final Order*, the Director has not designated his *Orders* denying the parties’ motions to modify and/or withdraw his *Request for Staff Memoranda* as final orders subject to judicial review. Therefore, those *Orders*, and the issues addressed therein, are not properly before the Court in this proceeding. I.C. §§ 67-5270(3) and 67-5271.

⁸ The South Valley Ground Water District did not file an opening brief in support of the appeal raised by the Petitioner.

F. Sun Valley is not entitled to an award of attorney fees on judicial review.

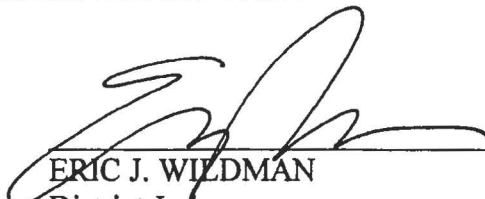
Sun Valley seeks an award of attorney fees under Idaho Code § 12-117. The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a “legitimate question for this Court to address.” *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the Court holds that the Respondents have presented legitimate questions for this Court to address regarding the *Final Order*. These include, but are not limited to, whether the delivery calls at issue should be governed by the procedures set forth in Rule 30 or Rule 40 of the CM Rules. The circumstances surrounding the Association’s calls present issues of first impression under the CM Rules. In light of that, the Court does not find the Respondents’ arguments to be frivolous or unreasonable. Therefore, the Court in an exercise of its discretion denies Sun Valley’s request for attorney fees.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Director’s *Order Denying Sun Valley Company’s Motion to Dismiss* issued on July 22, 2015, is hereby set aside and remanded for further proceedings consistent with this *Order*.

Dated Apr. 122, 2016


ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on April 20, 2016, with sufficient first-class postage to the following:

ALBERT P BARKER
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

DYLAN B LAWRENCE
VARIN WARDWELL LLC
242 N 8TH ST STE 220
PO BOX 1676
BOISE, ID 83701-1676
Phone: 208-922-7060

GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

HEATHER E O'LEARY
LAWSON LASKI CLARK & POGUE
675 SUN VALLEY RD STE A
PO BOX 3310
KETCHUM, ID 83340
Phone: 208-725-0055

JAMES P SPECK
120 EAST AVENUE
PO BOX 987
KETCHUM, ID 83340-0987
Phone: 208-726-4421

JAMES R LASKI
LAWSON LASKI CLARK POGUE PLLC
675 SUN VALLEY RD STE A
PO BOX 3310
KETCHUM, ID 83340
Phone: 208-725-0055

JOSEPH F JAMES
130 FOURTH AVE WEST
GOODING, ID 83330
Phone: 208-934-8185

MATTHEW J MC GEE

101 S CAPITOL BLVD, 10TH FL
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

MCLAIN, CHERESE D
950 W BANNOCK ST STE 250
BOISE, ID 83702
Phone: 208-331-1800

NORMAN M SEMANKO
101 S CAPITOL BLVD 10TH FL
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

SCOTT L CAMPBELL
101 S CAPITOL BLVD 10TH FL
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

SUSAN E BUXTON
950 W BANNOCK ST STE 520
BOISE, ID 83702
Phone: 208-331-1800

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

ORDER

Page 1 4/22/16

FILE COPY FOR 80044

Deputy Clerk



EXHIBIT 3

1992 MAY 19 PM 3:41

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

FILED *Lana*

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

In Re the General Adjudication
of Rights to the Use of Water
from the Snake River Basin
Water System

Case No. 39576

The State of Idaho, ex rel.
R. Keith Higginson in his
official capacity as Director
of the Idaho Department of
Water Resources,

ORDER RE: IDAHO DEPARTMENT
OF WATER RESOURCES' MOTION TO
RECONSIDER; AND

ORDER ESTABLISHING
ADJUDICATION REPORTING AREAS,
GENERAL SEQUENCE AND TEST
REPORTING AREAS

Petitioner,

vs.

The United States; the State
of Idaho; and all Claimants to
the use of water from the Snake
River Basin Water System

The Director of the Idaho Department of Water Resources (IDWR) has moved this Court to reconsider its October 7, 1991, and January 30, 1992, orders prohibiting the filing of a Director's Report which does not consist of the three parts described by Idaho Code § 42-1411. IDWR has asked to be allowed to file 45 reports in 38 stages over a 6-year period. Some reports would include recommendations for state water right claims only. Others would include federal and state consumptive use claims. Another set of proposed "catch-up" reports would also be filed to fully set forth all consumptive use claims in a given basin. The Motion to

Reconsider finally proposed that after these 45 reports were filed, or sometime after 1998, the Director would abstract the federal and tribal claims for reserved water rights and the Court would then proceed to begin the separate adjudication of federal and tribal reserved rights in the state.

To hear fully the merits of the Motion to Reconsider, parties were required to notice their intent to be heard on the issue of the establishment of hydrological sub-basins, as well as other matters presented in the Motion to Reconsider. In addition to IDWR, the following parties filed a Notice of Intent to be heard: the United States; Idaho Power Company; Northside Canal Company, Ltd. and Twin Falls Canal Company; Boise-Kuna, Nampa, Meridian, New York, Wilder and Big Bend Irrigation Districts (hereinafter "parties"). Aspects of the pending Motion to Reconsider have been the subject of Court hearings since its filing in February.

On April 9, 1992, the parties submitted a Stipulation Regarding Establishment of Sub-basins and Sequence of Director's Reports. The parties contend that the Stipulation resolves the issues raised in the Motion to Reconsider. Those issues not resolved by the proposed Stipulation are treated as having been withdrawn by IDWR and need not be addressed.

The parties agree that the Stipulation presents a logical solution to the number and geographical boundaries of hydrologic sub-basins which should be subject to, and treated as, separate

**ORDER RE: IDAHO DEPARTMENT OF WATER RESOURCE'S
MOTION TO RECONSIDER; AND ORDER ESTABLISHING
ADJUDICATION REPORTING AREAS, GENERAL SEQUENCE
AND TEST REPORTING AREAS**

reporting areas in the Snake River Adjudication. The Court notes that the issues about the notice requirements which shall govern the filing of the reports is not addressed by the parties.

Hearing on the proposed Stipulation was held in Twin Falls, Idaho, on April 21, 1992. Further hearings were held in Boise, Idaho, on April 22, 1992. The Court also granted IDWR's Motion Requesting a View of the Snake River Basin and Related Diversion Facilities to assist in ruling on the Motion to Reconsider and the Stipulation. The view took place with the Court and lead counsel for various parties on April 29, 1992.

Having reviewed the testimony and evidence presented at trial and for good cause shown;

IDWR's Motion to Reconsider is granted, in part, and the Stipulation of the parties is adopted, in part.

Facts presented to this Court support temporary deviation from the adjudication statutes and provide support upon which the Court may approve, in part, the Stipulation presented.

The Director may file reports in the Snake River Adjudication in the hydrologic sub-basins, Adjudication Reporting Areas, and in the sequence set forth in Exhibit 1, which is incorporated by reference herein.

24 ADJUDICATION REPORTING AREAS, INCLUDING 3 TEST AREAS

The Court will accept the Stipulation setting forth 24 hydrological basins. IDWR may file Director's Reports in three

ORDER RE: IDAHO DEPARTMENT OF WATER RESOURCE'S
MOTION TO RECONSIDER; AND ORDER ESTABLISHING
ADJUDICATION REPORTING AREAS, GENERAL SEQUENCE
AND TEST REPORTING AREAS

test basins, Adjudication Reporting Areas 34, 57 and 36. The Director's Report in each of the three reporting areas will include all consumptive use claims based upon state law and all consumptive use claims based upon federal law, excluding tribal consumptive use claims.

The Director's Report for Adjudication Reporting Area 34 may be issued in two parts. The Director may file a report which sets out recommendations as to all claims based upon state law, excluding the state-law based claims of the United States. The first part of the report in Test Basin 34 may not be filed until IDWR's Motion for Leave to File a Director's Report in Basin 34 is fully resolved and IDWR has shown compliance with the error correction procedure and has submitted the affidavit in accordance with Idaho Rules of Civil Procedure 11, as previously ordered by this Court.

Therefore, the timing of the filing of the first part of the Director's Report for Adjudication Reporting Area 34 will be decided later.

The second part of the Director's Report in Adjudication Reporting Area 34 shall be filed November 1, 1992. It will set out all federal consumptive use claims, whether based upon state or federal law, excluding tribal consumptive use claims.

The United States shall file all non-tribal federal consumptive use claims as follows:

**ORDER RE: IDAHO DEPARTMENT OF WATER RESOURCE'S
MOTION TO RECONSIDER; AND ORDER ESTABLISHING
ADJUDICATION REPORTING AREAS, GENERAL SEQUENCE
AND TEST REPORTING AREAS**

Reporting Area 34: July 31, 1992
Reporting Area 57: June 30, 1992
Reporting Area 36: August 31, 1992

The Director shall file one report setting out all consumptive use claims, excluding tribal consumptive use claims, in Adjudication Reporting Areas 57 and 36 as follows:

Reporting Area 57: October 1, 1992
Reporting Area 36: November 1, 1992

DIRECTOR'S REPORTS IN REMAINING 21 REPORTING AREAS

The timing of the filing of Director's Reports, as well as the rights reported in these remaining 21 reporting areas, will be decided after the test basins are underway and the Court, and parties, have sufficient, relevant information to determine when and how to proceed.

FEDERAL CLAIMS

This Court accepts the Stipulation which requires the United States to file all water rights claims to the use of water from the Snake River Basin within the State of Idaho on or before March 25, 1993. These claims include all federal consumptive use claims, whether based on state or federal law; all federal in-stream flow claims; and all tribal claims. The manner of reporting federal in-stream flow and all tribal claims, both consumptive and non-consumptive, will be determined, upon proper motion, prior to any Director's Report being filed beyond the filings allowed in the three test basins.

This Court further accepts two exceptions to the reporting of

ORDER RE: IDAHO DEPARTMENT OF WATER RESOURCE'S
MOTION TO RECONSIDER; AND ORDER ESTABLISHING
ADJUDICATION REPORTING AREAS, GENERAL SEQUENCE
AND TEST REPORTING AREAS

federal rights, included in the Stipulation: 1) that a test federal report including the "1990 Fort Hall Indian Water Rights Agreement" shall be filed with the Court when fully executed and upon proper motion to this Court; and 2) that the INEL and Park Service negotiated agreements will be reported in Adjudication Reporting Area 36 and in the federal report in Adjudication Reporting Area 34, both to be filed on November 1, 1992.

DATED and signed this 19 day of May, 1992.


DANIEL C. HURLBUTT, JR.
District Judge

ORDER RE: IDAHO DEPARTMENT OF WATER RESOURCE'S
MOTION TO RECONSIDER; AND ORDER ESTABLISHING
ADJUDICATION REPORTING AREAS, GENERAL SEQUENCE
AND TEST REPORTING AREAS

**SRBA ADJUDICATION REPORTING AREAS AND
SEQUENCE OF DIRECTOR'S REPORTS**

<u>Sequence & Reporting Area No.</u>	<u>Adjudication Reporting Areas</u>	<u>IDWR Administrative Sub-basins Within Each Adjudication Reporting Area</u>
1.	Test Case 34	34
2.	Test Case 57	57
3.	Test Case 36	36
4.	Upper Salmon	71-72
5.	Snake Plain 6 W	35
6.	Owyhee-Bruneau	51, 55, 61
7.	Southside Tributaries	41, 43
8.	Northern SW	31-33
9.	Portneuf	29
10.	Goose Creek	45
11.	Blackfoot	27
12.	Salmon Falls	47
13.	Boise	63
14.	Upper Snake	23-25
15.	Payette	65
16.	Wood River	37
17.	Henry's Fork-Teton	21-22
18.	Reach 1	1
19.	Weiser Area	67, 69
20.	Reach 2	2
21.	Reach 3	3
22.	Clearwater	81-86
23.	Middle Salmon	73-75
24.	Lower Salmon	77-79

EXHIBIT 1

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing ORDER ON IDAHO DEPARTMENT OF WATER RESOURCE'S MOTION TO RECONSIDER; AND ORDER ESTABLISHING ADJUDICATION REPORTING AREAS, GENERAL SEQUENCE AND TEST REPORTING AREAS was mailed this 19th day of May, 1992, in an envelope with sufficient first-class postage prepaid thereon to the following:

Six Copies To:

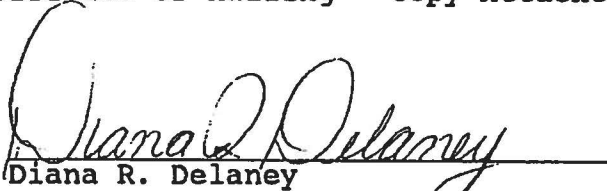
David B. Shaw, Chief
Adjudication Bureau
Idaho Department of
Water Resources
1301 North Orchard
Boise, ID 83706

One Copy Each To:

Clive Strong
Office of the Idaho
Attorney General
Room 210, Statehouse
Boise, ID 83720

Peter G. Monson
Indian Resources Section
Environment & Natural Resources
Division
P.O. Box 44378
Washington, DC 20026-4378

Court Certificate of Mailing - Copy Attached


Diana R. Delaney
Legal Secretary/Deputy Clerk of
the Court

**ORDER RE: IDAHO DEPARTMENT OF WATER RESOURCE'S
MOTION TO RECONSIDER; AND ORDER ESTABLISHING
ADJUDICATION REPORTING AREAS, GENERAL SEQUENCE
AND TEST REPORTING AREAS**

EXHIBIT 4

ORIGINAL

LARRY ECHOHAWK
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

A. RENE' MARTIN
Deputy Attorney General
Department of Water Resources
Statehouse Mail
Boise, Idaho 83720-9000
Telephone: (208) 327-7900

ATTORNEYS FOR PETITIONER

1992 FEB 14 AM 11:41

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

FILED

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

In Re the General Adjudication
of Rights to the Use of Water
from the Snake River Basin
Water System

Case No. 39576

The State of Idaho, ex rel.
R. Keith Higginson in his
official capacity as Director
of the Idaho Department of
Water Resources,

Petitioner,

vs.

The United States; the State
of Idaho; and all claimants to
the use of water from the Snake
River Basin Water System,

Defendants.

BRIEF IN SUPPORT OF
MOTION TO RECONSIDER
ORDERS RE DIRECTOR'S
REPORT

Descriptive Summary

This document is a brief submitted by the Director of the Department of Water Resources in support of his Motion to Reconsider Orders re Director's Report, which orders were dated October 7, 1991 and January 30, 1992.

I.

INTRODUCTION

The Idaho Legislature in 1985 passed legislation authorizing the Snake River Basin Adjudication (SRBA), a comprehensive adjudication of all water rights in the Snake River Basin in Idaho. In Chapter 14, Title 42, Idaho Code, the Legislature charged the Director of the Idaho Department of Water Resources (IDWR) with certain duties in the adjudication, which include claims taking, examination of the water systems and uses, preparation of the Director's Report, and filing of the Director's Report with the court. Idaho Code §§ 42-1409, 42-1410, and 42-1411.

The adjudication will involve up to 140,000 water right claims and encompasses nearly 87% of the total land area of the State of Idaho. In order to break down IDWR's duties in the adjudication into manageable parts, the Director in 1988 decided to prepare his report of the Snake River Basin in forty-three sub-basin segments, which correspond to the same sub-basins used by IDWR for the past twenty-five years in carrying out its statutory duties relating to regulation and administration of Idaho's waters. The sequencing of the sub-basins for examination and reporting was decided upon by the Director after considering many factors, which included 1) the number and location of IDWR work force in relation to the various sub-basins, 2) the projected amount of work required to prepare each sub-basin for reporting, 3) the needs of water users in particular sub-basins, and 4) the desire to accommodate negotiation of federal reserved water right claims. The Director made known to the court and all parties in the adjudication his decisions

regarding the division of the project into sub-basins and the sequence of sub-basins which would be followed in 1988, and has been carrying out his statutory duties based on those decisions since that time.

The Director's intent in 1988 was to include both Parts I and II (appropriation and reserved rights, respectively) in each sub-basin report. However, when the United States, the State of Idaho, and the court agreed to an extension of time for filing the United States' claims in the SRBA, staging of federal claims and non-federal claims¹ in the first few sub-basin reports became necessary in order for the adjudication to proceed in a timely fashion and to avoid delay and a significant increase in the cost of the adjudication.

After years of work and preparation by IDWR, the Director is now nearing completion of the sub-basin reports for the non-federal water claims in sub-basins 34, 57, 36, and 86. In fact, the proposed recommendations of all non-federal rights in Basin 34 (Big Lost River Basin) have already been mailed to water right claimants and the error-correction procedure is in progress, which is the prelude to the filing of the Director's Report for that basin.

In response to the concerns of the court and various parties, over the past several months the Director has revised his reporting plan three times. In order to further accommodate the interest of the parties and the concerns of the court regarding the schedule

¹Hereinafter the term "federal claims" refers to claims to water rights owned or held in trust by the federal government, which include both reserved right and appropriative water right claims. "Non-federal claims" refers to all other claims to water rights.

and form for submission of the Director's Report, the Director herewith submits a fourth revised plan.

There is no disagreement among the parties and the court regarding the need for segmenting the Director's Report. Indeed, the court stated at the SRBA status conference on December 17, 1991:

We can't do it all at once under any scenario. Even if you have one director's report that reported every private, every federal, state law or federal law claim simultaneously, from a litigation standpoint we still are going to bifurcate. We are going to have to separate these in some meaningful fashion. So bifurcation of the litigation is going to happen. That's a given.

Transcript of December 17, 1991 status conference at p. 65, lines 1-8. Thus, the issue is not whether to segment the Director's Report, but rather the issues are: 1) what is the appropriate geographic segmentation of the report; 2) in what order should the segments be filed; and 3) should the geographic segments be further broken down on the basis of type of claims. Determination of these issues turns upon an understanding of the water system as a whole and a knowledge of the rights being claimed. Because of the Director's duties in administering the Snake River Basin water system, he has unique knowledge and technical experience regarding the appropriate resolution of these issues.

The Director intends to produce evidence and argument at the March 3, 1992 hearing to show that the current plan is the appropriate method for the Director to proceed with his statutory duties. Based on such evidence and argument, the Director filed a motion requesting the court to reconsider its orders dated October 7, 1991 and January 30, 1992 so that the Director may proceed with

the filing of his report. This brief is submitted in support of the motion. The first section of the brief will outline the Director's plan for fulfilling his statutory duty to file a Director's Report and the evidence that he intends to submit in support of the plan. The second section of the brief will discuss the law that bears on resolution of the issues raised by this motion.

II.

GENERAL DESCRIPTION OF THE PLAN

A. Summary of the Director's Plan for Filing the Director's Report.

The Director intends to file the Director's Report in stages based both on sub-basins in a selected order and as to type of right. The plan contemplates filing the report in forty-five segments and thirty-eight stages, as shown in Exhibit A attached hereto. The first six segments of the report will include all non-federal claims and those federal claims which have been lodged at the time of the filing of the report segments for the first six sub-basins. These first six segments will be reported in six stages prior to the federal claim filing deadline, which is February 25, 1993. After the federal claim filing deadline has passed and all federal claims have been lodged or filed, further segments of the Director's Report for the remaining thirty-seven sub-basins will be filed as soon as they are prepared. These thirty-seven report segments will include all claims except certain multi-basin federal instream and tribal claims. The multi-basin federal instream and tribal claims will be listed in these thirty-seven reports for informational purposes only.

As soon as it can be prepared after the federal claim filing deadline, a "catch-up" segment of the Director's Report will be filed for all federal claims in the first six sub-basins, with the exception of certain multi-basin federal instream and tribal claims. The federal instream flow and tribal claims will be listed in this "catch-up" segment for informational purposes in the same manner as in the final thirty-seven sub-basin segments described above. A further segment of the Director's Report will be filed at the end of the reporting period or as soon as the remaining multi-basin federal instream and tribal claims are negotiated or negotiations have terminated.

B. Boundaries of the administrative sub-basins to be used for segments of the Director's Report.

Administrative boundaries for sub-basins for the entire state of Idaho were established by IDWR in the late 1960's. The boundaries were developed as part of a new water right numbering system, which became necessary due to the continued growth of water right records in IDWR. The boundaries outline administrative areas which are generally sub-basins, but which are also referred to as administrative basins, or simply basins. The basin designations began with the Snake River. Basin 01 begins where the Snake River enters the state at the Idaho-Wyoming border and ends at Milner Dam. Basin 02 begins at the base of Milner Dam and ends where the Snake River first leaves the state at the Idaho-Oregon border. Basin 03 begins where the Snake River re-enters the state and forms the Idaho-Oregon border and ends where the Snake River leaves the state near Lewiston.

The remaining basins, numbers 11 through 98, were generally developed as administrative subdivisions of major hydrologic areas within the state, i.e. Bear River Basin, Salmon River Basin, Clearwater River Basin, or other large unique areas. The first digit in the sub-basin number represents the major hydrologic area and the second digit represents a subdivision of that area.

Administrative sub-basin boundaries were established for ease and efficiency in the administration of Idaho's water resources. Boundaries were established to follow the surface hydrology of watersheds where that hydrology is significant for the administration of water rights. In areas where surface hydrology was obscure or not significant for the administration of water rights, other readily identifiable boundaries were selected that met the needs of water administration. This explains the occasional "suspiciously straight lines" noted by the United States.

The individual basin boundaries generally follow hydrologic boundary lines, but do not necessarily contain a single hydrologic drainage basin. Some sub-basins, such as Basin 71, contain only a small portion of an entire hydrologic drainage basin. Other sub-basins, such as Basin 57, contain several small hydrologic drainage basins. The decisions as to the boundaries of the various sub-basins were made administratively based on general water right and water use activity in a particular area. The basis for establishing the boundaries for each sub-basin will be further described at the March 3, 1992 hearing.

A unique situation exists in Basin 34 where the boundary follows the Big Lost River drainage boundary until it reaches the Idaho National Engineering Laboratory, at which point the basin boundary encompasses all of INEL. Since INEL is located in the area overlying the Snake Plain aquifer where there are no significant hydrologic features that would make useful administrative boundaries, the INEL boundary provided an existing identifiable boundary without dividing a major federal installation.

The Director of IDWR is vested with general authority over the administration of Idaho's water resources. IDWR has numerous duties in this regard, found throughout Title 42, Idaho Code. The same administrative sub-basins have been used by IDWR for nearly twenty-five years in carrying out these duties, and will continue to be used after the conclusion of the SRBA for administration of rights determined in the SRBA, as well as for IDWR's other duties. The Director therefore determined that these administrative sub-basins would be used in carrying out his duties in the SRBA, and has proceeded with second round service and the investigation of the claims and the water system using the same administrative sub-basins. Alteration of these boundaries would not only seriously impede IDWR's efforts in carrying out its duties in the SRBA, but would seriously disrupt IDWR's many other ongoing responsibilities in regulating and administering Idaho's waters.

C. The number of sub-basin report segments to be filed in the Director's Report.

The Director plans to file 43 sub-basin report segments, one for each of the sub-basins included in the Snake River Basin.² As noted in the previous section, subsequent administration of the water rights pursuant to the partial decrees and final decree in the SRBA will be based on these same sub-basins. Each segment of the report will contain general provisions as to the administration of rights within the sub-basin, as well as provisions for administration of that sub-basin in relation to the remainder of the Snake River Basin. Thus the various segments of the Director's Report filed with the court will each contribute to integration of all rights in the Snake River Basin, which integration will be completed with the filing of the last segment of the Director's Report.

The court has expressed its concern as to the number of report segments to be filed in the SRBA. "Consolidation" of report segments is of no real practical value, since the claims will be investigated and the Director's Report will be prepared in volumes for each sub-basin, regardless of when the volumes are filed. However, the Director has reduced the number of reporting stages in his plan by providing for some sub-basin reports to be filed at the same time. The result is that, although there will be 45 report segments, the reports will be filed in 38 stages.

²As outlined in section A above, two other segments to the Director's Report are planned, one "catch-up" report for federal claims not reported in the first six sub-basin reports, and another segment for some multi-basin federal instream flow and tribal claims.

D. Criteria used by the Director in determining the sequencing of sub-basins.

The efficient use of IDWR regional staff was one of the primary factors in the Director's decision to establish the sequencing of sub-basins in the SRBA. In the early 1970's, IDWR's administrative basins were grouped into four regions--Northern, Western, Southern, and Eastern--with offices located in Coeur d'Alene, Boise, Twin Falls, and Idaho Falls. IDWR staff in each of those regional offices are responsible for examining and preparing for reporting all rights in the sub-basins within their particular regional area. An advantage to having staff permanently localized in each region is that they have an opportunity to develop detailed knowledge as to the types of claims and conditions unique to their particular region.

The first four sub-basins selected by the Director for treatment in the SRBA include one sub-basin from each region. This allows all regional staff to be actively working toward preparation of a sub-basin report segment at the same time. The sub-basins selected by the Director for initial treatment were known by IDWR to include administrative issues in urgent need of resolution, and/or were likely to present a good cross-section of issues which would be likely to arise consistently in all or most sub-basins in the adjudication.

The decision as to the sequencing of the remainder of the sub-basins was made after considering factors such as balancing the workload among and within the regions, and the degree of urgency of problems of administration existing in particular basins. In order to accommodate desires expressed for an "orderly" progression, the

plan provides for reporting to proceed from one sub-basin to an adjoining sub-basin in the absence of overriding administrative factors. The primary factors that resulted in the placement of each sub-basin in the sequence are discussed in the following section, and will be discussed in further detail at the hearing.

E. The Director's sequence for treatment of sub-basins in the SRBA.

As stated in the preceding paragraphs, the Director's duties to examine all claims and prepare the required Director's Report are being carried out by the four regional offices of IDWR. The following is the chronological sequence chosen by the Director for accomplishing his duties in the SRBA on a region by region basis. Exhibits B through E, attached hereto, show the Director's planned report filing sequence for each region.

1) Northern Region. The sequence of sub-basins that will be followed in this region is as follows: 86, 85, 84, 83, 82, 03, and 81. See Exhibit E, attached hereto. This area comprises the Clearwater drainage and part of the lower mainstem of the Snake River. The majority of claims in Northern Region are found in sub-basins 84, 85 and 86. These sub-basins were selected for initial treatment in order to determine the highest number of rights in Northern Region early in the adjudication.

After years of work by Northern Region staff, the non-federal claims segment of the Director's Report is now near completion in Basin 86. Any tribal reserved water rights which exist in the Clearwater drainage are likely to be senior to the non-federal water rights in the sub-basin. As such, determination of the non-federal rights first should not impact the tribal water rights.

Basin 03 is the mainstem of the Snake River downstream from the point at which the Snake River re-enters Idaho from Oregon and becomes the boundary between the two states, and it is located in both Northern and Western regions. This sub-basin must be scheduled so that Northern and Western regional staff are able to work on it concurrently on investigating and reporting rights in this sub-basin.

2) Western Region. The sequence of sub-basins that will be followed in this region is as follows: 57, 55, 51, 61, 02, 63, 65, 67, 69, 03, 77, 78, and 79. See Exhibit C, attached hereto. Basin 57 was the sub-basin in Western Region originally selected to be treated first in the SRBA because there were no major disputed federal claims known to IDWR. The Director's Report segment for non-federal claims for Basin 57 is now near completion, and substantial progress has been made in Basin 55. Basins 55 and 51 are adjacent basins to 57, all on the south side of the Snake River. As noted in Section 1) above, the tribal water rights in these basins are probably senior to most, if not all, non-federal rights, and determination of the non-federal rights first should not impact the tribal water rights.

Basins 61 through 69 are tributaries on the north side of the Snake River, and will be covered proceeding from one adjacent basin to another in downstream order. Basin 02 is the mainstem of the Snake River between the base of Milner Dam and the point at which the Snake River leaves Idaho and enters Oregon, and it is located in both Southern and Western regions. The schedule for this sub-basin must allow for both Southern and Western regional staff to

work concurrently to prepare it for reporting. As noted in the discussion of the Northern Region basins, Basin 03 is located in both Western and Northern regions. It must be scheduled so that Western Region and Northern Region staff are able to work on it concurrently.

Basins 77, 78, and 79 are portions of the Salmon River drainage located in Western Region, and the progression followed is downstream through these basins. Basins 71 and 72, which are part of the headwaters of the Salmon River and are located in Southern Region, will have been reported by the time Basins 77, 78, and 79 are completed. Basins 73 through 75, which comprise portions of the Salmon River drainage located in Eastern Region, will not have been reported by the time Basins 77, 78, and 79 are completed, but will be filed in the same general time frame.

3) Southern Region. The sequence of sub-basins that will be followed in this region is as follows: 36, 41, 71, 72, 43, 45, 47, 02, 01, and 37. See Exhibit D, attached hereto. Basin 36 is an area known by the Director to require immediate resolution of disputes among non-federal water users, which is why it was chosen as the first sub-basin for treatment in Southern Region. The non-federal right segment of the Director's Report for this sub-basin is now near completion, and the corresponding report segment for Basin 41 is substantially in progress.

Basins 71 and 72 are part of the headwaters of the Salmon River and are located in Southern Region. There are some known disputes in Basin 71 which may be resolved in the SRBA. The sequence selected by the Director is primarily in response to the

desire of the United States to report this sub-basin early in the process and allows these sub-basins to be reported before the portions of the Salmon River drainage in Eastern and Western Regions are reported.

Basins 43, 45, and 47 are tributaries on the south side of the Snake River, adjacent to Basin 41, progressing in downstream order. Basin 01 is the mainstem of the Snake upstream from Milner Dam to the Wyoming border, and is located in both Southern and Eastern regions. It must be scheduled so that Southern and Eastern regional staff can work on it concurrently. As noted in the discussion of the Western Region basins, Basin 02 is located in both Southern and Western regions and must be scheduled so that Southern and Western regional staff are able to work on it concurrently. Basin 37 is the last remaining sub-basin to be reported in Southern Region.

4) Eastern Region. The sequence of sub-basins that will be followed in this region is as follows: 34, 35, 31, 32, 33, 29, 27, 25, 24, 23, 22, 21, 01, 73, 74, and 75. See Exhibit B, attached hereto. Basin 34 was selected by the Director as the first report segment in the entire adjudication based primarily on the urgent need for dispute resolution among non-federal water users. The proposed recommendations for non-federal and some federal claims in Basin 34 have already been mailed and the error-correction procedure is in progress. It is projected that the first segment of the Director's Report for this sub-basin will be presented to the court for filing in April 1992. Work on Basin 35 is substantially under way at the present time.

Basins 31, 32, and 33 are sub-basins on the north side of the Snake River that do not provide substantial surface flows to the river, but are part of the northern end of the Snake Plain aquifer. Together with Basins 34, 35, and 36 in Southern Region, most of the water uses of the Snake Plain aquifer will be reported in close progression. In addition, there are disputes in Basin 31 requiring resolution.

Basins 29, 27, 25, 24, 22, and 21 are tributaries on the south and east side of the Snake River, and will be reported in upstream progression. Disputes exist in Basin 29 that require resolution. Although the Director would prefer treating Basin 29 subsequent to Basin 31, the schedule provides for completion of Basins 32 and 33 before Basin 29 to preserve the general scheme of reporting adjacent basins consecutively wherever possible.

As noted in the discussion of the Southern Region basins, Basin 01 is located in both Southern and Eastern regions and must be scheduled so that Southern and Eastern regional staff can work on it concurrently. The remaining basins in Eastern Region are 73, 74, and 75, which are part of the Salmon River drainage located in Eastern Region. These basins will be examined and reported after the other basins in the Salmon River drainage. These basins were not moved ahead in Eastern Region's reporting schedule because there are other areas in the region where there are pressing disputes requiring resolution. There are no significant disputes presently known by IDWR in Basins 73, 74, and 75.

F. Law of the case issues as a factor in sub-basin sequencing.

The water rights included in the basins to be reported early in the Director's reporting sequence offer the opportunity to establish judicial precedent as to many key issues potentially of basin-wide significance if objections are properly made and pursued. Those issues include the following:

1) Basin 34 presents potential issues as to conjunctive administration of water rights, including groundwater versus surface water rights, tributary versus mainstem rights, and storage versus natural flow rights. Certain issues presented in Basin 34 may be unique to that basin, but many others may be of basin-wide importance. Basin 36 will also present potential issues as to conjunctive administration of ground and surface water rights.

2) Basins 34, 36, 57, and 86 will together provide a broad spectrum of potential issues relating to the first and second presumptions contained in Idaho Code § 42-1416.

3) Basins 34, 36, and 57 will present a variety of potential issues as to accomplished transfers, including changes in point of diversion, place of use, season of use, and nature of use.

4) Basin 57 will present potential issues as to geothermal water rights, such as whether an appropriator can be required to make beneficial use of the geothermal aspect of the water. In addition, Basin 57 will present potential issues as to administration of geothermal water, springs, and wells. As an example, where there is a hydrologic connection between geothermal and other groundwater, must groundwater use be regulated to protect the heat aspect of the geothermal water? Are geothermal water

users entitled to protection of artesian pressure? Are appropriators from springs entitled to maintenance of historic spring flow?

G. Other possible approaches to sequencing of sub-basins in Director's Report.

The sequential order of sub-basins does not follow a strict "headwaters to tailwaters" approach, which method is embraced by the United States. Although no evidence has been submitted in support of this view, it has been argued that this approach is "logical" and will aid in the administration of the rights pending a final decree.

Of the 43 sub-basins in the Snake River Basin, only four are not "headwater" basins--the lower and middle mainstem (Basins 02 and 03), and possibly Basins 35 and 36. All of the other sub-basins are headwater basins in the sense that no rights exist upstream on the tributary. The "logic" of the "headwaters to tailwaters" approach fails when the need becomes apparent to identify which "headwaters" with which to begin, and which headwaters should follow.

The order in which segments of the Director's Report are filed does not change the need for water users in other portions of the basin to be aware of the water rights being recommended in each segment of the report. When an upstream segment of the report is filed, downstream water users may be impacted by diversionary rights and may be aided by instream flow water rights. When a downstream report segment is filed, upstream water users with diversionary rights may be impacted by downstream water rights, and upstream instream flow users may be aided by downstream water

rights. Water users on separate tributaries may also be impacted by one another depending upon their relationship to downstream mainstem water users and the historical administration of the tributaries relative to the mainstem and to one another.

The sequence of submitting reports should not impact the investigation of other elements of the water system as required by Idaho Code § 42-1410. Investigation of the water system must necessarily take into account existing water uses, and the order in reporting the rights to those existing water uses does not materially impact the investigations.

In any event, the potential for impact upon water rights from one portion of the basin to another exists; the only element that changes is who may be impacted. The proper administration of the entire Snake River Basin requires adjudication of all rights in the basin; therefore, neither the "headwaters to tailwaters" approach or "tailwaters to headwaters" approach is the solution to facilitate administration. The only respect in which the sequencing of reports will aid the administration of water rights is where the first sub-basins adjudicated are those where major disputes among water users exist or where legal issues of basin-wide importance are likely to arise.

III.

ARGUMENT

THE DIRECTOR'S PLAN FOR FILING THE DIRECTOR'S REPORT IS PRACTICAL, IS WITHIN HIS DISCRETION AS PROVIDED BY STATUTE AND IS CONSISTENT WITH LAW

A. Staging of the Director's Report is a necessity for practical reasons.

Filing the Director's Report in stages is a necessity. It is not possible for IDWR to investigate and report all 140,000 claims in the SRBA at one time. IDWR projects that the investigation and reporting of all claims will take a minimum of nine to ten years from the commencement of the adjudication. While staleness of information is always a problem in a huge adjudication such as the SRBA due to constant, ongoing changes in ownership of water rights, staleness will be minimized if IDWR is able to report each sub-basin as soon as each report is prepared.³ Otherwise, a substantial number of rights will be years out of date at the time the Director's Report is filed. Reports are most accurate at the time they are completed, and should not be shelved for filing years hence.

If all claims are to be reported at the same time, the claimants will be faced with the monumental task of reviewing all the anticipated 140,000 reported claims in one time period. The time for filing objections will necessarily be extended well past

³Statistics indicate that on the average, property changes ownership every five to seven years, with the result that 14-20% of the land included in the SRBA changes ownership each year. Although claimants are required to notify IDWR in writing of changes in address or ownership pursuant to Idaho Code § 42-1409(7), the number of returned proposed recommendation notices in Basin 34 indicates that there is non-compliance.

the 180-day statutory objection period. Similarly, if IDWR and the claimants must respond to all objections in one time period, then the time period for filing responses will necessarily be much greater than the 120-day statutory response period. Awaiting the filing of these pleadings would cause substantial and unnecessary delays in the adjudication process. Staging, on the other hand, would allow existing disputes over the use of water to be resolved in a much shorter time.

The burden faced by the court if the Director's Report is not staged is incalculable. The deluge of documents that would be filed with the court in the period of a few short months defies explanation. Even if the court were able to devise some method for sorting through the mountain of objections and responses to shape the same into individual cases, the litigation that would ensue at that late date would carry the parties well toward retirement and perhaps beyond. And ironically, the court would be faced with few pressing litigation matters during the ten-year period prior to filing of the Director's Report.

B. Establishing a method for filing the Director's Report is within the discretion of the Director.

In Idaho Code §§ 42-1406A the Legislature laid the statutory groundwork for commencing and conducting the Snake River Basin Adjudication. In Idaho Code §§ 42-1406A and 42-1411, the Legislature set forth the duties of the Director. Those duties include: 1) petitioning the district court to commence the adjudication, after making certain specific determinations relating

to the form and scope of the adjudication;⁴ 2) taking claims; 3) examining the water system and all claims; and 3) preparing and filing the Director's Report. Idaho Code §§ 42-1406A, 42-1409, 42-1410, 42-1411.

The Director's reporting duties as set forth in Idaho Code § 42-1411 include: 1) preparing a report on the water system, 2) determining certain delineated elements of all water rights acquired under state law, 3) abstracting the notices of claim or negotiated agreements for all water rights reserved under federal law, and 4) filing an original of the Director's Report with the district court, giving notice of such filing as provided in the statute. Idaho Code § 42-1411(1), (2), (3), and (4).

In the adjudication statutes, Idaho Code § 42-1401 through 42-1423, the Legislature established only a general framework for water right adjudications. This general framework establishes a procedure that is a combination of judicial and administrative responsibilities. The duties of the Director to commence the adjudication, examine the claims and water systems, and prepare the report are clearly required by statute, and involve areas within his administrative knowledge and expertise. Due to the complexity of certain adjudications, and particularly the SRBA, it would have been impossible for the Legislature to foresee and provide for every possibility that might arise during the conduct of the adjudication. The Legislature's general statement of the

⁴These determinations are delineated in Idaho Code § 42-1406A(1) and include the boundaries of the system to be adjudicated, any classes of water users or boundaries of hydrologic sub-basins for which the Director intends to proceed separately, and water uses to be excluded from the adjudication.

Director's duties and the lack of specific direction as to how those duties should be carried out shows that the Legislature intended to grant the Director sufficient discretion to manage and direct the areas of the adjudication within his knowledge and expertise.

One of the Director's primary duties in the adjudication is to prepare and file the Director's Report. However, the applicable statutory language does not address the timing of the report and the form the report will take, referring to the report in the singular in certain statutory language. See Idaho Code § 42-1411. However, the Director in applying his knowledge and expertise in the technical area of water right adjudication has determined that the only method to accomplish his statutory duties in the SRBA in any realistic and timely way, given the enormity of the project and the limited resources of IDWR, is to break down the required examination and reporting into segments or stages, both by sub-basin and by type of right. This determination is entitled to deference by the court.

The Director's reporting method, which is specifically set forth and explained earlier in this document and will be further explained at the hearing, is not inconsistent with the statutory language outlined above. The Director will file a report in the SRBA, but it will be produced in multiple volumes filed with the court at different times. The final report filed with the court at the conclusion of the adjudication, will be one report as contemplated by the statute. But that final structure can be accomplished only by one building block at a time. Other western

states conducting large adjudications have applied such staging under similar statutory language. See Section Part III, Section E, infra.

All parties and the court recognize that some type of staging is essential to accomplishing this adjudication. Indeed, the court has indicated that it intends to treat each objection to the Director's Report as a separate case, which is itself a type of staging. Comity and judicial restraint require deference to the decisions of an agency "created by statute or regulation to deal with particular technical questions requiring a special expertise."⁵ People v. Fremont Energy Corp., 651 P.2d 802 (Wyoming 1982); also see Fischer v. Sears, Roebuck and Co., 687 P.2d 587, 107 Idaho 197 (App. 1984); In Re Real Estate Brokerage Antitrust, 622 P.2d 1185, 95 Wash. 2d 297 (1980); Industrial Communications Systems, Inc. v. Pacific Tel. & Tel. Co., 505 F.2d (9th Cir. 1974); Far East Conference v. United States, 342 U.S. 570 (1952). Such deference to an agency decision is particularly applicable where an agency is charged with responsibility for regulating a complex area, and because of specialized experience and expertise. Industrial Communications Systems, supra at 157.

⁵An agency's jurisdiction and power are derived from its enabling statutes. Lemhi Tel. Co. V. Mountain States Tel. & Tel. Co., 571 P.2d 753, 98 Idaho 692 (1977). Once its jurisdiction is established, an agency should be given sufficient discretion to carry out its duties. Cain v. Kansas Corp. Com'n, 673 P.2d 451, 9 Kan. App.2d 100 (1983); Petty v. Utah State Bd. of Regents, 595 P.2d 1299 (1979). Indeed, the Idaho Supreme Court has stated that "Every power expressly granted, or fairly to be implied from the language used [in the enabling statutes], or necessary to enable [the agency] to exercise the powers expressly granted should be afforded." Lemhi Tel. Co. v. Mountain State Tel. & Tel. Co., supra at 757.

The Director's interpretation of the applicable statutory language as allowing the required report to be filed in segments satisfies the four-prong test for judicial deference to an administrative decision as set forth by the Idaho Supreme Court in the recent case of J.R. Simplot v. Idaho State Tax Commission, 91.22 ISCR 1393 (Oct. 1, 1991). In that case, the court noted that deference should be given when 1) the Legislature has entrusted the agency with administration of the statute, 2) the agency's construction of the statute is reasonable, 3) the statutory language does not clearly set forth the procedure, and 4) the interpretation is "practical."

The method for accomplishing his investigation and reporting duties in the SRBA is a decision within the Director's area of specialization, and he is best equipped by insight gained through experience and expertise to make such a decision. The Director has chosen to proceed with the required reporting by staging, and has been working toward that end for at least five years. Such decision is consistent with Idaho Code §§ 42-1406A and 42-1411. Therefore, the court should defer to the Director's decision and permit the Director to proceed with his reporting duties in the SRBA.

C. The Director's plan for filing Director's Reports is consistent with constitutional requirements.

The Fifth and Fourteenth Amendments to the United States Constitution, as well as their counterparts in the Idaho Constitution, require that all parties to the SRBA have the right to notice and an opportunity to be heard. The Director's plan for filing the required report is consistent with these requirements.

Upon completion of each sub-basin segment of the Director's Report, each individual claimant will be sent notice of the filing of the Director's Report segment for that sub-basin, as well as a copy of that individual's right as determined by the Director. Docket sheet notice will be provided to all SRBA claimants and any other interested parties of developments in all sub-basins and the umbrella case in general. The extent of the docket sheet notice provided is addressed in the Director's contemporaneous cross-motion to establish procedures.

Some SRBA claimants have expressed the desire to see all reported rights and claims in a particular sub-basin, i.e. both federal and non-federal rights, before they decide whether or not to object to their own and other rights as recommended in the Director's Report. Although at first blush this position seems compelling, in reality it only presents a question of convenience and strategy.

The two basic attributes of water rights are the basis for this conclusion. First, water rights provide legal authorization to divert and use water. This attribute is solely a function of the water right claimant's use of water; it is not dependent upon other rights. Issues that will be determined by the court in this regard are source of water, purpose of use, place of use, and quantity diverted. Thus, water right claimants do not need to know all claims before they file objections regarding these matters.

The second attribute is how the right holder is provided water in time of scarcity. In Idaho this is a question of priority. A water user's standing depends on the date of his right in relation

to the rights of others and the amount of water to be diverted to others before he receives his right. Priority is only important when water is scarce. Scarcity can be caused by any number of unforeseeable problems. Drought is the most unforeseeable, yet is the prevalent problem at the present time. The existence or non-existence of a federal water right of high priority could also cause scarcity in a water source. However, whether faced with a drought situation or a prior federal right, water right holders must assume scarcity. If they feel that higher priority water rights are legally or factually incorrect as reported, objections should be filed to those reported rights.

Some water right holders may be reluctant to object to their neighbor's water rights if they feel they do not have to. Or, the neighbors may have a "back fence" agreement for dividing water in times of scarcity. The existence or non-existence of federal water rights should have no bearing on a water user's decision to object to his own right or the rights of his neighbors. If parties do not, for any number of reasons, desire to object to higher priority rights, they should be prepared for the consequences of scarce water, whether caused by drought or later-reported federal rights. The cause of the scarcity is immaterial.

A claimant's right as determined in the Director's Report will always exist subject to the priorities of other claimants' rights under the appropriation doctrine, regardless of when other related rights are reported by the Director. If a claimant has cause to object to his right as recommended in the Director's Report, he has a duty to object immediately; there is no constitutional

requirement that he be allowed to acquiesce in the Director's determination until a later time when he may discover that later-determined rights may have a practical impact on his rights.

The reporting of federal claims is simply not a predicate to the reporting of non-federal claims. Indeed, numerous adjudications, including the Lemhi and Payette River adjudications, have gone forward successfully without all the federal claims included in the report. The purpose of this adjudication is to ensure that every right is defined in accordance with applicable law. Thus, the filing of an objection should not be based upon the convenience of the parties, but rather upon a good faith belief that the claim as reported is not consistent with applicable law.

It is not inequitable for a claimant to be required to pursue his cause of action when his right is first reported and his cause of action becomes evident, or be precluded from doing so when later segments of the report are filed. Due process requires only that a claimant receive proper notice of the determination of his right and have a reasonable opportunity to object to such determination with the option of having the matter decided by the court.⁶

The possibility of reopening a decree due to particularly extreme and unforeseen circumstances always exists under court rules and precedent. It is imprudent and unnecessary to prohibit staging of the Director's Report to accommodate those asserting a position of mere strategy and convenience.

⁶This matter is treated in greater depth in a separate brief and motion of the Director. The Director therein proposes other procedures that should satisfy the concerns of those asserting this position, without having to disrupt the Director's plan to stage the required report.

D. Staging state and federal rights in the first six sub-basin report segments is essential to avoid unreasonable delay and unnecessary additional cost in the SRBA.

As stated in Part II, Section A above, the first six segments of the Director's Report (Basins 34, 57, 36, 86, 41, and 71) will include all non-federal claims, and will also include federal claims that are filed or lodged prior to the preparation of those reports.⁷ The remaining sub-basin segments will include substantially all federal claims in those sub-basins, except for certain multi-basin federal instream and tribal claims.

As soon as practicable after the February 25, 1993 federal claim filing deadline, a "catch-up" report segment will be filed for the first six sub-basin report segments. This report will include substantially all of the federal claims in those sub-basins, except for those already included in the first six sub-basin segments, and except for certain multi-basin federal instream flow and tribal claims to be reported later.⁸

⁷The federal claims that IDWR expects the United States to assert and that IDWR expects will be available at that time include: claims by the Department of Energy for the Idaho National Engineering Laboratory in Basin 34 (for which a negotiated agreement has been completed); claims by the Park Service for Craters of the Moon National Monument in Basins 34 and 36 (for which a negotiated agreement is in the process of being signed); claims by the Bureau of Reclamation, which have been lodged; and some of the claims by the Farmers Home Administration (generally state law claims for irrigation, domestic, and/or stockwater purposes for properties acquired by FmHA as a result of loan defaults, potentially in all six basins).

⁸The claims that IDWR expects the United States to assert will include, for example: claims by the Bureau of Land Management in all but one of the sub-basins (primarily a large number of small claims for wildlife and stockwatering purposes); forest service claims other than instream flow claims in all but two of the sub-basins (primarily a large number of small stockwater and domestic claims); the remaining Farmers Home Administration claims; claims by the Corps of Engineers in Basin 36 (believed to be for existing

There will be one additional federal segment, which will include the remaining multi-basin federal instream and tribal claims, and will be filed after negotiations have been completed or terminated. These claims include the instream flow claims of the Forest Service, the Fish and Wildlife Service, and the Indian tribes, and may include other tribal claims.⁹ Tribal claims, for both on-reservation and off-reservation water rights, will cross sub-basin boundaries. Similarly, the federal instream flow claims, as IDWR believes they will be claimed, will encompass multiple sub-basins and will raise the same issues in each sub-basin. These claims, as IDWR believes they will be filed, may impact every sub-basin in the Snake River Basin. Therefore, reporting all of these claims at the same time will be the most effective means to put them before the court and the claimants. In addition, this will promote the legislative policy of negotiating agreements as to federal reserved right claims, and takes into account the time necessary for completing negotiations of major claims.

fish hatcheries); claims by the Park Service in Basin 86; and claims by the Fish and Wildlife Service in Basins 36 and 41 (nature and extent unknown to IDWR at this time).

⁹The United States has indicated that its instream flow claims potentially involve all sub-basins. Tribal claims other than the instream flow claims, however, could conceivably be reported in the sub-basin reports. For example, the Shoshone-Bannock claims above Hell's Canyon fall within Basins 27, 29, and 01. Thus, if these claims, which are the subject of a negotiated agreement, are reported in the sub-basin segments, they will be included in three reports and subject to objections by claimants in each of these three sub-basins. Proceedings on objections to these claims in Basins 27 and 29 would need to be stayed until Basin 01 is reported. The alternative would be to abstract these claims in the multi-basin federal report segment.

If staging by sub-basins is an appropriate basis for filing report segments in the SRBA, it only follows that staging by type of right, is also appropriate. As discussed in Part III, Section B above, staging is not precluded by the statutes outlining the Director's authority and duties in the SRBA. Further, it is the only reasonable way to proceed in view of the later-filed federal claims and the Legislative directive to conduct good faith negotiations. The effect of staging by type of right is the same as staging by sub-basin. A claimant in one sub-basin may be affected by later-reported claims in another sub-basin, just as a claimant may be affected by later-reported federal claims in the same or another sub-basin. However, all claimants will have an opportunity to object not only to their own right as described in the Director's Report, but also to object to all other rights, regardless of when they are reported.¹⁰

As previously discussed in Section C above, this notice and opportunity to object meets constitutional requirements. Concerns expressed by some claimants as to the need to see later-reported claims is a matter of strategy and convenience that should not preclude the staging of report segments. Nonetheless, the Director proposes the following procedure to address these issues with respect to the claims to be included in the "multi-basin" federal report. In the "catch-up" report and the sub-basin reports to be

¹⁰Individual notices will be mailed to all claimants in the sub-basins where the federal claims are located, and docket sheet notice will be made to all others, the same as with the sub-basin reports. Thus, individual notice of the "catch-up" report will be mailed to all claimants in the first six sub-basins; individual notice of the last federal report will be mailed to all claimants basin-wide.

filed after the federal claim filing deadline, the Director will include an abstract of the multi-basin federal claims "for informational purposes" only. The reports will note that these claims are not subject to objection at the time these reports are filed, but will be subject to objection at the time the multi-basin report is filed, and that individual notices of the filing of the multi-basin report will be mailed to all claimants basin-wide. This procedure will accommodate the desire expressed by some parties to see the federal claims at the time the earlier report segments are filed, as well as accommodating the need for resolving multi-basin claims in a basin-wide manner.

After considering all relevant factors in devising a method for filing the required report, the Director determined that the reporting schedule described in Part II, supra, in his judgment is the best possible method to keep the adjudication moving steadily toward completion within a reasonable time, and to bring the most current information before the court. If the Director is not allowed to stage the reporting of federal claims in the first six sub-basins and his reporting is placed on hold until all federal claims are filed with the court, no report segments will be filed until mid-1993 and the reporting will not be completed until late 1999 at the earliest. As the Director expects his first report segment to be ready for filing in April of 1992, with further segments to be ready continuously thereafter, if the Director is not allowed to stage by type of right in the first six sub-basin reports, the progress of the adjudication will be delayed a minimum of fourteen months. Also, if the court grants further claim filing

extensions to the United States upon a showing of "emergency," the delay may be even more substantial.

Another factor militating against delay in the adjudication is the need to resolve active disputes among non-federal water users. One of the primary reasons for commencing the adjudication was to resolve such disputes. Many of the first sub-basins selected for reporting contain serious disputes among water users that require immediate resolution. If the Director is prevented from adhering to his current reporting schedule, IDWR may be seriously hamstrung in providing needed assistance to such water users in the adjudication. As a result, it is probable that disputing parties may petition the court for preliminary injunctive relief in ever-increasing numbers and exert pressure on both IDWR and the court to focus attention on their particular problems. This would divert focus from the adjudication as a whole and force a piecemeal approach to resolving individual problems, ultimately causing further delay and increased cost. The court and IDWR should be working jointly to immediately bring some resolution to these pressing problems.

The current appropriation for IDWR's adjudication bureau is approximately \$3 million per year, and the fund will be depleted by 1995 at the current level of expenditure. If the Director is not allowed to stage federal claims in the first six sub-basins, extensive and unnecessary delay will result, both to IDWR in carrying out its statutory duties in the SRBA and to the court in managing the deluge of litigation expected in the adjudication. Litigation in the SRBA cannot effectively begin until the Director

begins filing his report segments. Such a delay will cause major increases in the ultimate cost of the adjudication and will require taxpayer or further claimant support.

Five years of IDWR efforts and millions of dollars have been invested in the adjudication effort to date under the Director's plan first made known in 1988. As has been shown in the foregoing and will be shown in greater detail at the March 3, 1992 hearing, the Director's plan is practical and consistent with law. It is a reasonable way to proceed with the adjudication. It is unreasonable to alter the framework of the SRBA at this late hour if the law does not require it.

E. The court's counterparts in other western states conducting large adjudications are staging the required reports.

Other western states conducting large adjudications have concluded that the only practical way to conduct a large adjudication is in stages. Some or all federally owned rights are staged in Arizona, Montana, Washington, New Mexico, Wyoming, and Colorado. The adjudication of water rights is staged by sub-basin in all of these states, as well as in Utah. Nevada, Oregon, and California do not stage; however, these states conduct separate adjudications in each individual sub-basin.

Arizona and Washington are similar to Idaho in that their adjudication statutes refer to "a report" and "the report" and contain no specific authority to stage the report in various segments filed over time. However, both states use a form of staging for filing the counterpart of their report. Washington has staged its reporting into four separate tracks, with state rights and federally owned rights filed in different reporting tracks.

State-based rights are further divided by nature of claimant and administrative sub-basin and size of claim, with the sequence of sub-basins not followed in "headwaters to tailwaters" order. See Exhibit F, attached hereto. The Arizona court has approved the plan submitted by the Arizona Department of Water Resources which provides for staging by sub-basin and by type of right. In its order filed August 1, 1989, which is attached as an exhibit to the United States' Response to Director's Plan of January 17, 1992, the Arizona court stated:

There is nothing in the adjudication statutes which precludes the "statutory" report from being prepared in sequential segments, nor is there anything in the adjudication statutes which precludes the incorporation of all the "segmented" reports from being considered as the single comprehensive report for the entire river system.

Exhibit 2 to the United States Report, at p.14. The same reasoning should be applied to the Director's Plan for filing the required report.

IV.

CONCLUSION

From the foregoing and from evidence and argument to be presented at the hearing on March 3, 1992, the Director submits that his plan for filing the Director's Report is within his discretion as provided by statute and is consistent with law; furthermore, such plan is clearly the most practical way to proceed with the adjudication. Therefore, the Director respectfully requests the court to reconsider its orders preventing filing of the Director's Report and allow the adjudication to proceed.

DATED this 11th of February, 1992.

LARRY ECHOHAWK
Attorney General

A. Lynne Krogh-Nampa for
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

A. Rene Martin
A. RENE MARTIN
Deputy Attorney General
Department of Water Resources

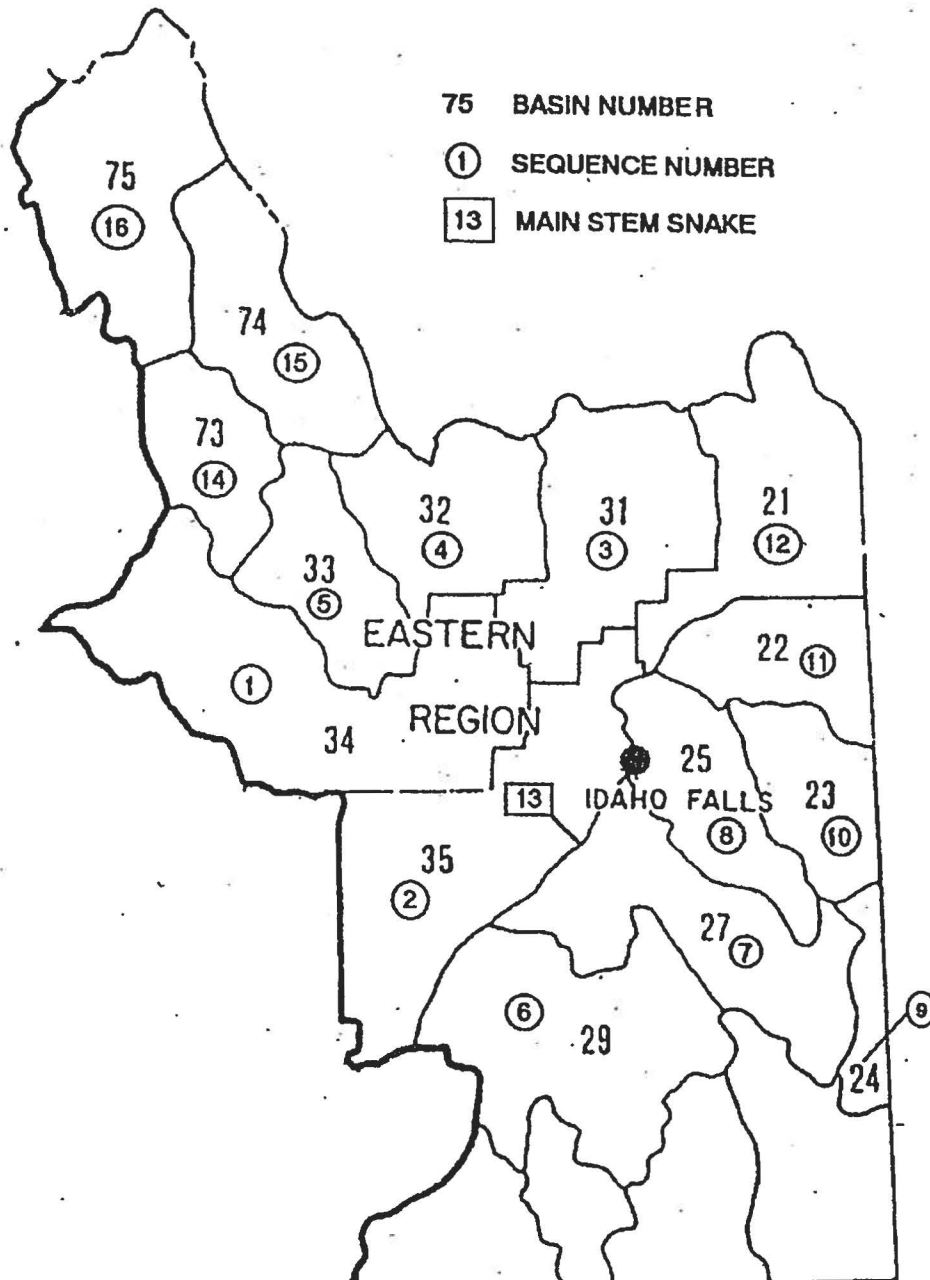
EXHIBIT A

Sub-basin Reporting Sequence And Proposed Filing Dates By IDWR Region

Stage	Sub-Basin	Eastern	Western	Southern	Northern
1	34	4/16/1992			
2	57		6/ 1/1992		
3	36			6/30/1992	
4	86				7/16/1992
5	41			12/ 1/1992	
6	71			12/17/1992	
7	35, 55, 72	5/27/1993	5/27/1993	5/27/1993	
8	51		9/20/1993		
9	31	12/13/1993			
10	43			2/ 7/1994	
11	32, 61	2/22/1994	2/22/1994		
12	33	5/19/1994			
13	45			1/ 9/1995	
14	85				2/ 2/1995
15	29	5/ 9/1995			
16	27	9/ 7/1995			
17	47			12/12/1995	
18	2		2/22/1996	2/22/1996	
19	25, 63	3/28/1996	3/28/1996		
20	84				4/25/1996
21	24	5/23/1996			
22	23	7/16/1996			
23	83				9/26/1996
24	65		10/28/1996		
25	22	3/17/1997			
26	82				6/19/1997
27	21	7/15/1997			
28	67		8/11/1997		
29	1	8/28/1997		8/28/1997	
30	69, 3		9/25/1997		9/25/1997
31	77, 37		11/27/1997	11/27/1997	
32	73	12/23/1997			
33	81				1/ 8/1998
34	74, 78	3/ 9/1998	3/ 9/1998		
35	79		5/25/1998		
36	75	9/17/1998			

This reporting sequence does not show two report segments of federally owned claims to water rights.

**EXHIBIT B
PROPOSED REPORTING SEQUENCE
FOR IDWR'S
EASTERN REGION**

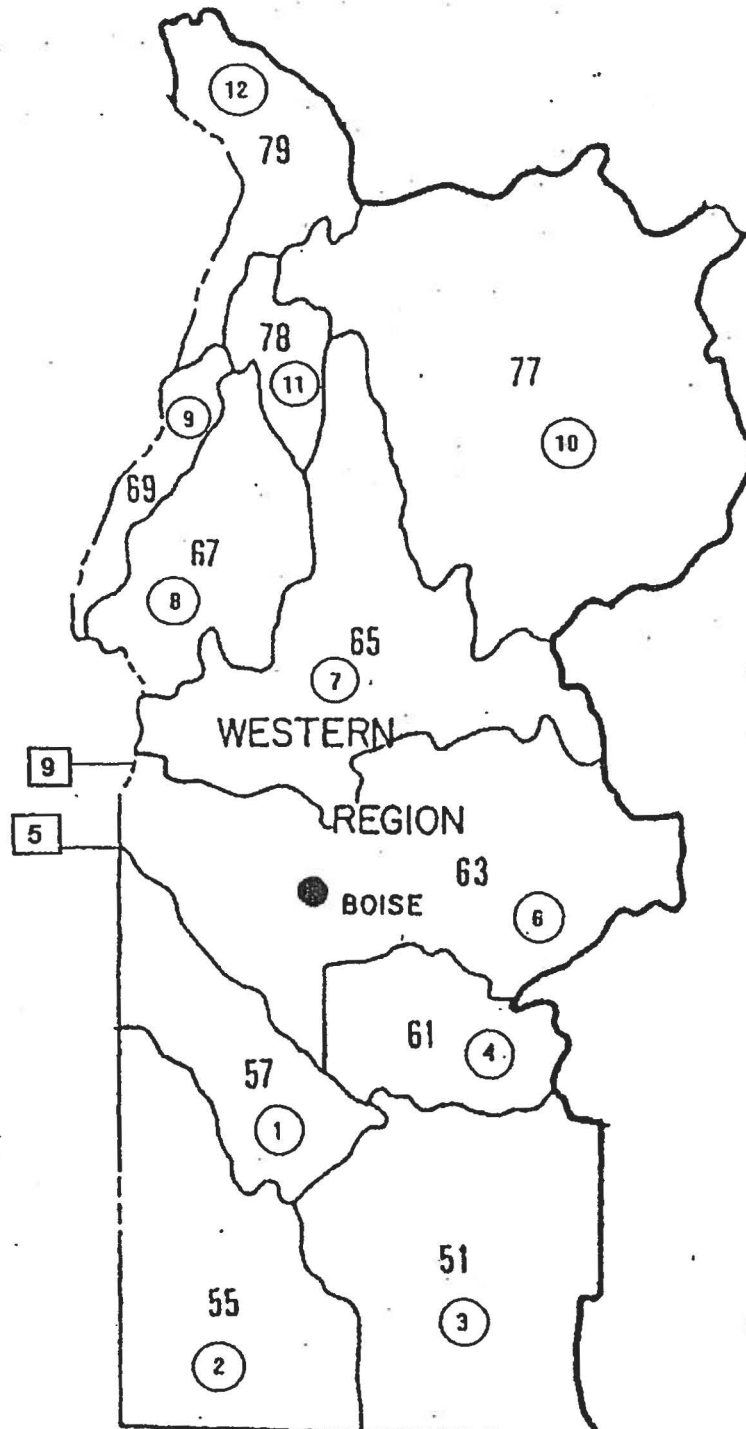


**EXHIBIT C
PROPOSED REPORTING SEQUENCE
FOR IDWR'S
WESTERN REGION**

77 BASIN NUMBER

⑥ SEQUENCE NUMBER

⑨ MAIN STEM SNAKE

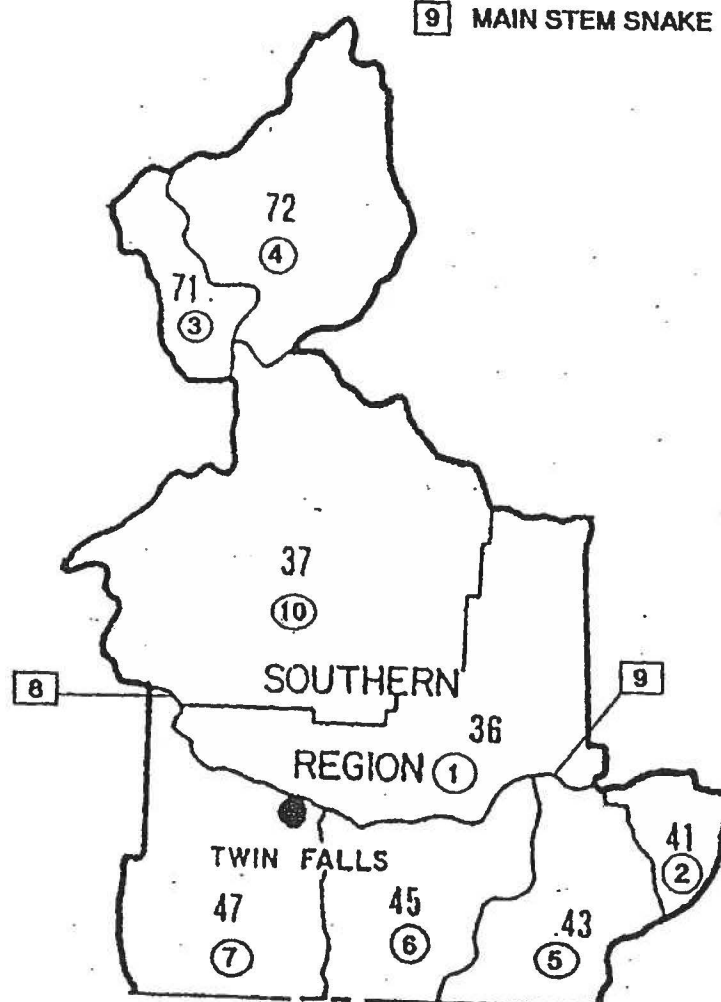


**EXHIBIT D
PROPOSED REPORTING SEQUENCE
FOR IDWR'S
SOUTHERN REGION**

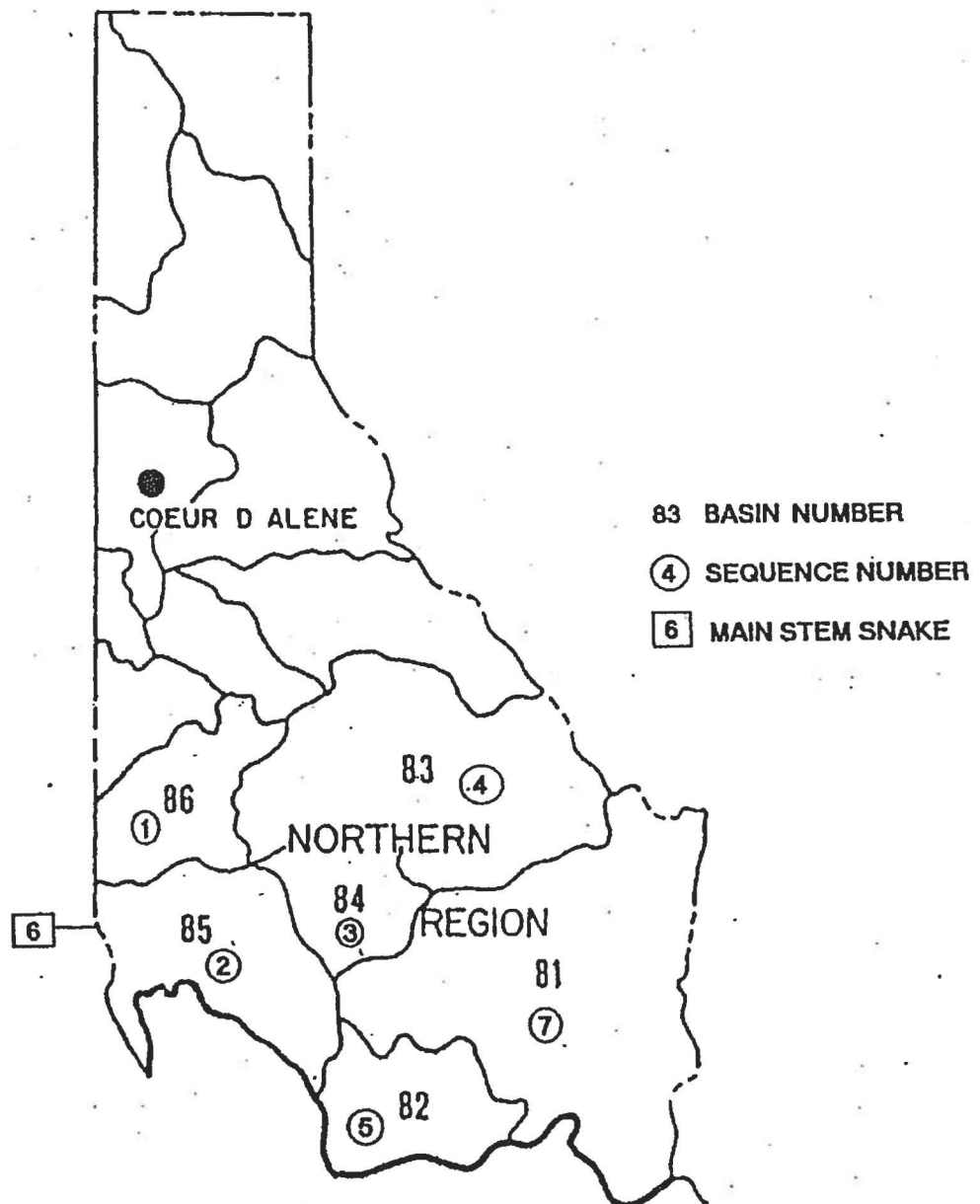
72 BASIN NUMBER

⑦ SEQUENCE NUMBER

9 MAIN STEM SNAKE



**EXHIBIT E
PROPOSED REPORTING SEQUENCE
FOR IDWR'S
NORTHERN REGION**



RECEIVED
MAR 9 1989

FILE

MAR 3 1989

ATTORNEY GENERAL'S OFFICE
ECOLOGY DIV.
OLYMPIA

BETTY MCGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

IN THE MATTER OF THE DETERMINATION
OF THE RIGHTS TO THE USE OF THE
SURFACE WATERS OF THE YAKIMA RIVER
DRAINAGE BASIN, IN ACCORDANCE WITH
THE PROVISION OF CHAPTER 90.03,
REVISED CODE OF WASHINGTON,

THE STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

JAMES J. ACQUAVELLA, et al.,

Defendants.

No. 77-2-01484-5

PRETRIAL ORDER NO. 8

Re: Procedures for
Claims Evaluation
(Revised)

INTRODUCTION

This order is issued with the following background:

1. This action involves an unusually large number of defendants and will take a long period of time to complete.
2. There are claims based upon state or federal laws, and it would be in furtherance of convenience and economy to evaluate certain of said claims separately.
3. There are claims based upon either federal or state law which can be further divided into discrete, manageable groups.

Exhibit F

1 4. The division of the claims into groups would be in
2 furtherance of convenience and promote economy.

3 5. Procedures to govern the expeditious evaluation and
4 resolution of each claim, consistent with due process, are
5 necessary and desirable.

6 6. The parties and their respective attorneys have been
7 afforded a full opportunity to provide their views to the Court.
8 Now therefore, the following procedures are adopted for the
9 evaluations of claims:

10 7. This "Procedures for Claims Evaluation (Revised)"
11 supersedes the procedures set forth in Referee's Prehearing Order
12 No. 1 as approved by this court April 18, 1986.

13
14 I. DIVISION OF CLAIMS

15 A. The claims filed in this action shall be generally divided
16 into groups based upon whether the claimed right is based
17 upon federal law or state law. Under each of the divisions,
18 there shall be a further subdivision based upon the category
19 of the claimant or user as follows:

20 1. Federal

- 21 a. Federal reserved rights for Indian claims
22 b. Federal reserved rights for non-Indian claims

23 2. State

- 24 a. State-based rights of major claimants
25 b. State-based rights for other claimants, by
26 subbasin.

- 1 B. Each category shall be processed separately, although any
2 interested party may participate in any of the proceedings.
- 3 C. Where there is inadequate information available to cate-
4 gorize a claim or to locate a claim within a subbasin,
5 such claim will be processed within a separate group, known
6 as the residual claims, in advance of the claims of the four
7 major categories. Claims which are subsequently categorized
8 or located will be placed in their proper category.

9

10 II. INDIAN CLAIMS

- 11 A. The Indian claims portion of the proceeding shall be
12 conducted using the ordinary procedure for the adjudication
13 of water rights. See subsection V.F. The claims to be
14 considered in this portion of the proceeding shall include
15 all claims asserted by the United States on behalf of an
16 Indian or the Indian Nation.
- 17 B. Evidence relating to the bases of the claims which relate
18 to each element necessary to establish and continue to
19 possess a water right will be relevant to the hearing.
- 20 C. The referee's report to the Court shall include a
21 recommended schedule of rights or other disposition as to
22 all Indian claims.
- 23 D. Parties interested in this portion of the case must
24 participate in the proceedings and hearings held thereon, or
25 shall be deemed to waive any objection to any matter for
26 which an objection could have been made.

1 E. Schedule. The following schedule shall apply to the Indian
2 claims portion of this proceeding:

3 1. Claimant shall file with the Clerk of the Court a
4 list of each named claimant, corresponding court
5 claim number, and priority date claimed, on or
6 before July 1, 1986.

7 2. Discovery shall be completed on or before June 30,
8 1992. See "Scheduling Order (Revised)" entered by
9 this court December 12, 1988 for additional
10 scheduling dates.

11 3. All parties shall be ready for trial on federal
12 water rights claims by September 1, 1992.

13 F. Information on Priority Dates. Based upon the information
14 submitted by the claimant on the claimed priority dates, the
15 referee will cause to be sent to all parties within a
16 reasonable time, a list of the claims with the following
17 information, as available:

- 18 1. Name of claimant
19 2. Court claim number
20 3. Priority date claimed
21 4. Location of point of diversion.

22 G. Copies of all documents filed with the Court pertaining to
23 Indian Claims shall be served upon the plaintiff and upon
24 each major claimant.
25
26

1 III. FEDERAL RESERVED NON-INDIAN CLAIMS

2 A. The federal reserved non-Indian claims portion of the
3 proceeding shall be conducted using a special procedure to
4 evaluate the claims and to remove those claims for which
5 there is no controversy, and thereafter a hearing shall be
6 held where there is some dispute as to a water right
7 claimed.

8 B. Special Procedure. The plaintiff Department of Ecology and
9 the defendant United States shall jointly evaluate the
10 claims of the United States relating to various non-Indian
11 reservations, e.g., national forests, fish and wildlife
12 refuges, and military reserves. The two parties shall
13 submit to the referee an agreed recommendation of confirma-
14 tion as to all or a portion of such claims of the United
15 States. The recommendation shall include all pertinent
16 information evidencing a water right, and shall be further
17 identified by claimant name and court claim number. Claims
18 for which there is a controversy shall be separately grouped
19 and identified by claimant name, court claim number and
20 claimed priority date.

21 C. Upon receipt of the recommendation, the referee will cause a
22 copy of the report to be provided to all parties. Any party
23 may object to any claim recommended for confirmation in the
24 report by filing a written objection pursuant to subsection
25 VII.A of this order.

1 D. The referee shall include as confirmed water rights in a
2 report to the Court, as provided in RCW 90.03.190, all water
3 right claims recommended as provided in subsection III.B and
4 not subject to a notice of objection as provided in
5 subsection III.C.

6 E. All recommended water right claims included in the list in
7 subsection III.B, but not to be included in the report of
8 the referee to the Court as provided in subsection III.D
9 shall be processed and considered by the referee at the
10 evidentiary stage of proceedings.

11 F. The non-inclusion of a water right claim in the report of
12 the plaintiff and defendant as provided in subsection III.B
13 shall establish no inference or implication that a water
14 right is either valid or invalid.

15 G. The inclusion of a water right claim in the agreed
16 recommendation for confirmance to the referee as provided in
17 subsection III.B to which a notice of objection has been
18 filed, shall not be admissible evidence in support of a
19 claim. No burden of proof of any party relating to the
20 asserting or contesting of a claim shall be modified as the
21 result of said inclusion.

22 ☒ The water right claims included in the agreed recommendation
23 for confirmation to the referee as provided in subsection
24 III.B and to which no objection is made shall be
25 conclusively established in the pending action unless the
26 Court, on motion, permits otherwise.

1 I. Claims which are not included for confirmance in the report
2 of the referee as provided in subsection III.B shall be
3 brought for hearing as provided in RCW 90.03.170. ;

4 J. Schedule. The following schedule shall apply to the federal
5 reserved non-Indian claims portion of this proceeding:

- 6 1. Claimant shall file with the Clerk of the Court a
7 list of each named claimant, corresponding court
8 claim number, and priority date claimed, on or
9 before July 1, 1986.
- 10 2. Plaintiff's and defendant United States' report
11 shall be submitted to the referee on or before
12 February 3, 1987.
- 13 3. The referee shall cause the report to be mailed to
14 all parties within thirty (30) days after its
15 receipt.
- 16 4. Any party may file an objection (Subsection VII.A)
17 to any claim in the report within ninety (90) days
18 after its date of mailing, or such other time as may
19 be provided by notice by the referee.
- 20 5. A schedule for preparation and discovery, if needed,
21 will be established upon the receipt of the report
22 described in subsection III.J.2.
- 23 6. Hearing on any claim in controversy shall be
24 conducted after notice to all interested parties.

25 K. Information on Priority Dates. Based upon the information
26 submitted by the claimant on the claimed priority dates, the

1 referee will cause to be sent to all parties a list of the
2 claims with the following information, as available:

- 3 1. Name of the claimant
- 4 2. Court claim number
- 5 3. Priority date claimed
- 6 4. Location of point of diversion.

7
8 IV. MAJOR CLAIMANTS

- 9 A. Definition. "Major Claimants" shall include all claimants
10 who were parties to the 1945 Consent Decree, and others as
11 noted in Appendix A. This list may be modified to include
12 or remove other claimants as the case proceeds.
- 13 B. The Major Claimants portion of the proceeding shall be
14 conducted using the ordinary procedure for the adjudication
15 of water rights. See subsection V.F. The claims to be
16 considered in this portion of the proceeding shall include
17 all claims asserted by a Major Claimant. Copies of all
18 documents filed with the Court shall be served upon the
19 plaintiff and upon each of the other Major Claimants.
- 20 C. Evidence relating to the bases of the claims which relate to
21 each element necessary to establish and continue to possess
22 a water right will be relevant to the hearing.
- 23 D. The referee's report to the Court shall include a
24 recommended schedule of rights and other disposition as to
25 all claims filed in this matter by the Major Claimants.

1 E. Parties interested in this portion of the case must
2 participate in the proceedings and hearings held thereon, or
3 shall be deemed to waive any objection to any matter to
4 which an objection could have been made.

5 F. Schedule. The following schedule shall apply to the Major
6 Claimants portion of this proceeding:

7 1. Claimants shall file with the Clerk of the Court a
8 list of each claim with the name of the claimant,
9 the corresponding court claim number, and the
10 priority date claimed, on or before July 1, 1986.

11 2. Discovery shall be completed on or before June 30,
12 1992. See "Scheduling Order (Revised)" entered by
13 this Court December 12, 1988 for additional dates.

14 3. All parties shall be ready for trial on claims of
15 major claimants by September 1, 1992.

16 G. Information on Priority Dates. Based upon the information
17 submitted by each Major Claimant, the referee will cause to
18 be sent to all parties, a list of the claims with the
19 following information, as available:

- 20 1. Name of claimant
21 2. Court claim number
22 3. Priority date claimed
23 4. Location of point of diversion.
24
25
26

1 Applications and permits for the appropriation of surface
2 waters by any Major Claimant shall be listed by plaintiff
3 with the following information:

- 4 1. Name of applicant
- 5 2. Application or permit number
- 6 3. Date of receipt.

7
8 V. SUBBASIN

- 9 A. An efficient, economical, fair, and expeditious approach to
10 evaluate individual claims is necessary in view of the many
11 remaining claims in the drainage basin. The following
12 procedures are adopted for use in the subbasins.
- 13 B. Definition. A "subbasin" is a geographic area comprised of
14 a smaller, discrete drainage area within the larger area
15 affected by this adjudication, generally described in
16 Pretrial Order No. 3, dated April 18, 1985, and as mapped by
17 plaintiff. Where a subbasin is bordered by a water body or
18 river, it will be deemed to extend to the middle thereof,
19 unless there are reasons to delineate the border otherwise.
- 20 C. Claims Excluded. Claims excluded from consideration within
21 a subbasin shall include claims by the United States based
22 upon the federal reserved rights doctrine and claims of
23 Major Claimants. These excluded claims shall be considered
24 in proceedings described in sections II, III and IV above.
- 25 D. Subbasin Identification and Notice. Plaintiff and claimants
26 shall establish or verify the location of a diversion within

1 an identified subbasin. Plaintiff shall be responsible for
2 initiating the identification process. Claimants shall be
3 responsible to respond to plaintiff with the appropriate
4 information. Notice to claimants relating to a particular
5 subbasin will be based upon the information received.

6 E. Procedures.

7 1. Upon the request of the referee, the plaintiff
8 shall investigate and evaluate all water right
9 claims of a subbasin as to their validity.
10 Thereafter, plaintiff shall submit a report
11 setting forth a list of claims with priority dates
12 that the plaintiff recommends to the referee for
13 confirmance as valid claims of water rights, a
14 list of claims that plaintiff cannot recommend
15 confirmance, and any proposed stipulations
16 applicable to the subbasin. The list for
17 recommendation shall include:

- 18 a. Name of claimant(s)
- 19 b. Point of diversion
- 20 c. Source of water
- 21 d. Place of use
- 22 e. Purpose of use
- 23 f. Extent of use
- 24 g. Period of use
- 25 h. Limitation of use

- i. Maximum quantity
 - (1) Annual total volume
 - (2) Instantaneous use
- j. Priority date
- k. Court claim number

The claims in the subbasin which are excluded from the plaintiff's list for recommendation shall be listed with the following information:

- a. Name of claimant
- b. Court claim number
- c. Priority date, if any, claimed

Applications and permits for the appropriation of surface waters within a subbasin shall be listed by plaintiff with the following information:

- a. Name of applicant
- b. Application or permit number
- c. Date of receipt.

Even in the case where a report does not recommend any water rights for confirmation, the Plaintiff may include, in said report a statement of suggested duties of water for various uses of general relevance to those uses within a subbasin.

2. Upon receipt of the report described above, the referee shall cause a copy of the report to be mailed to all parties. Any party may object to any claim recommended for confirmation in the report by

1 filing an objection pursuant to subsection VII.A of
2 this order.

3 3. a. The referee shall include as confirmed water
4 rights in a report to the Court, as provided
5 in RCW 90.03.190, all water right claims
6 recommended as provided in subsection V.E.1
7 and not subject to a notice of objection as
8 described in subsection VII.A.

9 b. All recommended water right claims included
10 in the list under subsection V.E.1, but not
11 included in the report of the referee to the
12 Court as provided in subsection V.E.3.a,
13 shall be processed and considered at the
14 evidentiary stage of the subbasin
15 proceeding.

16 4. a. The non-inclusion of a water right claim in
17 the list of recommendations of the report of
18 the plaintiff as provided in subsection
19 V.E.1 shall establish no inference or
20 implication that a water right is either
21 valid or invalid.

22 b. The inclusion of a water right claim
23 for confirmance in the report of the
24 plaintiff as provided in subsection
25 V.E.1, to which a notice of objection
26 has been filed, shall not be admissible

1 as evidence in support of a claim. No
2 burden of proof of any party relating to
3 the asserting or contesting of a claim
4 shall be modified as the result of
5 said inclusion.

6 5. Schedule:

7 a. Subbasins shall be evaluated commencing
8 immediately and in the following order,
9 unless the order is modified:

- 10 (1) Upper Naches (Subbasin No. 16)
11 (2) Tieton (Subbasin No. 17)
12 (3) Lower Naches (Subbasin No. 19)
13 (4) Cle Elum Lake (Subbasin No. 1)
14 (5) Richland (Subbasin No. 31)
15 (6) Hanford (Subbasin No. 30)
16 (7) Umtanum Creek (Subbasin No. 13)
17 (8) Shushuskin Canyon (Subbasin No. 12)
18 (9) Taneum Creek (Subbasin No. 6)
19 (10) Manastash (Subbasin No. 11)
20 (11) Thorp (Subbasin No. 8)
21 (12) Wilson-Naneum (Subbasin No. 9)*
22 (13) Burbank (Subbasin No. 21)

23
24
25 An "*" following a subbasin number denotes that the procedures of
26 subsection V.E are not applicable. See subsection V.F.

- (14) Easton (Subbasin No. 2)
- (15) Kittitas (Subbasin No. 10)*
- (16) Reecer Creek (Subbasin No. 7)*
- (17) Ahtanum Creek (Subbasin No. 23)*
- (18) Swauk (Subbasin No. 4)
- (19) Wenas Creek (Subbasin No. 15)*
- (20) Teanaway River (Subbasin No. 3)
- (21) Elk Heights (Subbasin No. 5)
- (22) Roza Creek (Subbasin No. 14)
- (23) Selah (Subbasin No. 20)
- (24) Cowiche (Subbasin No. 18)
- (25) Wide Hollow (Subbasin No. 22)*
- (26) Moxee (Subbasin No. 24)
- (27) Toppenish (Subbasin No. 25)*
- (28) Granger (Subbasin No. 26)*
- (29) Satus Creek (Subbasin No. 27)*
- (30) Sunnyside (Subbasin No. 28)
- (31) Mabton-Prosser (Subbasin No. 29)

b. Information Filing Requirement with Court Clerk.

An "*" following a subbasin number denotes that the procedures of subsection V.E are not applicable. See subsection V.F.

1 (1) Claimants with diversions
2 located within Subbasin No. 16,
3 shall file any changes to their
4 claimed priority dates on or
5 before July 1, 1986 and shall
6 indicate their court claim
7 number.

8 (2) Claimants with diversions
9 located within Subbasin No. 17
10 shall file any changes to
11 their claimed priority dates
12 on or before August 1, 1986
13 and shall indicate their
14 court claim number.

15 (3) Claimants with diversions
16 located within Subbasin No. 19
17 shall file any changes to
18 their claimed priority dates
19 on or before September 2, 1986
20 and shall indicate their court
21 claim number.

22 (4) The referee will establish other
23 dates for other subbasins by
24 further order.

c. Hearing Schedule.

(1) Subbasin No. 16:

- (a) Plaintiff shall file its report pursuant to subsection V.E.1 on or before November 14, 1986.
- (b) The referee shall cause to be mailed a copy of plaintiff's report to all parties within thirty (30) days of receipt.
- (c) Any objection (Subsection VII.A) from a party to a claim recommended for confirmance in plaintiff's report shall be filed within the time specified, or shall be deemed waived.
- (d) A prehearing conference shall be scheduled regarding claims in Subbasin No. 16.
- (e) A hearing on the merits and issues of claims in Subbasin No. 16 shall be conducted in early 1987.

(2) Subbasins No. 17 and 19 will be scheduled for hearing in mid-1987 after notice.

(3) The remaining subbasins will be processed at a rate of about two (2) to six (6) subbasins per year, and possibly at a faster rate.

d. Preparation and Discovery. All claimants should ensure that enough time has been set aside to prepare their respective cases well in advance of the hearing.

F. Paragraphs 1 - 4 of subsection E. above shall not apply to the processing of claims relating to subbasins 7, 9, 10, 15, 22, 23, 25, 26, and 27.

VI. PROCEEDINGS FOR RESIDUAL CLAIMS

A. Plaintiff shall review each claim and locate the diversion within a specific subbasin or category as provided in subsection I.A. Plaintiff shall thereafter prepare a list of claims which cannot be adequately identified or located from the records. Such list, known as the residual claims list, shall contain the following information, as available:

1. Claimant name
2. Claimant address
3. Court claim number
4. Priority date claimed.

B. Plaintiff shall file the original copy of the residual claims list with the Clerk of the Court on or before May 20, 1986 with a copy to the referee.

C. Upon receipt of the residual claims list, the referee will schedule a prehearing conference for the purpose of preparing the claims on such list for hearing. If it appears that a claim from such list can be placed in an established category, the claim will be so transferred unless there is a reason to do otherwise.

D. The hearings on the claims included in the list of residual claims shall be conducted after notice to all interested parties.

E. Parties interested in this portion of the proceedings must participate therein, or shall be deemed to waive any objection to any matter for which an objection could have been made.

VII. OBJECTIONS/SANCTIONS

A. Objections. Objections to any recommendation for confirmation made by plaintiff shall be made in writing, state the bases therefor, and shall identify the claim or claims objected to by claimant name and court claim number.

1 The filing of an objection shall have the effect of
2 asserting a claim or defense in controversion to the water
3 right claim and the recommendation of plaintiff.

4 The objection shall be signed by the party or attorney
5 making it and shall be filed in this cause with the Clerk of
6 the Court and served upon the affected claimant(s) within
7 ninety (90) days of the mailing of the recommendation to the
8 parties, or such other time as may be provided by the
9 referee in an accompanying notice with plaintiff's report.

10 The referee may request that parties filing objections
11 provide additional information regarding the specific legal
12 and factual basis supporting the objections. A party
13 failing to supplement an objection as requested, within such
14 reasonable time as may be established by the referee and
15 conveyed to the objecting party with the referee's request,
16 shall be deemed to have waived the objection previously
17 filed.

18 B. Sanctions. Pursuant to RCW 4.84.185, RCW 4.48.070 or other
19 applicable laws, the Court may find that an objection or
20 evidence offered was frivolous and advanced without reason-
21 able cause, and require the nonprevailing party to pay
22 the prevailing party the reasonable expenses, including
23 fees of attorneys, incurred in opposing such objection or
24 evidence. The Court may request the views of the referee as
25 to sanctions under this subsection.

VIII. HEARINGS BEFORE THE REFEREE

A. After the time period provided for preparation and discovery has elapsed, hearings may be conducted on any category of claimant as provided in subsection I.A of this order and upon claims provided by sections II, III, IV, V, and VI of this order.

B. Notice. The referee shall fix a time and place for hearing of the claims for each category of claimant, or portion of such category, after the time period for preparation and discovery has elapsed. The referee shall cause to be sent to each party or their attorney, a written notice of hearing at least thirty (30) days before the time of the hearing. The hearing may be adjourned from time to time and place to place.

C. Transcript. The referee will arrange for all hearings to be recorded by a court stenographer. After the completion of a hearing, the referee shall cause to be prepared and filed with the Clerk of the Court a transcript of the testimony taken at such hearing, in triplicate, together with all papers and exhibits offered and received in evidence and not already a part of the record. Any party may review the materials so filed, or may receive a copy of some or all the materials upon payment of the copying costs.

D. Briefs. Briefs shall be optional, but if submitted, shall be filed on or before the first day of hearing in the matter

1 being tried. Post-hearing briefs may be filed with leave of
2 the referee.

- 3 E. Report of the Referee. After the completion of the hearing
4 in a matter being tried, and after post-hearing briefs, if
5 any, have been filed, the referee shall make a full and
6 complete report to the Court as to all claims in such
7 matter.

8
9 IX. SPECIAL EVIDENTIARY PROCEDURES: COMPLEX CLAIMS

- 10 A. In order to expedite the evidentiary process for the
11 proceedings regarding Major Claimants claims, federal
12 reserved Indian claims, and such other categories or
13 subparts thereof which are identified by the referee, the
14 following procedures are adopted.

- 15 B. Advance Submission of Documentary Evidence.

- 16 1. The referee may require that all documentary evidence
17 which is to be offered during the hearing be filed
18 at a prescribed time with the Clerk of the Court and
19 such other parties who shall make known their interests
20 by a time prescribed by the referee. The materials shall
21 be filed sufficiently in advance of the hearing to
22 permit study and preparation of cross-examination and
23 rebuttal evidence.

1 2. The authenticity of all documents submitted in
2 advance as provided in subsection IX.B.1 shall be
3 deemed admitted unless written objection is filed
4 within the time prescribed by the referee, or unless
5 there is good cause for the failure to have filed a
6 written objection.

7 C. Expert Witnesses. Where practical, some or all parties are
8 encouraged to agree upon the witnesses who are to give expert
9 testimony.

10 D. Direct Expert Testimony. Unless ordered to the contrary by the
11 referee, all direct expert testimony and all direct testimony
12 based upon economic or statistical data shall be reduced to
13 written sworn statements and, together with the exhibits
14 related thereto and the qualifications of the witness, shall
15 be filed at a prescribed time with the Clerk of the Court
16 and such other parties who shall make known their interests
17 by a time prescribed by the referee set reasonably in
18 advance of the hearing. Such sworn statements shall be
19 accepted as evidence upon formal offer at the hearing,
20 subject to objection on any ground except that the testimony
21 is not presented orally. The witness making such sworn
22 statement shall be available for cross-examination upon
23
24
25
26

1 2. The authenticity of all documents submitted in
2 advance as provided in subsection IX.B.1 shall be
3 deemed admitted unless written objection is filed
4 within the time prescribed by the referee, or unless
5 there is good cause for the failure to have filed a
6 written objection.

7 C. Expert Witnesses. Where practical, some or all parties are
8 encouraged to agree upon the witnesses who are to give expert
9 testimony.

10 D. Direct Expert Testimony. Unless ordered to the contrary by the
11 referee, all direct expert testimony and all direct testimony
12 based upon economic or statistical data shall be reduced to
13 written sworn statements and, together with the exhibits
14 related thereto and the qualifications of the witness, shall
15 be filed at a prescribed time with the Clerk of the Court
16 and such other parties who shall make known their interests
17 by a time prescribed by the referee set reasonably in
18 advance of the hearing. Such sworn statements shall be
19 accepted as evidence upon formal offer at the hearing,
20 subject to objection on any ground except that the testimony
21 is not presented orally. The witness making such sworn
22 statement shall be available for cross-examination upon
23
24
25
26
27

1 written request by any party served upon the offering party
2 or parties not less than twenty (20) days before the
3 time of the hearing.
4

5 X. REPORT OF THE REFEREE

- 6 A. The Referee will file a report on each subbasin, Major
7 Claimant claims, Indian claims or Federal Non-Indian claims
8 about forty-five (45) days after the conclusion of
9 hearings, filing of transcripts and submission of
10 post-hearing briefs, if any.
11

12 XI. CONDITIONAL FINAL ORDER

- 13 A. Upon filing of the Report of Referee with the Court, the
14 Court will set a time for trial thereon. The Referee shall
15 cause a notice to be prepared designating a time for filing
16 exceptions to the Report not less than forty-five (45) days
17 before the trial and a notice for the time of the trial, and
18 serve a copy thereof, together with the Report, on all parties
19 or their attorneys who have appeared in the proceeding. Such
20 service shall be made not less than ninety (90) days before the
21 time for the Court trial, either personally or by registered
22 mail, and an affidavit of such service filed with the Clerk.
23 B. If no objections are filed to the Report, the Court will
24 enter the Report of Referee as a Conditional Final Order as to
25 that group of claimants.
26

- 1 C. If objections are filed, the Court will hear and determine
2 such objections or may remand the case to the Referee for taking
3 of further evidence and submission of an amended Report of
4 Referee, if warranted. Thereafter, the Court will enter a
5 Conditional Final Order as to such group of claimants. Such
6 order shall be a final order for purposes of appeal except as to
7 the conditions of final intergration. See RAP 2.2(d). Any
8 appeal of a Conditional Final Order as to any group of claimants
9 shall not preclude continuing proceeding on any other claim.
10 See RAP 7.2(1).
- 11 D. If the Court determines that any objection is frivolous, the
12 Court will order the nonprevailing party to pay attorneys fees
13 and costs incurred in opposing such objections.

14
15 XII. FINAL ADJUDICATION

- 16 A. When all hearings have been concluded and Conditional Final
17 Orders have been filed as to all categories of claimants, the
18 Court will set a trial date for hearing exceptions on the final
19 integration of all confirmed rights as provided below.
- 20 B. All of the Conditional Final Orders previously entered by
21 the Court will be integrated into a Proposed Final Adjudication
22 Order. The Referee shall cause a copy of such Proposed Final
23 Adjudication Order to be mailed to all parties.
- 24 C. Any party may file a written objection to the Proposed Final
25 Adjudication Order with the Court within forty-five (45) days

1 after the date of mailing. Any objections received more than
2 forty-five (45) days after the date of mailing will be deemed to
3 have been waived.

4 D. If no objections are received by the Court, the Court will
5 consider the Proposed Final Adjudication Order and will enter a
6 Decree determining the rights of all parties according to the
7 evidence and the Proposed Final Adjudication Order.

8 E. If objections are filed, the Court will set the date or
9 dates for the hearing thereof and will take such action thereon
10 as may be deemed necessary.

11 F. As noted before, sanctions may be imposed by the Court for
12 any objections deemed to be frivolous.

13
14 XIII. ISSUES OF LAW

15 A. Throughout the course of the hearings by the Referee, the
16 Referee shall decide all procedural issues of law, including but
17 not limited to, questions as to the admissibility of evidence.
18 The Referee may also decide issues of substantive law. All
19 substantive rulings shall be specifically noted in the record
20 and the Report of Referee.

21 B. In the event that a major issue of substantive law should
22 arise during any hearing by the Referee, the Referee may adjourn
23 the hearing and refer the matter to the Court for the resolution
24 of the issue. The Court will then promptly set briefing and
25
26

1 hearing schedules thereon and determine the issue before the
2 Referee reconvenes the hearing on that category or group of
3 claimants.
4

5 XIV. INTERIM REGULATION

6 During the pendency of this proceeding, prior to judgment
7 or upon appeal, the surface waters involved shall be regulated
8 or partially regulated according to the schedule of rights
9 specified in the Report of Referee.
10

11 XV. ORDER

12 A. This Order supersedes Referee's Prehearing Order No. 1 Re:
13 Procedures for Claims Evaluation dated April 17, 1986, as
14 expressly amended by subsequent Orders entered prior to the
15 entry of this Pretrial Order. This order establishes
16 procedures and schedules applicable to the water right
17 claims of all parties filed in this matter. The procedures
18 in this order are intended to separate and limit the
19 evidentiary portion of this proceeding to those issues
20 which are in genuine dispute.
21
22
23
24
25
26

1 B. This order shall control the subsequent course of the
2 action, unless modified to prevent manifest injustice.

3 DATED this 3rd day of March, 1989.
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 written request by any party served upon the offering party
2 or parties not less than twenty (20) days before the
3 time of the hearing.

4
5 X. REPORT OF THE REFEREE

- 6 A. The Referee will file a report on each subbasin, Major
7 Claimant claims, Indian claims or Federal Non-Indian claims
8 about forty-five (45) days after the conclusion of
9 hearings, filing of transcripts and submission of
10 post-hearing briefs, if any.

11
12 XI. CONDITIONAL FINAL ORDER

- 13 A. Upon filing of the Report of Referee with the Court, the
14 Court will set a time for trial thereon. The Referee shall
15 cause a notice to be prepared designating a time for filing
16 exceptions to the Report not less than forty-five (45) days
17 before the trial and a notice for the time of the trial, and
18 serve a copy thereof, together with the Report, on all parties
19 or their attorneys who have appeared in the proceeding. Such
20 service shall be made not less than ninety (90) days before the
21 time for the Court trial, either personally or by registered
22 mail, and an affidavit of such service filed with the Clerk.
- 23 B. If no objections are filed to the Report, the Court will
24 enter the Report of Referee as a Conditional Final Order as to
25 that group of claimants.

- 1 C. If objections are filed, the Court will hear and determine
2 such objections or may remand the case to the Referee for taking
3 of further evidence and submission of an amended Report of
4 Referee, if warranted. Thereafter, the Court will enter a
5 Conditional Final Order as to such group of claimants. Such
6 order shall be a final order for purposes of appeal except as to
7 the conditions of final intergration. See RAP 2.2(d). Any
8 appeal of a Conditional Final Order as to any group of claimants
9 shall not preclude continuing proceeding on any other claim.
10 See RAP 7.2(1).
- 11 D. If the Court determines that any objection is frivolous, the
12 Court will order the nonprevailing party to pay attorneys fees
13 and costs incurred in opposing such objections.

14
15 XII. FINAL ADJUDICATION

- 16 A. When all hearings have been concluded and Conditional Final
17 Orders have been filed as to all categories of claimants, the
18 Court will set a trial date for hearing exceptions on the final
19 integration of all confirmed rights as provided below.
- 20 B. All of the Conditional Final Orders previously entered by
21 the Court will be integrated into a Proposed Final Adjudication
22 Order. The Referee shall cause a copy of such Proposed Final
23 Adjudication Order to be mailed to all parties.
- 24 C. Any party may file a written objection to the Proposed Final
25 Adjudication Order with the Court within forty-five (45) days

1 after the date of mailing. Any objections received more than
2 forty-five (45) days after the date of mailing will be deemed to
3 have been waived.

4 D. If no objections are received by the Court, the Court will
5 consider the Proposed Final Adjudication Order and will enter a
6 Decree determining the rights of all parties according to the
7 evidence and the Proposed Final Adjudication Order.

8 E. If objections are filed, the Court will set the date or
9 dates for the hearing thereof and will take such action thereon
10 as may be deemed necessary.

11 F. As noted before, sanctions may be imposed by the Court for
12 any objections deemed to be frivolous.

13
14 XIII. ISSUES OF LAW

15 A. Throughout the course of the hearings by the Referee, the
16 Referee shall decide all procedural issues of law, including but
17 not limited to, questions as to the admissibility of evidence.
18 The Referee may also decide issues of substantive law. All
19 substantive rulings shall be specifically noted in the record
20 and the Report of Referee.

21 B. In the event that a major issue of substantive law should
22 arise during any hearing by the Referee, the Referee may adjourn
23 the hearing and refer the matter to the Court for the resolution
24 of the issue. The Court will then promptly set briefing and
25

1 hearing schedules thereon and determine the issue before the
2 Referee reconvenes the hearing on that category or group of
3 claimants.
4

5 XIV. INTERIM REGULATION

6 During the pendency of this proceeding, prior to judgment
7 or upon appeal, the surface waters involved shall be regulated
8 or partially regulated according to the schedule of rights
9 specified in the Report of Referee.
10

11 XV. ORDER

12 A. This Order supersedes Referee's Prehearing Order No. 1 Re:
13 Procedures for Claims Evaluation dated April 17, 1986, as
14 expressly amended by subsequent Orders entered prior to the
15 entry of this Pretrial Order. This order establishes
16 procedures and schedules applicable to the water right
17 claims of all parties filed in this matter. The procedures
18 in this order are intended to separate and limit the
19 evidentiary portion of this proceeding to those issues
20 which are in genuine dispute.
21
22
23
24
25
26

1 B. This order shall control the subsequent course of the
2 action, unless modified to prevent manifest injustice.

3 DATED this 3rd day of March, 1989.

4
5 Walter Stanfloche
6 Judge.

7 Presented by:

8 Charles B. Roe, Jr.
9 Charles B. Roe, Jr.
10 Senior Assistant Attorney General
11 Attorney for Plaintiff.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

APPENDIX A

MAJOR CLAIMANTS

Ahtanum Irrigation District
Benton Irrigation District
Cascade Irrigation District
Ellensburg Water Company
Fowler Ditch Company
Grandview, City of
Grandview Irrigation District
Granger, City of
Granger Irrigation District
Home Irrigation District
Kennewick Irrigation District
Kittitas Reclamation District
Konnewok Ditch Company
Mabton, Town of
Moxee Ditch Association and
Moxee Ditch Sub-A
Moxee - Hubbard Ditch Company
Naches - Cowiche Canal Company
Naches - Selah Irrigation District
Outlook Irrigation District
Piety - Flat Ditch Company
Prosser, City of
Prosser Irrigation District
Richland, City of
Roza Irrigation District
Selah - Moxee Irrigation District
Snipes Mountain Irrigation District
Sunnyside, City of
Sunnyside Division, District and Towns
Sunnyside Valley Irrigation District
Terrace Heights Irrigation District
Union Gap, City of
Union Gap Irrigation District
United States of America
West Side Irrigation Company
Yakima - Tieton Irrigation District
Yakima Reservation Irrigation District
Yakima Valley Canal Company
Yakima, City of
Zillah, City of
Zillah Irrigation District

EXHIBIT 5

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF MODIFYING)
THE BOUNDARIES OF THE)
AMERICAN FALLS GROUND)
WATER MANAGEMENT AREA)

**FINAL ORDER MODIFYING THE
BOUNDARIES OF THE AMERICAN
FALLS GROUND WATER
MANAGEMENT AREA**

The Director of the Department of Water Resources ("Director" or "Department") on August 3, 2001, entered an order designating the American Falls Ground Water Management Area ("American Falls GWMA") pursuant to Idaho Code § 42-233b. The Director made the designation pursuant to his statutory authorities to administer rights to the use of ground water in a manner that recognizes and protects senior priority water rights in accordance with the directives of Idaho law. The severe drought conditions in 2001, which caused the Director to designate the ground water management area, have continued to exist across the Snake River Basin and, therefore, administration of the ground water rights is still necessary. However, Water District Nos. 120 and 130 have been established for the purpose of administration of water rights, and these districts overlay portions of the GWMA located in Administrative Basins 35, 36, 41, and 43, which is most of the GWMA. Thus, the need for the GWMA no longer exists in those portions of the GWMA overlain by Water District Nos. 120 and 130, and its continued existence within the Water District boundaries may cause confusion in the administration of water rights. Therefore, the Director enters the following Findings of Fact, Conclusions of Law and Order modifying the boundaries of the American Falls GWMA.

FINDINGS OF FACT

1. On August 3, 2001, the Director established the American Falls GWMA pursuant to Idaho Code § 42-233b. The Director designated the American Falls GWMA due to concerns about the depletionary effects of ground water withdrawals under junior priority water rights and the availability of water supplies for senior priority water rights from connected surface and ground water sources during the severe drought conditions experienced across the Snake River Basin. The Director issued the order in response to his recognition that he has a responsibility, subject to the confines of existing knowledge and technology, to exercise his statutory authorities to administer water rights for the use of ground water in a manner that recognizes and protects senior priority surface water and ground water rights in accordance with the provisions of Idaho law. In establishing the American Falls GWMA, the Director stated his intent to curtail diversions under certain junior ground water rights that caused significant depletions to hydraulically connected surface water sources thereby causing injury to senior priority water rights.

2. Findings of Fact one through seven of the Director's order of August 3, 2001, describe the general hydrologic features of the Eastern Snake River Plain Aquifer ("ESPA") and the level of confidence that the Director places upon simulations using the Department's calibrated computer model of the ESPA and are incorporated in this order by reference.

3. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 35, 36, 41 and 43 overlying the ESPA, pursuant to chapter 6, title 42, Idaho Code, based upon a determination that such interim administration is necessary to protect senior water rights.

4. On February 19, 2002, the Director entered an order pursuant to Idaho Code § 42-604 creating the American Falls Area Water District, designated as Water District No. 120, and the Thousand Springs Area Water District, designated as Water District No. 130.

7. The boundaries of Water District Nos. 120 and 130 encompass the area over the ESPA covered by the American Falls GWMA in Administrative Basins 35, 36, 41 and 43.

CONCLUSIONS OF LAW

1. The Director has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights and yet allow full economic development of the state's underground water resources in the public interest. See Idaho Code §§ 42-226, 42-237a.g, and 42-602.

2. The Director has general responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, as provided in chapter 6, title 42, Idaho Code and IDWR regulations.

3. The establishment of Water District Nos. 120 and 130, which includes the area within the boundaries of the American Falls GWMA over the ESPA located in Administrative Basins 35, 36, 41, and 43, provides the Director with the more comprehensive water administration authorities available under chapter 6, title 42, Idaho Code. These authorities together with the "Rules for Conjunctive Management of Surface and Ground Water Resources" (IDAPA 37.03.11) make it unnecessary to retain the current boundaries of the American Falls GWMA.

4. The Director should modify the boundaries of the American Falls GWMA area because it is no longer necessary to retain the current boundaries for water administration purposes.

5. Because publication of notice in two (2) consecutive weekly issues of one or more newspapers of general circulation in the area is required by Idaho Code § 42-233b upon the

designation of a ground water management area, the Director will provide similar published notice of the modification of the boundaries of the American Falls GWMA.

6. Any person aggrieved by this order shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days following published notice of the order, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Idaho Code § 42-1701A(4).

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the boundaries of the American Falls Ground Water Management Area designated by order of the Director on August 3, 2001, are hereby modified as depicted on the map appended hereto as Attachment A and incorporated herein by reference.

DATED this 29th day of August 2003.

/Signed/
KARL J. DREHER
Director

Modified American Falls Ground Water Management Area

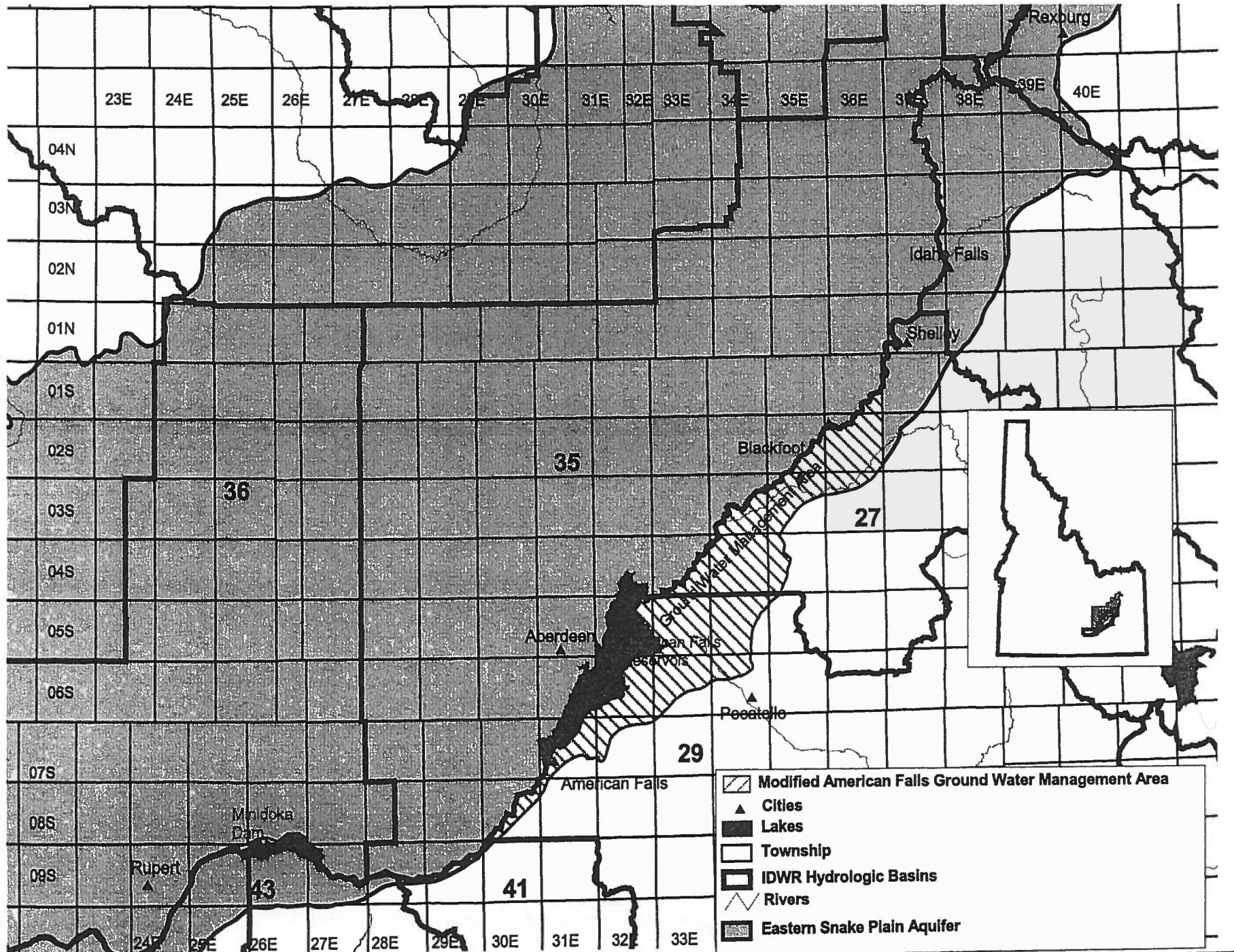


EXHIBIT 6

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DESIGNATING)
THE AMERICAN FALLS GROUND)
WATER MANAGEMENT AREA)
_____)

ORDER

This matter comes before the Director of the Department of Water Resources ("Director" or "Department") as a result of the severe drought conditions being experienced across the Snake River Basin and the possibility that the drought conditions could continue into the 2002 irrigation season and beyond. The Director initiates this matter in response to his recognition that he has a responsibility, subject to the confines of existing knowledge and technology, to exercise his statutory authorities to administer rights to the use of ground water in a manner that recognizes and protects senior priority surface water rights in accordance with the directives of Idaho law. The Director enters the following Findings of Fact, Conclusions of Law and Order in furtherance of those directives.

FINDINGS OF FACT

1. The Eastern Snake River Plain Aquifer ("ESPA") is defined as the aquifer underlying the Eastern Snake River Plain as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," USGS Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply (see Rule 50, IDAPA 37.03.11050).
2. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and the Snake River, including tributary surface water sources, is in the Shelley to Minidoka reach of the river, herein termed the "American Falls reach" located along the southeastern edge of the ESPA in the vicinity of American Falls Reservoir.
3. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from the ESPA for irrigation and other consumptive purposes, which occur in relatively close proximity to the area of the American Falls reach, cause significant reductions in the gains to this reach of the Snake River that result from hydraulic connection with the ESPA (herein termed "reach gains") within six (6) months or less from the time the withdrawals occur.

4. Although all consumptive ground water diversions from the ESPA eventually affect surface water flows to varying degrees, the Department's model simulations and other analytical calculations demonstrate that ground water diversions occurring within a band on both sides of the American Falls reach varying in width from 1.6 kilometers to five (5) kilometers on each side of the river result in seasonal reach gain reductions equal to fifty percent (50 percent) or more of the amount of water diverted and consumptively used, and such reductions occur within six (6) months of the diversions.

5. Surface and ground water studies for the Eastern Snake River Plain, funded in part by the Idaho Legislature, are presently being performed by or on behalf of the Department, with the participation of other public and private entities. These studies will provide additional data that will be used to further refine and calibrate the ground water model used by the Department to calculate the amount, location, and timing of surface water depletions caused by the withdrawal and use of ground water throughout the plain overlying the ESPA. The purpose for the additional data collection and model refinement/calibration is to reduce uncertainty in the model and increase acceptance of the Department's use of the model to implement long-term, conjunctive administration of rights to the use of interconnected surface and ground waters within the Eastern Snake River Plain. Although efforts are underway to improve the Department's ground water model, the results from simulations using the ground water model as it presently exists provide a suitable basis for making some water management decisions when the uncertainties of the existing model are appropriately addressed.

6. The Department presently does not have a sufficient basis to undertake full conjunctive administration of rights to the use of interconnected surface and ground waters within the Eastern Snake River Plain. The Department is confident, however, that the results of simulations from its existing ground water model and other analytical calculations are suitable for determining the area containing those ground water diversions for which the depletion of water from the ESPA results in the most direct and significant reduction in reach gains with an acceptable degree of accuracy. For the purposes of this order and to account for the uncertainties in the Department's present ground water model, a ground water diversion is considered to cause a direct and significant reduction in reach gains if, based on simulations using the Department's ground water model or other analytical calculations, the reach gains are reduced by an amount equal to fifty percent (50 percent) or more of the ground water depletion associated with the ground water diversion, and such reduction occurs within six (6) months of the ground water diversion.

7. The water supply available, including both natural flow and reservoir storage, for use under senior surface water rights that in part rely on reach gains is expected to be further diminished, should the drought continue, and inadequate to fully satisfy all senior surface water rights during the next irrigation season. This water supply is also expected to be reduced as a result of ground water withdrawals from the ESPA for irrigation and other consumptive purposes that are diverted in close proximity to the area of the American Falls reach without mitigating the effects of the associated ground water depletions.

8. Based upon the depletionary effects of ground water withdrawals on the reach gains and the inadequate water supply expected to be available for senior surface water rights, that portion of the ESPA along the American Falls reach may be approaching the conditions of a critical ground water area.

9. On July 13, 2001, the Twin Falls Canal Company and the North Side Canal Company ("Canal Companies") submitted to the Department through their attorney a written request asking for the Director "to promptly designate a Groundwater Management Area for Basin 35 pursuant to I.C. § 42-233(b)." The Department will proceed under the Department's Rules of Procedure, IDAPA 37.01.01, to consider the request of the Canal Companies as a petition for creation of a ground water management area including all of Basin 35 in accordance with Rule 30.06, IDAPA 37.03.11030.06.

10. The action of the Director in the present matter relates only to that portion of the ESPA, as depicted on the map identified as Attachment A, that contains all or parts of the townships along the Snake River that encompass or are adjacent to the 1.6 kilometer to five (5) kilometer wide band on each side of the American Falls reach described in Finding of Fact No. 4. The action is taken as a result of the Director's independent initiative and is not taken in response to the petition of the Canal Companies.

CONCLUSIONS OF LAW

1. Idaho law declares all ground waters in this state to be the property of the state of Idaho, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. I.C. § 42-226.

2. The Director of the Department has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights and yet allow full economic development of the state's underground water resources in the public interest. See I.C. §§ 42-226 and 42-237a.g.

3. Section 42-233a, Idaho Code, authorizes the Director to designate a "critical ground water area" which is defined as any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time by the Director.

4. Section 42-233b, Idaho Code, authorizes the Director to designate a "ground water management area" which is defined as any ground water basin or designated part thereof which the Director has determined may be approaching the conditions of a critical ground water area.

5. Although Rule 30.06, IDAPA 37.03.11030.06, provides a procedure that the Department may follow in a proceeding upon a petition for designation of a ground water management area, the present action is taken as a result of the Director's independent initiative and is not taken in response to a petition.

6. When a ground water management area is designated by the Director, or at any time thereafter during the existence of the designation, the Director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water. I.C. § 42-233b.

7. The Director may require all water right holders within a designated water management area to report withdrawals of ground water and other necessary information for the purpose of assisting the Department in determining available ground water supplies and their usage. I.C. § 42-233b.

8. The Director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the Director, to cease or reduce withdrawal of water until such time as the Director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given. I.C. § 42-233b.

9. Based upon the foregoing findings, the Director determines that the portion of the ESPA located in the area of the American Falls reach may be approaching the conditions of a critical ground water area.

10. The Director should designate a ground water management area for the area of the ESPA near the American Falls reach as ordered below.

11. Upon designation of a ground water management area the Director shall publish notice in two (2) consecutive weekly issues of one or more newspapers of general circulation in the area. I.C. § 42-233b.

12. Any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days following published notice of the order, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Section 42-1701A(4), Idaho Code.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the following described area be included within and designated as the "American Falls Ground Water Management Area."

That portion of the Eastern Snake Plain Aquifer within all or parts of the following townships along the Snake River in Cassia, Minidoka, Blaine, Power, Bingham, and Bannock Counties:

T8S and T9S, R25E, Boise Meridian (B.M.); T8S and T9S, R26E, B.M.; T8S and T9S, R27E, B.M.; T8S and T9S, R28E, B.M.; T8S and T9S, R29E, B.M.; T6S, T7S, T8S and T9S, R30E, B.M.; T4S, T5S, T6S, T7S and T8S, R31E, B.M.; T3S, T4S, T5S, T6S and T7S, R32E, B.M.; T2S, T3S, T4S, T5S, T6S and T7S, R33E, B.M.; T2S, T3S, T4S, T5S and T6S, R34E, B.M.; T1S, T2S, T3S, T4S and T5S, T35E, B.M.; and T1S, T2S and T3S, R36E, B.M.

Attached to this Order is a map identified as Attachment A, that graphically shows the boundaries of the "American Falls Ground Water Management Area."

DATED this 3rd day of August 2001.



KARL J. DREHER
Director

American Falls Ground Water Management Area and Basin 35

