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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHT NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARM)	)	**CLEAR SPRINGS FOODS, INC.'S RESPONSE TO JULY 28, 2006 ORDER**

Clear Springs Foods, Inc. ("Clear Springs"), by and through its counsel of record Barker Rosholt & Simpson LLP, hereby submits this *Response* to the Director's *Order Requesting Briefing on Nature of Further Proceedings* that was filed on July 28, 2006 ("*Briefing Order*").

INTRODUCTION

The timing and substance of the request in the Director's *Briefing Order* is unusual given the Court's ruling in *American Falls Reservoir District #2 et al. v. IDWR et al.* (Gooding County District Court, Fifth Jud. Dist., Case No. CV-2005-600) and the Court's clear directive to the Director. Clear Springs and the other party to this proceeding, the Idaho Ground Water Appropriators, Inc. ("IGWA"), intervened in the *AFRD #2* litigation. On July 21, 2006, the Defendants, including the Director, moved the District Court to "stay" the judgment in that case pending their appeal to the Idaho Supreme Court. Clear Springs filed a response opposing the

Defendants' motion on August 1, 2006. *See* Exhibit A (Clear Springs' *Joinder in Plaintiffs' Response to Defendants' Motion for Stay* filed in *AFRD #2* case). A hearing on the motion to stay is scheduled to be held at 10:00 a.m. on August 8, 2006. Whether and why the Director must receive "briefing" from the parties on "their position regarding the nature of further proceedings, if any, that should occur before the Department, pending action on the Department's appeal and motion for stay" a day prior to the hearing on his motion to stay in the *AFRD #2* case is unknown. The timing is particularly troublesome given the Director's lack of action in this proceeding over the past two months. Moreover, given the Director's position in the *AFRD #2* litigation that "the Director could not proceed with administration until the [conjunctive management] Rules are amended or re-promulgated" and "[the conjunctive management rules] are also the best option – actually the only practical option – available while the appeal is pending", it is obvious the Director, the Hearing Officer in this proceeding, has already decided how "further proceedings, if any" should occur. Apparently the Director believes administration should not occur at all without the conjunctive management rules. *See* Exhibits B, C (Defendants' *Memorandum in Support of Motion for Stay* and *Reply in Support of Motion for Stay* filed in the *AFRD #2* case).

BACKGROUND

The Director issued an *Order Approving IGWA's Substitute Curtailments* on April 29, 2006, which required the two ground water districts to submit a "substitute curtailment plan" resulting in 16 cfs steady state gain to the Buhl gage to Thousand Springs reach of the Snake River. If the districts failed to submit "sufficient replacement water" or a an "acceptable substitute curtailment plan(s)" by May 30, 2006, junior priority ground water rights were to be curtailed as described in the Director's July 8, 2005 Order. The North Snake and Magic Valley

Ground Water Districts submitted a *Joint Replacement Water Plan* on May 30, 2006. The plan was deemed insufficient through Gary Spackman's June 9, 2006 letter to Michael Creamer. Prior to the issuance of the Spackman letter, on June 5, 2006 the Director held a hearing on IGWA's petition for reconsideration of mitigation credits as analyzed in the April 29, 2006 Order. The Director ordered further briefing after the hearing, which was submitted by IGWA on June 19, 2006, and by Clear Springs on June 26, 2006. Despite outstanding matters in this case the Director has failed to issue any orders with respect to the *Joint Replacement Water* Plan that was submitted on May 30, 2006, or IGWA's petition for reconsideration that was the subject of the June 5, 2006 hearing.

The Gooding County District Court declared the Department's Rules unconstitutional on June 2, 2006. The Court then issued a judgment on June 30, 2006, which was later certified as final on July 11, 2006. Clear Springs submitted a letter to the Director on July 21, 2006, which identified the Court's decision, as well as the inconsistencies in IGWA's July 10, 2006 letter regarding replacement water for a separate delivery call proceeding and the ground water districts' *Joint Replacement Water Plan* submitted in this case. Whereas the Director is aware that the Department's Rules have been declared unconstitutional since June 2, 2006, he nonetheless proceeded to use the Rules in other delivery call proceedings, and now is apparently seeking to do the same here given the "uncertainty" and the need to request "briefing" on the question.

Clear Springs objects to the Director's request and its timing, particularly given the litigation in the *AFRD #2* case wherein the Director has already stated that he opposes Clear Springs' position. Moreover, a hearing on the Defendants' (Director's) motion for stay will be held tomorrow in front of the District Court.

I. The Director Has Constitutional and Statutory Authority and a "Clear Legal Duty" to Administer Junior Priority Ground Water Rights.

The Director possesses express constitutional and statutory authority to administer junior priority ground water rights and distribute water to satisfy Clear Springs' senior surface water rights. The Director must carry out this duty regardless of the District Court's or Supreme Court's action on the Director's stay motion or pending the Director's appeal of the Court's decision. The Director has a "clear legal duty" to distribute water to senior water rights by priority, and the failure to do so warrants a writ of mandate. *Musser v. Higginson*, 125 Idaho 392, 395 (1994). Although the "details of the performance of the duty" are left to the Director's discretion, and must be consistent with Idaho law, the *Musser* Court did not hold that performing water right administration was contingent upon using a set of administrative rules.

The following constitutional provisions and statutes provide the Director with the requisite authority in the absence of administrative rules:

> Priority of appropriations shall give the better right as between those using the water;

IDAHO CONST. art. XV, § 3.

> As between appropriators, the first in time is first in right.

Idaho Code § 42-106.

> 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.

Idaho Code §§ 42-233a, 233b.

The Director has the statutory authority to designate the ESPA, or "designated part[s] thereof" as either "critical ground water areas" or "ground water management areas." The Director can make these designations at any time. Upon such designation and finding that the water supplies are insufficient to meet the demands of water rights, the Director can order water right holders on a "time priority basis" and order juniors to "cease or reduce" pumping provided notice is given before September 1st. Such administration is "prospective" and is available to the Director this year. Moreover, such action is not clouded by fruitless allegations that the Director must have rules in order to administer. Neither the statutes identified, nor the Director's own orders creating Water District 130 identify the necessity of rules to administer.

The Director previously used I.C. § 42-233b to designate the Thousand Springs Ground Water Management Area in August 2001 ("*Thousand Springs Order*").[1] *See* Exhibit D. In that order the Director expressly recognized:

> The Director initiates this matter in response to his recognition that he has a responsibility . . . to exercise 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.

See Thousand Springs Order at 2.

Given the Director's express acknowledgment that junior priority "ground water diversions occurring within a five (5) to ten (10) kilometer band from the canyon wall along the north side of the Snake River in the Thousand Springs reach result in seasonal spring flow 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" there is no reason to condition administration of those water rights on a new set of agency rules. *See Thousand Springs Order* at 2, ¶ 4.

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[1] The Director issued an order on August 29, 2003 purporting to "dissolve" the Thousand Springs GWMA. This order is presently subject to challenges filed by Clear Springs and others.

The Director knows that ground water diversions in these areas deplete the source for Clear Springs' senior water rights and that these depletions are realized within 6 months. Despite this knowledge he has continued to permit out-of-priority ground water diversions throughout 2005 and 2006. The Director plainly has authority in Chapter 2, Title 42, Idaho Code to administer junior priority ground rights by creating a ground water management area.

Apart from the above process, the Director can further administer water rights immediately going forward pursuant to his authority in Chapters 6 and 14, Title 42.

> The director of the department of water resources shall distribute water in water districts accordance with the prior appropriation doctrine.

Idaho Code § 42-602.

> It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, . . . according to the prior rights of each respectively, and to shut and fasten . . . facilities for diversion of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . .

Idaho Code § 42-607.

> (1) The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code: (a) in accordance with the director's report or as modified by the court's order; (b) in accordance with the applicable partial decree(s) for water rights acquired under state law . . . (2)(c) upon a determination by the court, after hearing, that the interim administration of water rights in accordance with the report, or as the report is modified by the court's order, and in accordance with any partial decree(s), is reasonably necessary to protect senior water rights.

Idaho Code § 42-1417.

The Director requested authority from the SRBA Court to perform interim administration, based upon the above statutes, not the conjunctive management rules. The final order creating Water Districts 130 requires the watermaster to curtail out-of-priority diversions:

> 10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:
>
> * * *
>
> d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director.
>
> 11. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, models, and the Director's best professional judgment.

See Final Order Creating Water District 130 at 5, 6. Exhibit E.

Nothing in the *WD 130 Order* requires the watermaster or the Director to use agency rules in order to "curtail out-of-priority diversions". Indeed, nothing in the entire order even mentions the Department's now void conjunctive management rules. The Director is authorized to issue instructions to the watermaster to curtail out-of-priority ground water diversions. While such a duty is mandatory under I.C. § 42-607, not having a set of agency rules does not preclude the watermaster from curtailing ground water rights.

In short, the Director can and must proceed with administration in the absence of new conjunctive management rules. If new rules are necessary the Director has the authority to promulgate the same. Waiting for administration to occur until these new rules are adopted, with or without a stay of the District Court's judgment, or until the Idaho Supreme Court rules on the Director's appeal is unacceptable, particularly in light of the ongoing curtailment that Clear Springs must suffer. *See* Exhibit F (*Affidavit of Linda L. Lemmon* filed in the *AFRD #2* case).

II. The Director Cannot Use Unconstitutional Rules in Administration.

The Gooding County District Court has declared the Department's Rules unconstitutional. The Court's order and judgment in the *AFRD #2* case "must be complied with

promptly." *Bayes v. State*, 117 Idaho 96, 99 (Ct.App. 1987). Therefore, the Director's prior orders responding to Clear Springs' requests for water right administration, based upon the Rules, are now void as a matter of law and must be reconsidered. *See Clemens v. Pinehurst Water Dist.*, 81 Idaho 213, 218-19 (1959). Accordingly, by letter of July 21, 2006, Clear Springs requested the Director to reconsider his prior orders and proceed with water right administration that complied with Idaho's constitution and water distribution statutes. To date the Director has not responded, other than to request "briefing" in this case thereby further delaying proper administrations. Readily accepting the benefit of this administrative delay, out-of-priority ground water rights have continued to divert to Clear Springs' detriment ever since the Rules were declared unconstitutional on June 2, 2006, and ever since Clear Springs' sent the Director its July 21st letter. The lack of "timely" administration this year is obvious.

Regardless of the District Court's action on the Director's stay motion, the Director cannot proceed to use unconstitutional rules in failing to administer junior priority ground water rights that are injuring Clear Springs' senior water rights. Staying execution of the Judgment would not somehow erase the District Court's order. The prior orders and actions of the Director are void, and even granting the Director's "stay motion" pending the appeal does not somehow make those orders and actions "legal" and constitutional.

III. No Administration Pending Action on the Defendants' (Director's) Stay Motion or the Appeal in the *AFRD #2* Litigation is Unlawful and Continues the Injury to Clear Springs' Senior Water Rights.

Rather than honor the Gooding County District Court's order and judgment, the Director continues down a path that ignores the constitution and further delays proper water right administration. The Director, using his position as Hearing Officer in this matter, is requesting

"briefing" on issues that are presently before the District Court. The request is a delay move and has furthered the unconstitutional administration to date.

In the meantime, Clear Springs, a senior water right holder, is left to suffer the shortages in the water supply. The continuing injury to Clear Springs and other spring users in the Thousand Springs reach is demonstrated by recent measurements of the spring flows that supply those various senior rights. *See* Exhibit F (*Affidavit of Linda L. Lemmon* filed in the *AFRD #2* case). No action pending resolution of the Director's stay motion and appeal in the *AFRD #2* case is unlawful given the Director's "clear legal duty" to administer water rights by priority in conformance with Idaho's constitution and water distribution statutes.

CONCLUSION

The question posed by the Director in this matter is troubling given the fact that his stay motion will be heard by the District Court tomorrow, a motion that the Director knows Clear Springs opposes. The outcome of that hearing will not change the Court's final judgment that declared the Department's conjunctive management rules unconstitutional. The Director's prior actions and orders in this matter are void and must be reconsidered. The Director has a "clear legal duty" to administer water rights by priority and this duty is not conditioned on having a set of agency rules. Therefore, the Director must proceed in conformance with Idaho law and the Court's judgment and order in the *AFRD #2* case.

DATED this 7th day of August, 2006.

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson

Attorneys for Clear Springs Foods, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2006, I served a true and correct copy of the foregoing *Clear Springs Foods, Inc.'s Response to July 28, 2006 Order* on the following by the method indicated:

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

AMERICAN FALLS RESERVOIR DISTRICT #2, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY, Plaintiffs, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL J. DREHER, its director, Defendants.	Case No. CV-2005-600 CLEAR SPRINGS FOODS, INC.'S JOINDER IN PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR STAY

COMES NOW, Plaintiff-Intervenor CLEAR SPRINGS FOODS, INC. ("Clear Springs"), by and through counsel of record, and hereby joins in the *Plaintiffs' Response to Defendants' Motion for Stay*. Clear Springs joins in the response submitted by the Plaintiffs and further opposes the Defendants' efforts to stay the Court's June 2nd Order and June 30th Judgment for the additional points set forth below.

Clear Springs holds numerous decreed water rights to springs that emanate from the northern rim of the Snake River Canyon in the area known as the "Thousand Springs reach" north of Buhl, Idaho.[1] *See* Ex. A to *Affidavit of John K. Simpson in Support of Clear Springs Foods, Inc.'s Motion for Summary Judgment* (hereinafter "*Simpson Aff.*").[2] Clear Springs' decreed water rights provide for year-round diversion at specified rates. *See id.*

On May 2, 2005, Clear Springs requested water right administration and delivery of water to its Snake River Farm and Crystal Springs Farm pursuant to Idaho Code § 42-607. *See* Exs. B, C to *Simpson Aff.* The Director of the Idaho Department of Water Resources ("Department") deemed Clear Springs' request to be a "delivery call" under the conjunctive management rules ("Rules"), and responded by issuing an order on July 8, 2005 ("*July Order*"). *See* Ex. D to *Simpson Aff.* Since Clear Springs originally requested administration in May 2005, the spring flows that supply Clear Springs' senior surface water rights have not increased, and Clear Springs' water rights are still not being satisfied. *See* Ex. A to *Linda L. Lemmon* (demonstrating the decreed amounts versus the recorded low spring flows for 2003 and 2006 and the percentage loss). The injury to Clear Springs' water rights is continuing and likely to continue for the rest of this year and beyond. *See id.*

This Court declared the Department's Rules unconstitutional on June 2, 2006 Order. A judgment was issued on June 30, 2006 and later certified as final on July 11, 2006 pursuant to the Defendants' representations that they would honor and follow the judgment. The Director's prior orders responding to Clear Springs' requests for water right administration, based upon the Rules, are now void as a matter of law. *See Clemens v. Pinehurst Water Dist.*, 81 Idaho 213,

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[1] Clear Springs' water rights in Basin 36 are listed as follows: 36-2048, 36-2703, 36-4013A, 36-4013B, 36-4013C, 36-7040, 36-7083, 36-7148, 36-7201, 36-7218, and 36-7568.

[2] Mr. Simpson's affidavit was submitted in this case on November 1, 2005 in support of Clear Springs' motion for summary judgment.

218-19 (1959). Accordingly, by letter of July 21, 2006, Clear Springs requested the Director to reconsider his prior orders and proceed with water right administration that complies with Idaho's constitution and water distribution statutes. *See* Ex. I to *Third Thompson Aff.* The Director responded to Clear Springs' letter with an order requesting "briefing" on how the Director should continue with administration, if any, at this time in light of this Court's judgment and the Defendants' appeal and present motion for stay. *See* Ex. J to *Third Thompson Aff.*

Rather than honor this Court's judgment, the Defendants are continuing on a path that ignores the constitution and further delays proper water right administration. In the meantime, Clear Springs, a senior water right holder, is left to suffer the shortages in the water supply. The Defendants' procedural "gamesmanship" over the two months since this Court issued its June 2nd Order has gone on long enough and must come to an end.

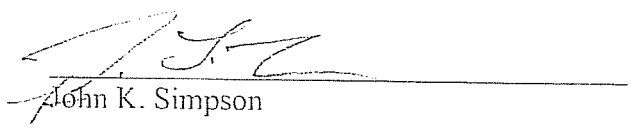
In the face of shortages to senior water rights throughout Water District 130, the Defendants' claim that the "public interest" weighs in favor of a stay are meritless. Moreover, the Defendants' allegation that "the current good water year minimizes the potential injury" during the appeal is similarly flawed. The so-called "good water year" has not alleviated the injury to Clear Springs and other spring users in the Thousand Springs reach as evidenced by recent measurements of the spring flows that supply those various senior rights. *See* Ex. A to *Affidavit of Linda L. Lemmon.*

The Defendants have not met their burden to show that a stay of this Court's judgment is necessary. The Defendants should not be permitted to shrug off their constitutional and statutory duties for yet another year. Staying the judgment in this case will ensure no lawful administration is performed this year, and will effectively give the Defendants the "green light" to continue to use the Rules in 2007. Whereas the Court has declared the Department's Rules to

be unconstitutional, there is no basis to stay that decision and allow the Director to proceed with unlawful administration to the detriment of Clear Springs and other senior surface water users. Clear Springs requests this Court deny the Defendants' motion.

DATED this 15th day of August 2006.

BARKER ROSHOLT & SIMPSON LLP



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I hereby certify that on the 1st day of August, 2006, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

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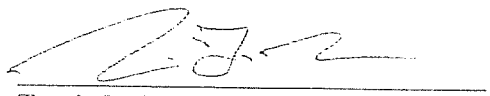

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
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AMERICAN FALLS RESERVOIR DISTRICT NO. 2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY, Plaintiffs-Repondents, and RANGEN, INC., CLEAR SPRINGS FOODS, INC., THOUSAND SPRINGS WATER USERS ASSOCIATION, and IDAHO POWER COMPANY, Intervenors-Respondents, v. THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL J. DREHER, its Director, Defendants-Appellants, and IDAHO GROUND WATER APPROPRIATORS, INC., Intervenors.	**Case No. CV-2005-600** **MEMORANDUM IN SUPPORT OF MOTION FOR STAY UNDER IRCP 62(d) AND IDAHO APPELLATE RULE 13(b)**

BACKGROUND

The Court entered an Order on Plaintiffs' Motion for Summary Judgment on June 2, 2006 ("Order"), and a Judgment Granting Partial Summary Judgment on June 30, 2006 ("Judgment"). The Judgment stated that the Rules for the Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.011 *et. seq* (the "CM Rules" or "Rules"), are "constitutionally deficient" and "facially unconstitutional." Judgment at 2. The Court certified the Judgment under Rule 54(b) of the Idaho Rules of Civil Procedure on July 11, 2006. *See* Order Certifying Judgment Granting Partial Summary Judgment Under Rule 54(b). The Defendants filed a Notice of Appeal on the same date.

DISCUSSION

I. LEGAL STANDARDS

When an appeal is taken to the Idaho Supreme Court, the Idaho Rules of Civil Procedure provide that "the proceedings in the district court upon the judgment or order appealed from shall be stayed as provided by the Idaho Appellate Rules." I.R.C.P. 62(d). Under the Idaho Appellate Rules, this Court is authorized to "[s]tay the execution or enforcement" of the Judgment while the Defendants' appeal is pending. I.A.R. 13(b). The decision of whether to grant a stay pending appeal is committed to the Court's discretion. *Waters v. Dunn*, 18 Idaho 450, 457, 110 P. 258, 260 (1910); *see also Continental Cas. Co. v. Brady*, 127 Idaho 830, 834, 907 P.2d 807, 811 (1995) ("The determination as to whether to grant a stay of proceedings pending the resolution of related proceedings in another court is a matter vested in the sound discretion of the trial court.")

No reported Idaho case defines or explains "the legal standards applicable to" a motion for a stay under I.A.R. 13(b). *Craig Johnson Const., L.L.C. v. Floyd Town Architects, P.A.*, 142

Idaho 797, 800, 134 P.3d 648, 651 (2006) (holding that in exercising its discretion, a trial court must act consistently with "the legal standards applicable to the specific choices available to it").[1] The widely accepted approach in other states and in the federal courts under rules analogous to I.A.R. 13(b) is that four factors, similar to those considered in preliminary injunction cases, are considered in analyzing a motion to stay a judgment pending appeal.

> These well-known factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991).[2] "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Id*; *see also State v. Gudenschwager*, 529 N.W.2d 225, 229 (Wisc. 1995) (same).

II. APPLICATION OF THE FOUR FACTORS TO THE DEFENDANTS' MOTION

The Judgment in this case decided difficult and pivotal questions of Idaho water law on which the Idaho Supreme Court has not yet passed, and which have far-reaching ramifications for holders of water rights in Idaho, whether the rights apply to surface water or ground water, and whether the use is for irrigation, domestic purposes, municipal water supplies, industrial activity, or any other purpose. If the Judgment is not stayed during the appeal, implementation of the Judgment is likely to cause additional litigation, increase the uncertainty and delay in the

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[1] Prior to the enactment of I.A.R. 13(b), the Idaho Supreme Court held that a stay pending appeal was appropriate when (1) necessary "to preserve the status quo to do complete justice," (2) the stay would "not be seriously injurious to respondent," and (3) it was "entirely possible that refusal to grant a stay would injuriously affect the appellant." *McHan v. McHan*, 59 Idaho 41, 46, 80 P.2d 29, 32 (1938) (citing *Kiefer v. City of Idaho Falls*, 46 Idaho 1, 265 P. 701 (1928)). These pre-I.A.R. 13(b) standards are similar to the approach described in the discussion below.

[2] *See also, e.g., McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *Lopez v. Heckler*, 713 F.2d 1432, 1435 -1436 (9th Cir. 1983); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir. 1977); *State v. Gudenschwager*, 529 N.W.2d 225, 29 (Wisc. 1995); 5 Am.Jur.2d *Appellate Review* § 470 ("Standards for granting stay").

administration of water rights in interconnected surface and ground water sources, and cause needless irreparable harm to water users and the economy of the state should the Judgment ultimately be reversed.

Moreover, the Judgment is a ruling on an application for declaratory judgment regarding the facial constitutionality of the CM Rules. It is not a decision on judicial review of a final action of the Director, and does not entitle the Plaintiffs to any specific relief in their delivery call, other than effectively barring the Director from continuing to apply the CM Rules. A stay will preserve the relief the Plaintiffs have already obtained under the Director's orders, and allow the Director to continue to provide any additional relief determined to be necessary in the existing proceeding while preserving the status quo on what is admittedly an unsettled area of law. Given the uncertainties regarding the applicable legal principles, it is not in the public interest to undertake yet another approach to conjunctive administration at this intermediate point in the determination of the constitutionality of the CM Rules, because doing so would threaten even more economic disruption and uncertainty with respect to existing water rights. The public interest thus weighs heavily in favor of a stay until the Idaho Supreme Court resolves the Defendants' appeal. Under these circumstances, a stay until the appeal is decided is necessary and appropriate.

A. THE LIKELIHOOD THE DEFENDANTS WILL PREVAIL ON APPEAL

1. LEGAL PRINCIPLES APPLICABLE UNDER THE "LIKELIHOOD OF SUCCESS" FACTOR

Courts have repeatedly held that this factor does not require a showing that an appeal will probably succeed. Indeed, in an oft-cited explanation of the standards for granting a stay pending appeal, the United States Court of Appeals for the District of Columbia Circuit observed

that depending on the showing made under the other factors, a stay may be warranted even when the court believes the appeal will probably fail on the merits:

> The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C.Cir. 1977).[3]

Other courts have agreed that the showing required under this factor depends largely on how the other factors apply in the circumstances of a particular case. "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other." *Michigan Coalition of Radioactive Material Users, Inc.*, 945 F.2d at 153 (citation omitted). Moreover, the importance of the perceived likelihood of success diminishes sharply when the appeal raises difficult and significant legal questions:

> If Defendants can meet the other requirements for a stay pending appeal, they will be deemed to have satisfied the likelihood of success on appeal element if they show "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation."

McClendon v. City of Albuquerque, 79 F.3d 1014, 1020 (10th Cir. 1996) (citations omitted); *see also Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) ("when a serious legal question is

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[3] Indeed, as the Fifth Circuit has observed, the fact that the rules require a movant to seek a stay pending appeal from the District Court before asking the same of an appellate court necessarily implies that the movant is not required to show a "probability of success" on appeal. *See Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) ("If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed. That judge has already decided the merits of the legal issue.")

involved," the movant "need only present a substantial case on the merits . . . and show that the balance of the equities weighs heavily in favor of granting the stay.")

Thus, when serious and significant legal questions are at issue, irreparable harm would result without a stay, and a stay would be in the public interest, the question of the likelihood of success on appeal recedes to the point of becoming largely irrelevant:

> An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Washington Metropolitan Area Transit Commission, 559 F.2d at 844.

2. THE OVERRIDING IMPORTANCE OF THE QUESTIONS PRESENTED BY THE DEFENDANTS' APPEAL OBVIATES ANY NEED TO SHOW A "LIKELIHOOD" OR "PROBABILITY" OF SUCCESS ON APPEAL.

It is beyond dispute that the Defendants' appeal involves difficult and pivotal questions of Idaho water law. This case is no ordinary lawsuit. It directly challenges the facial constitutionality of a comprehensive set of administrative rules that have been in place for nearly twelve years. *See* IDAPA 37.03.11.001 (dated Oct. 7, 1994). Further, the CM Rules, and the Judgment, go to the heart of an issue that "is one of the main reasons for the commencement of the Snake River Basin Adjudication." *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). Indeed, "a major objective" of the SRBA has always been to provide the foundation for the Director of IDWR to administer water rights in interconnected surface water sources and ground water sources. *Id.*; *see also* Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits, *In re SRBA Case No. 39576* (Subcase

91-00005 (Basin Wide Issue 5)) (July 2, 2001) ("Order on Basin-Wide Issue 5") at 7, 34 (similar).[4]

> [C]onjunctive management is not the typical administrative duty. Historically ground and surface water have not been managed together and the implementation of such an administrative plan potentially affects all water rights in the Snake River basin. Thus the potential for future controversy is almost certain. Because of the attendant complexities, the reasoning behind IDWR's administrative actions may not be as readily apparent as in the situation of the administration of surface rights only. The Idaho Supreme Court and the Idaho Legislature have both acknowledged that the resolution of the conjunctive management issue is one of the most important objectives of the SRBA.

Order on Basin-Wide Issue 5 at 24.

Thus, it is not surprising that the issue of validity of the CM Rules has lurked behind the scene of Idaho water law for some years, with general recognition that the case that properly raised and presented the question would certainly make its way to the Idaho Supreme Court. *Cf.* Order on Basin-Wide Issue 5 at 7 ("[r]esolving the issue of conjunctive management is one of the major objectives of the SRBA. . . . In all likelihood, review of this Court's decision will be sought whatever the result"); *Twin Falls Canal Co. v. Idaho Dept. of Water Resources*, 127 Idaho 688, 905 P.2d 89 (1995) (holding that the SRBA District Court lacked jurisdiction in a declaratory action challenging the validity of the CM Rules); *A & B Irr. Dist*, 131 Idaho at 422-23, 958 P.2d at 579-80 (commenting on but making no ruling as to the CM Rules). This may well be that case.

The question of the constitutionality of the CM Rules is a crucial part of one the most important issues to arise in Idaho water law. There are enormous interests and compelling arguments on both sides of the question, and the consequences of the ultimate outcome of this case will be dramatic and far-reaching. The importance of the legal issues raised by this lawsuit

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[4] Attached as Exhibit B to the Affidavit of Travis L. Thompson in Support of Plaintiffs' Motion for Summary Judgment (Oct. 14, 2005) ("Thompson Affidavit").

can scarcely be overstated, and this Court has noted on more than one occasion, an appeal to the Idaho Supreme Court was inevitable, regardless of the outcome in this Court. *See, e.g.*, Transcript of Hearing of Tuesday, November 29, 2005 at 63 ("whatever the decision is . . . it's not going to stop here. And it's most probably – in fact, I'd bet a lot of money it will go on to Boise, and we need to get that going and get this resolved").[5]

In short, the issues raised by the Defendants' appeal are too important, and the impact of the Judgment is too potentially far-reaching and disruptive, to require any particular minimum showing of a certain "likelihood" or "probability" of success on appeal. The likelihood of success factor weighs in favor of a stay pending appeal simply because of the legal and factual gravity of the questions raised in the case and decided by the Judgment. This is particularly true in light of the fact that the CM Rules have been in force for nearly twelve years—staying the Judgment will maintain the established status quo and minimize uncertainty. The likelihood of success on appeal is essentially a *de minimis* consideration in this case and should be deemed satisfied. *See supra McClendon*, 79 F.3d at 1020; *Washington Metropolitan Area Transit Commission*, 559 F.2d at 844.

Even under the most demanding standard courts have imposed in cases of substantial public importance, the Defendants must only demonstrate a "substantial case" or "strong position" on the merits of the appeal. *Ruiz*, 650 F.2d at 565; *Securities Investor Protection Corp. v. Blinder, Robinson & Co., Inc.*, 962 F.2d 960, 968 (10th Cir. 1992). Under these circumstances, a stay is appropriate even if the Court is of the view that the Defendants' appeal will probably fail, as long as the other factors weigh in favor of a stay. *Washington Metropolitan Area Transit Commission*, 559 F.2d at 843.

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[5] Attached as Exhibit A to the Affidavit of Phillip J. Rassier in Support of Defendants' Memorandum in Response to Motions for Summary Judgment.

The Defendants have a "substantial case" or a "strong position" on the merits of their appeal, as the record in this case demonstrates. The number and complexity of the substantive and procedural issues raised, the extent of the briefing, and the depth of the Court's summary judgment analysis show not only that many of the legal questions are of the utmost importance in Idaho water law, but also that the Defendants had strong and substantial arguments on the issues, even though the Court ultimately concluded that the CM Rules are facially defective. Indeed, the Order and Judgment rejected several of the arguments and positions strenuously urged by the Plaintiffs, thus upholding certain important aspects of the CM Rules.

In addition, the Court's decision raises another important issue that must be considered on appeal. The Court's Order and Judgment appear to contemplate that the Director is limited to acting principally as a referee or special master in responding to a delivery call, and must therefore adhere to standards, burdens and procedures that were judicially developed in the context of private litigation between water users, as if a delivery call was a lawsuit. The Director is not a mere referee, however, and a delivery call is not a traditional lawsuit. As the Court has recognized, the Director is a statutorily appointed water management professional vested by the Legislature with authority to direct and control the distribution of water. *See* Order at 82 ("Authorization to administer/distribute/curtail water is vested only in the Director and his watermasters and the Director has a clear legal duty to do so"); *see also* Idaho Code § 42-602 ("The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district"). This is a grant of administrative authority, and a delivery call is an invocation of this authority and the Director's professional expertise. As such, it is the Defendants' position that the Idaho Administrative

Procedure Act provides the procedures, burdens and standards that the Court concluded were lacking in the CM Rules, and, therefore, that the CM Rules are not procedurally deficient.

B. THE LIKELIHOOD THERE WILL BE IRREPARABLE HARM ABSENT A STAY

Unless stayed, the Judgment will cause irreparable harm because it presents the Director with a Hobson's choice: either initiate conjunctive administration rulemaking before the appeal is decided, or respond to delivery calls and perform conjunctive administration without any rules, presumably under the procedure described in the Order. Until the Idaho Supreme Court decides the appeal, however, the State will not know what substantive guidelines, principles and concepts will ultimately be required in the CM Rules, if any. On the other hand, any other action the Director takes to respond to the Plaintiffs' delivery call in the absence of duly promulgated rules will expose him to legal challenges for acting arbitrarily and capriciously. Both situations invite litigation and delay, and the final outcome of the appeal may well render any rulemaking or administrative action a false start, thus potentially requiring the Director to begin anew. Further, the lack of a stay will generally increase uncertainty and delay in the administration of water rights in interconnected surface and ground water sources, to the detriment of the parties and other water right holders in the Snake River basin, and the State of Idaho at large.

1. ABSENT A STAY, THE DEFENDANTS DO NOT HAVE THE LEGAL AUTHORITY TO CONJUNCTIVELY ADMINISTER WATER RIGHTS.

The SRBA District Court concluded in the *Musser* case that the Director must respond to conjunctive administration delivery calls according to duly promulgated rules and regulations, and that it would be arbitrary and capricious for the Director to respond to such a call in the absence of duly promulgated rules:

> The issue here is not whether the Director must exercise discretion in how to carry out the call by distributing water. The issue is whether the Director possesses any discretion as to what he must do to answer the call. In this regard, the Director

> must respond to calls for distribution by following rules and regulations for the distribution of water which he is authorized to adopt under I.C. § 42-603 and which must conform with chapter 52, title 67, Idaho Code. Failure to respond to calls under duly promulgated rules and regulations renders the Director's actions arbitrary and capricious. Therefore, in this case the Director has not met his duty to distribute water by failing to have adopted the required rules and regulations under which he determines both whether and how to answer a call. The duty to lawfully distribute water through duly promulgated rules and regulations under the Administrative Procedures Act is ministerial or executive and not discretionary.

Musser v. Higginson (In re SRBA Case No. 39576), Order and Memorandum Granting Petition for Writ of Mandate (Dist. Ct. of the Fifth Jud. Dist. of the State of Idaho, Twin Falls County, Aug. 5, 1993) at 5, *affirmed*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994).

This Court has similarly recognized that suitable administrative rules are "essential" for proper administration of water rights in interconnected surface and ground water sources. Order at 124 ("Rules for the administration of hydraulically connected ground and surface water sources are not only specifically authorized by the Legislature, they are essential in proper administration and to protect vested property rights").[6] Duly promulgated rules for conjunctive administration guide the Director in analyzing the complex questions inherent in a conjunctive administration delivery call—questions such as the extent of the hydraulic interconnection and injury, the determination of which specific juniors are causing injury, whether (and to whom) the call is futile, and the delay inherent in providing relief through curtailment of junior ground water rights causing injury. *See* Order at 99 ("[T]he determination of which specific juniors are causing injury with respect to ground water is infinitely more complex than making the same determination as between surface users, and the methodology and science is not exact.").

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[6] Similarly, the Order recognized that Idaho water distribution statutes are not self-executing and do not require a watermaster to "simply engage in curtailment to satisfy rights in order of priority," and that the Director is statutorily authorized to adopt rules and regulations for the proper distribution of water in accordance with Idaho law. Order at 98 (citing Idaho Code § 42-406); *see also* Idaho Code § 42-603 (authorizing the Director to adopt rules and regulations for the distribution of water).

In the absence of rules tailored to provide the legal principles and framework necessary for analyzing these questions, a conjunctive administration delivery call can easily become intractable from both practical and legal perspectives. Further, in such an administrative vacuum, the factual investigations the Director undertakes, the determinations he makes, and the orders he enters, all invite litigation regarding their substantive and procedural compliance with Idaho law.

This is the situation the Judgment forces on the Director. The Judgment invalidates the only administrative rules available to the Director for responding to delivery calls by surface water right holders against ground water right holders.[7] The Director may be required to respond to such calls even in the absence of suitable administrative rules. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). Thus, the Director could not proceed with administration until the CM Rules are amended or re-promulgated.

Such an undertaking makes little sense until the Idaho Supreme Court has resolved the Defendants' appeal because any rulemaking in the interim is an exercise in guesswork. As this case has demonstrated, the issues that the rules must address are numerous and complex, and there are very different and strongly held views of what must be in the rules—and what must not—if they are to conform to Idaho law. Experience has shown that in the absence of substantive and procedural guidance from the Supreme Court, any new rulemaking on such a complex and controversial subject is no more likely to pass constitutional muster than the existing CM Rules.[8] Further, rulemaking prior to the resolution of the appeal entails a substantial risk that the new rules would eventually be deemed invalid under the Supreme

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[7] *See* Judgment at 2 (holding that the CM Rules are "constitutionally deficient" and "facially unconstitutional").

[8] The CM Rules were the product of negotiated rulemaking. Then, as now, the surface water right holders and ground water right holders were unable to reach agreement on many of the points that are at issue in this case.

Court's decision, which would in turn invite more lawsuits. Moreover, unless the new rules substantially conformed to all of the holdings of the Idaho Supreme Court's decision—an unlikely result, given the nature and complexity of the subject—the Director would have to re-start the rulemaking process and promulgate new rules.

In short, the law governing conjunctive administration is unsettled and must be clarified by the Idaho Supreme Court. The Judgment is an important and necessary step in this process, but it is not the final one. The Supreme Court's decision will provide direction on the question of the implementation of constitutional requirements in administrative rules for conjunctive administration, but until then the Defendants lack the appellate guidance necessary to craft new rules.

2. AS A PRACTICAL MATTER, THE DIRECTOR MAY NOT BE ABLE TO RESPOND TO THE PLAINTIFFS' DELIVERY CALL WITHOUT RULES.

The potential for irreparable harm if the Director attempted to substantively respond to the Plaintiffs' delivery call in the absence of suitable administrative rules is great. Under such circumstances, the Director would be faced with making factual and legal determinations that are "infinitely more complex" than those involved in the administration of surface water rights, Order at 99, but without rules that provide the analytical framework, procedures or principles necessary for making such determinations. Without rules in place, the Director's actions could be challenged as arbitrary and capricious. *See Musser*, Order and Memorandum Granting Petition for Writ of Mandate at 5 ("arbitrary and capricious"); *see also* Order at 95 (stating that even the CM Rules are "devoid of any objective standards against which the Director is to apply the various criteria.").

Further, this lack of structure in an important and contentious administrative case is a formula for sidetracking the proceedings from the central issues, engendering additional disagreements and litigation among the parties, and generally delaying resolution of the matter and running up costs. It is virtually assured that whatever actions the Director did take in such a context would be procedurally and/or substantively defective in some manner under the Idaho Supreme Court's final decision, raising the possibility that the entire exercise would eventually be invalidated, again resulting in the need to re-do the process.

3. APPLICATION OF THE ILLUSTRATIVE PROCEDURE DESCRIBED IN THE ORDER IN RESPONDING TO THE PLAINTIFFS' DELIVERY CALL WOULD RESULT IN IRREPARABLE HARM.

Irreparable harm is just as likely under the delivery call procedure the Court set forth as an illustration of the deficiencies the Court identified in the CM Rules. *See* Order at 99-103. This illustrative procedure does not constitute rules duly promulgated under the Idaho Administrative Procedure Act, and therefore any action the Director took under such procedure would also be vulnerable to the legal challenges described above. Indeed, as the Order itself recognizes, the suggested procedure should not be viewed as a stand-alone process ready for immediate adoption and direct application by the Director, but rather as an illustration of the Court's view of concepts and principles "that the CMR's need to also incorporate." Order at 98.[9]

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[9] The prefatory statements to the illustrative procedure show that it is not, and was not intended as, a self-contained method for responding to a conjunctive administration delivery call in the absence of duly promulgated rules: "However, based on the foregoing discussion, and by way of illustrating the deficiencies and providing context, it is this Court's view that the CMR's need to also incorporate the following." Order at 98. It should also be noted that, as previously discussed, the statutory authority to direct and control the distribution of water and to adopt appropriate administrative rules is vested in the Director. Moreover, the questions of the validity of the specific actions taken or the specific procedures applied in the Plaintiffs' delivery call were not before this Court on summary judgment, and were not decided by the Judgment or Order.

Moreover, just as new CM Rules promulgated or amended while the Defendants' appeal is pending may effectively be invalidated by the Idaho Supreme Court's ultimate decision, the illustrative procedure may also turn out to be incomplete or flawed under that decision. If so, once again the process would have to be re-started, in conformance with the requirements of the Supreme Court's directives.

Similarly, the illustrative procedure appears to contemplate that the Director would not issue an order for relief until after an evidentiary hearing on issues such as injury, futile call, and waste. *See* Order at 101-02. Under the existing CM Rules, in contrast, the Director can and has entered an order for relief prior to a hearing.[10] In this regard, the illustrative procedure could result in less-timely administration than the existing CM Rules.

It should also be noted that, by its own terms, the illustrative procedure probably cannot be implemented without legislative guidance on futile call principles, along with appellate court review of the same. The Director historically has made futile call determinations on a case-by-case basis, using case-specific facts and principles from the common law of prior appropriation. In describing the illustrative procedure, the Order states, as to the futile call doctrine, that "[a]lthough the determination would be a mixed question of law and fact, some of the legal standards or criteria may have to come from the legislature, subject to constitutional review by the Idaho Supreme Court." Order at 100 (emphasis added). In other words, even the Order acknowledges that the illustrative procedure probably cannot be implemented without predicate

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[10] The initial relief order was issued just three weeks after the beginning of the irrigation season, without the requirement of first holding a hearing. *See* Defendants' Sur-Reply in Opposition to Motions for Summary Judgment at 12; Third Affidavit of Phillip J. Rassier at Exhibit A. Moreover, the Director issued an order for relief only two and a half weeks after the 2005 joint inflow forecast by the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers became available. *See id.* The fact that the Director can issue an order for relief prior to a hearing under the CM Rules does not deprive a senior (or a junior) of the opportunity for a hearing—the Plaintiffs were entitled to seek a hearing on the Director's order, and did so

action by the Legislature and the Idaho Supreme Court clarifying the application of the futile call doctrine, which is a crucial consideration in conjunctive administration.

C. THE PROSPECT THAT OTHERS WILL BE HARMED IF THE COURT GRANTS THE STAY

A stay will allow the Director to continue applying the CM Rules to the Plaintiffs' delivery call and any other similar calls, providing a degree of relief to the Plaintiffs while the appeal is pending, albeit not the specific type or extent of relief to which the Plaintiffs believe they are entitled.[11] In contrast, the absence of a stay will effectively prevent relief during the pendency of the appeal because as a practical matter the absence of appropriate administrative rules will prevent the Director from effectively administering water rights in interconnected surface and ground water sources, for reasons discussed above.[12] It should also be noted that the juniors subject to the relief orders that the Director has entered to date in response to the Plaintiffs' delivery call could certainly challenge the orders as being arbitrary and capricious, and seek a stay of any relief ordered, potentially leaving the Plaintiffs with even less relief than they currently receive under the Director's orders.

In the broader sense, a stay would also minimize uncertainty by retaining the existing system of administration while the appeal is pending. To be sure, a certain amount of uncertainty regarding the present course of conjunctive administration is inevitable until the Idaho Supreme Court resolves the Defendants' appeal, but staying the Judgment will minimize

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[11] As the Court is well aware, the Plaintiffs have repeatedly asserted that they have yet to receive any relief on their delivery call, and the Director has also repeatedly pointed out that he ordered timely and adequate relief shortly after the start of the 2005 irrigation seasons. There is a genuine dispute issue of material fact on this point, as the Court has recognized. *See* Order at 7 ("This Court understands IDWR disputes that it has not administered some water pursuant to the call.") The parties have not presented evidence on this issue and no final action of the Director is properly before this Court.

[12] As also discussed above, any substantive action the Director might take in response to the Plaintiffs' delivery call in the absence of administrative rules would likely bog down in more disputes over substance and procedure, thus generating further litigation.

this uncertainty. Further, while the parties have significantly different views of the law, they have the common objective of expeditiously resolving these issues in a manner that minimizes uncertainty and potentially unnecessary economic disruption. A stay will advance this common objective by reducing the risk of collateral litigation.

Staying the Judgment will preserve the status quo. The absence of a stay, in contrast, would force dramatic changes in conjunctive administration while the appeal is pending, thereby creating even more uncertainty in the conjunctive administration of surface and ground water rights.

D. THE PUBLIC INTEREST WEIGHS STRONGLY IN FAVOR OF GRANTING A STAY

The public interest is best served by minimizing the disruption of the day-to-day conduct of irrigation, agriculture, domestic use, municipal and commercial water use, and business in general while issues of critical importance to these sectors are resolved. This is best accomplished by maintaining the status quo while the Defendants' appeal is pending, without resort to interim measures and procedures that are temporary by definition, and by avoiding the potentially dramatic and costly effects of the Judgment before the Idaho Supreme Court has resolved the appeal. It should also be noted that it is too late to provide any additional relief to the Plaintiffs in 2006, and the current good water year minimizes the potential injury to the Plaintiffs while the appeal is pending. In contrast, implementation of the Judgment and Order during the pendency of the appeal is likely to have irreversible consequences to the junior water users.

One example in particular brings this point into sharp focus. The Judgment holds that, the "reasonable carryover" provision of the CM Rules is facially unconstitutional, Judgment at 2,

and the Court has determined that storage right holders are "allowed to store up to the quantity stated in the storage right . . . [and] . . . carry it over to future years." Order at 114-15.

A potential reading of the Order suggests Plaintiffs are entitled to carryover the full amount of their storage authorizations each year. Applying this holding alone, even if the Court had ruled that the rest of the provisions of the CM Rules were entirely valid, would result in a material injury finding for 2005 of 2,018,600 acre-feet, which is approximately *fifteen times* that in the Amended Order.[13] The combined total of annual ESPA depletions due to ground water withdrawals is estimated at "nearly 2 million acre-feet." Amended Order at 5 ¶ 22. Thus, under this interpretation of the Order, the vast majority, if not all, ground water rights on the ESPA for irrigation, municipal and domestic uses, as well as commercial and industrial uses, likely would have to be curtailed.[14] Such large scale curtailment of ESPA ground water right holders before the Idaho Supreme Court has resolved the appeal and identified the legal principles required of conjunctive administration rules is not in the public interest and would cause irreparable harm to

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[13] Using the "reasonable carryover" methodology, the Director determined that the reasonably likely material injury to the Plaintiffs during 2005 would be approximately 133,400 AF. Amended Order at 27 ¶ 120. If, as the Court's Judgment and Order appear to require, the Director had determined reasonably likely material injury using the full face amount of the Plaintiffs' storage authorizations rather than "reasonable carryover," this projected injury would have been 2,018,600 AF (as explained below), which is approximately fifteen times as large an injury as the 133,400 AF of reasonably likely material injury that the Director originally determined, and approximately the same as the amount of annual depletions from the ESPA due to ground water withdrawals.

The revised determination of 2,018,600 AF of reasonably likely material injury is the sum of (1) the combined total of the predicted shortfalls and surpluses in the Plaintiffs' surface flow and storage supplies during the irrigation season, plus (2) the combined total of the face amount of the Plaintiffs' reservoir storage authorizations. The value of (1) in this equation is -320,000 AF, which is the sum of the shortages and shortages set forth in the "Predicted Shortages" column of Finding 116 of the Amended Order. Amended Order at 25-26 ¶ 116. (The negative sign means that for all the Plaintiffs taken together there was a net supply surplus. Some of the Plaintiffs had supply surpluses while others did not. *See id.* The sum of the surpluses and shortfalls for all the Plaintiffs combined is a net surplus.) The value of (2) in the equation is 2,320,636 AF, which is the sum of the face amounts of the Plaintiffs' storage authorizations. *See id.* at 15-16 ¶ 70. Using these values, the calculation becomes (-320,000 AF + 2,320,636 AF), or 2,018,600 AF. This is the revised predicted material injury to the Plaintiffs using the face amounts of the Plaintiffs' storage authorizations rather than the Director's "reasonable carryover" determinations.

[14] The futile call doctrine would presumably apply to prevent curtailment of some ground water rights.

junior water right holders, who planted their crops this year in reliance on duly adopted conjunctive management rules and the Director's orders.

The Order and Judgment also appear to mean that that Plaintiffs may not need to have water released from storage for subsequent diversion during a particular irrigation year, but instead can leave their water in storage and carryover the amounts of water in storage up to the entirety of their storage water authorizations for use in the future, even if a significant portion of the water in carryover storage would have to be discharged soon after that irrigation year to make storage space available for flood control purposes. These holdings imply that Plaintiffs are entitled to have junior priority water rights curtailed, or replacement water provided by the junior right holders, whenever either the senior natural flow water rights are not filled, which occurs during every irrigation year, or the quantities of authorized reservoir storage allotments under senior rights are not met, including the amounts in carryover storage at the end of the irrigation year.

While the Court may be correct that a harsh and irreversible result may be required under Idaho's version of the prior appropriation doctrine, nothing therein requires such a result during the pendency of an appeal that challenges duly adopted administrative rules that have been in place for twelve years. The public interest clearly militates against it.

These are just a few aspects of the potentially sweeping and fundamental changes that the Judgment would work in the historic practice for management of the Snake River reservoir system. Reservoir storage allotments and authorizations have historically been administered as supplemental to surface flow supplies and surface water rights. *See, e.g.,* Exhibit J to Third Affidavit of Phillip J. Rassier. Further, the reservoirs must be managed not only for irrigation storage but also for flood control operations, and the interactions of these different uses and their

effects on each other must be taken into account in responding to a conjunctive administration delivery call in accordance with the prior appropriation doctrine as established by Idaho law.[15]

The Judgment potentially essentially severs these historic linkages, ignores long-standing management practices and operations, and the effect is to create a parallel system of storage water rights that are entirely independent of surface flow rights. This is being done without the benefit of a full record regarding the actual nature of the reservoir storage rights. The magnitude of such changes means that the public interest weighs strongly in favor of a stay until the Idaho Supreme Court has had an opportunity to review the issue.

CONCLUSION

In this case, the equities and practical considerations weigh heavily in favor of a stay of the Judgment until the Idaho Supreme Court resolves the Defendants' appeal. A stay will prevent irreparable harm, preserve the status quo, minimize uncertainty and facilitate water rights administration while the appeal is pending. A stay will preserve the relief the Plaintiffs have obtained to date and will serve the public interest. For the reasons discussed herein, a stay pending the final resolution of the Defendants' appeal under Idaho Appellate Rule 13(b) is appropriate and warranted in this case.

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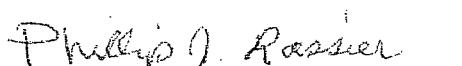
[15] For instance, in Water District 01, the determinations of how much surface flow and how much reservoir storage each water right holder used during the season are made retrospectively, in a year-end accounting that allocates the appropriate quantities used to either surface flow or storage.

DATED this 30th day of July 2006.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

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



PHILLIP J. RASSIER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July 2006, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR STAY UNDER IRCP 62(d) AND IDAHO APPELLATE RULE 13(b)** to the following parties by the indicated methods:

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

AMERICAN FALLS RESERVOIR DISTRICT NO. 2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY, Plaintiffs-Respondents, and RANGEN, INC., CLEAR SPRINGS FOODS, INC., THOUSAND SPRINGS WATER USERS ASSOCIATION, and IDAHO POWER COMPANY, Intervenors-Respondents, v. THE IDAHO DEPARTMENT OF WATER RESOURCES and KARL J. DREHER, its Director, Defendants-Appellants, and IDAHO GROUND WATER APPROPRIATORS, INC., Intervenors.	**Case No. CV-2005-600** **REPLY IN SUPPORT OF MOTION FOR STAY UNDER IRCP 62(d) AND IDAHO APPELLATE RULE 13(b)**

I. INTRODUCTION

The issue before this Court is whether to issue a stay of the Court's order declaring the Department's Conjunctive Management Rules ("CM Rules") facially invalid while the case proceeds on appeal before the Idaho Supreme Court. It should come as no surprise that when the CM Rules were declared unconstitutional, the Director and the Department were left in a difficult predicament on how to provide relief to senior surface water users who made delivery calls under the CM Rules, yet follow this Court's Judgment and Supreme Court precedent. *See Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994) and *In re SRBA Case No. 39576, Musser,* Order and Memorandum Decision Granting Petition for Writ of Mandate at 9 (5th Jud. Dist. Aug. 5, 1993) (hereinafter collectively referred to as "*Musser*"). The Order Granting Plaintiffs' Motion for Summary Judgment ("Order") expressly recognizes duly promulgated administrative rules are "essential to proper administration and to protect property rights." Order at 124. *See also Musser*. The effect of the Judgment is that the Director is currently without rules for responding to conjunctive administration delivery calls that may come before him, not just the Plaintiffs' delivery call. Thus, the Director by the present motion seeks to fill the void created by the Judgment by staying the effect of the Judgment during the pendency of appeal.

The Plaintiffs seek to characterize the Director's application for a stay pending appeal as a means of subverting the Court's orders. Nothing could be further from the truth. The application for a stay is authorized by law and in this case is a reasonable attempt to navigate the issues raised by the Judgment. The Court certified its Judgment, expressly noting that it was the Director and the Department's right to seek a stay. *See, e.g.,* Transcript on Appeal at 372. The Plaintiffs' characterization not only improperly assumes the Director lacks respect for this Court

and Idaho law, but reflects the Plaintiffs' continuing and misguided belief that conjunctive administration is simply a matter of automatic curtailment upon submission of a delivery call.

Even though the Court has declared the CM Rules to be unconstitutional, they nevertheless remain the only viable option available to the Director for responding to conjunctive administration delivery calls and for providing relief to the Plaintiffs during the pendency of the appeal. Importantly, the stay would enable the Director, without violating *Musser*, to continue to respond to delivery calls against junior ground water rights and to continue providing relief to the Plaintiffs under existing orders and replacement water plans in their specific delivery call case. Whether the replacement water ordered by the Director is to continue to be provided to the Plaintiffs during the pendency of the appeal should be an important consideration in determining whether to issue a stay.

In the absence of any stay ruling, any administrative order curtailing junior ground water users or requiring mitigation likely will be challenged as arbitrary and capricious under *Musser*. If the Director's current orders stay in place, however, then the replacement water and curtailment obligations ordered for the benefit of the seniors can continue. As a result, Twin Falls Canal Company will receive the full 27,700 acre-feet in replacement water ordered by the Director in his Amended Order of May 2, 2005. Thus, entry of a stay will result in more, not less, relief for senior water right holders during the pendency of the appeal and the Director will have a legal basis for ordering any relief determined to be necessary during the 2006 irrigation season. *Third Supplemental Order* at 22; *Fourth Supplemental Order* at 6. Under these circumstances, and in light of the far-reaching effects of the Judgment, a stay that maintains the status quo is the best course of action.

Twin Falls Canal Company will receive the full 27,700 acre-feet ordered by the Director in his Amended Order of May 2, 2005 to mitigate material injury suffered by Twin Falls Canal Company. Further, the Director will continue to have a legal basis for ordering any relief determined to be necessary during the 2006 irrigation season.

The Plaintiffs seemingly ignore the fact that the Judgment is a declaratory judgment regarding the facial constitutionality of the CM Rules, and not a ruling on review of the Director's order in the Plaintiffs' delivery call proceeding. The issue raised by the Judgment for purposes of a motion for stay on appeal is not how or if administration will take place in the Plaintiffs' particular delivery call. The issue is how conjunctive administration is to be done on a systematic, global basis while the appeal is considered. The declaratory relief ordered by the Court in this case does not direct a specific response to the Plaintiffs' delivery call. Rather the Court's order simply invalidates the CM Rules, which leaves the Director without an effective means of responding to a conjunctive administration delivery call during the pendency of the appeal.

Finally, the stay sought is not intended to apply permanently, but only until the appeal is resolved.

II. ARGUMENT

A. The Director has and Continues to Comply with this Court's Judgment

Plaintiffs have not pleaded an action for contempt and, therefore, the issue is not properly before the Court. Idaho Rule of Civil Procedure 75(c)(2) requires that "all contempt proceedings, except those initiated by a judge . . . , must be commenced by a motion and affidavit." The rule goes on to provide that specific factual allegations must be alleged and the respondent must be served with a written notice with the time, date and place to appear in order

to answer any charge of contempt. I.R.C.P. 75(c)(3) and (4), I.R.C.P. 75(d). Nonetheless, the Director is confident that the facts show that he is following the Court's Order and also performing his statutory duty to distribute water and manage the State's water resources.

The Plaintiffs contend that the Director ignored the Judgment and is in contempt of this Court due to his issuance of the *Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006* ("*Third Supplemental Order*") and the *Fourth Supplemental Order On Replacement Water Requirements For 2005* ("*Fourth Supplemental Order*") in the Plaintiffs' delivery call proceeding. Plaintiffs' Response to Defendants' Motion for Stay ("Opposition to Stay") at 2-3. This contention is wholly wrong and off base for several reasons.

What the Plaintiffs fail to point out is that the Director stayed the hearing schedule in their delivery call in response to the Judgment. *See* Exhibit A attached to Fourth Affidavit of Phillip J. Rassier. In other words, the Director is not presently applying the CM Rules to the Plaintiffs' delivery call, or otherwise using the CM Rules to respond to the Plaintiffs' delivery call—or for that matter, to any other conjunctive administration call. *See* Exhibit B attached to Fourth Affidavit of Phillip J. Rassier.

Contrary to the assertions of the Plaintiffs, the *Third Supplemental Order* and the *Fourth Supplemental Order* were issued not in contravention of the Judgment but rather to effectuate the Judgment and to preserve the status quo. The *Third Supplemental Order* and the *Fourth Supplemental Order*, which the Director entered <u>prior</u> to the Judgment, were issued for the benefit of the Plaintiffs. These orders ensure that the relief ordered prior to the Judgment is in fact provided to the senior water right holders. Importantly, the Court held in its Order that the

Director may require juniors to provide replacement water in lieu of curtailment. Order at 90, 108.[1]

It should also be noted that the *Third Supplemental Order* could not possibly be contrary to the Judgment because the order was issued before the Judgment was entered.[2] Likewise, the Plaintiffs also fail to point out that the *Fourth Supplemental Order* was issued on July 17, 2006, during the automatic two-week stay triggered by the filing of the Defendants' Notice of Appeal on July 11, 2006. *See* I.A.R. 13(a) ("upon the filing of a notice of appeal . . . all proceedings and execution of all judgments, orders or decrees in a civil action in the district court, shall be stayed for a period of fourteen (14) days"). The Plaintiffs conveniently ignore this fact and fail to explain how the Director can be in contempt of a Judgment that has been stayed.

It is also overreaching and unreasonable to suggest that by seeking a stay the Director is somehow flaunting the Judgment, and that his real objective is to avoid the Court's decision and to continue administering water rights pursuant to rules that have been declared unconstitutional. Plaintiffs appear to argue that the Defendants' oral representations to the Court at the July 11, 2006, hearing that they would abide by the Judgment amounted to a promise not to seek a stay of

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[1] In light of the fact that the *Third Supplemental Order* and *Fourth Supplemental Order* require replacement water—i.e., relief—be provided to the Plaintiffs, and that any attempt by the Director to provide the Plaintiffs with relief in the absence of duly promulgated administrative rules will be complicated by uncertainty and delay and will likely generate additional litigation (as discussed herein and previously in the Defendants' memorandum in support of a stay pending appeal), the Plaintiffs' suggestion that the *Third Supplemental Order* and *Fourth Supplemental Order* constitute a continued taking of the Plaintiffs' property rights rings hollow.

[2] This is not, as Plaintiffs suggest, a mere technicality. As the Court knows, there was considerable disagreement among the parties as to what the substance of the judgment should be under the Order. The proposed judgment submitted by the Plaintiffs differed substantially from the alternative proposed judgment submitted by the Defendants. *Compare* Plaintiffs' Proposed Declaratory Judgment *with* Defendants' Objection to Plaintiffs' Proposed Form of Declaratory Judgment. The Court ultimately entered a Judgment that differed in at least some respects from both alternatives. Under these circumstances, the Director's reluctance to attempt to divine what the Judgment would say and what specific effects it would have in the Plaintiffs' delivery call proceeding was entirely reasonable. This is underscored by the fact that even after the Judgment has been entered, the parties apparently cannot agree on all the effects and ramifications of the Judgment, as the briefing on this motion for a stay pending appeal amply demonstrates.

the Judgment. The record is clear, however, that the Defendants preserved their right to seek such a stay. *See, e.g.,* Transcript on Appeal at 348 ("It's possible that the department will seek a further order from this court, you know, either staying the judgment as to the applicability of the underlying proceedings or not. That hasn't been decided.")[3]

The Plaintiffs' "contempt" argument also incorrectly assumes that the Judgment entitles them to some specific affirmative relief in their delivery call proceeding. Since no final order of the Director from the administrative hearing has been presented for review to this Court, the only affect of the Judgment on that proceeding is that the Director is bound by this Court's finding that the CM Rules are unconstitutional unless the Judgment is stayed or overturned on appeal.

B. Rules Provide Necessary Standards for the Director to Act

The Plaintiffs expend considerable energy explaining that the Director has sufficient statutory and constitutional authority to respond to conjunctive administration calls in the absence of duly promulgated administrative rules. This argument misses the point because, as this Court and the SRBA District Court have recognized, such rules are in fact "essential" prerequisites for conjunctive administration. Order at 124; *see also Musser v. Higginson (In re SRBA Case No. 39576)*, Order and Memorandum Granting Petition for Writ of Mandate (Dist. Ct. of the Fifth Jud. Dist. of the State of Idaho, Twin Falls County, Aug. 5, 1993) at 5, *affirmed*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994).

The Plaintiffs cannot escape this fact, and their entire discussion of the various statutory and constitutional authorities for administration without administrative rules is inapposite. The question is not whether the Director has such authority. The question is whether the Director can effectively respond to conjunctive administration calls while the appeal is pending in the absence of administrative rules. As the Defendants have pointed out, as a practical matter, and

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[3] Attached as Exhibit H to the Third Affidavit of Travis L. Thompson.

in light of the above-cited holdings of the Order and *Musser*, any attempt to respond to a conjunctive administration delivery call in the absence of a stay will in all probability result in even more delay, expense and uncertainty for all involved, and foster yet more duplicative litigation. *See, e.g.,* Memorandum in Support of Motion for Stay Under IRCP 62(d) and Idaho Appellate Rule 13(b) ("Memorandum") at 10-16. The Plaintiffs do not appear to dispute this, rather, they simply appear to believe that the Director has legal authority to conjunctively administer water rights in the absence of rules and that such administration can proceed smoothly on pending delivery calls now that the CM Rules are out of the way.

This naive view of the realities facing the Director cannot change the fact that this Court held the CM Rules invalid, in large part, on the ground that it believes the Rules contained too few procedural and substantive standards to guide the Director's exercise of his statutory authority. *See, e.g.,* Order at 84, 90, 91, 95, 96, and 125. Yet, the Plaintiffs essentially assert that administration without any rules whatsoever will be even smoother and more trouble-free than administration under the CM Rules. Thus revealed, the Plaintiffs' argument simply cannot be credited.

The point that the Plaintiffs fail to grasp is that while the CM Rules have been declared unconstitutional, they are also the best option—actually the only practical option—available while the appeal is pending. The Director can, and has, provided relief to the Plaintiffs under the CM Rules. In the absence of a stay, the relief provided thus far will certainly be challenged by the juniors subject to the orders, as will any attempt to provide relief in the absence of duly promulgated rules, for reasons already discussed above in the Defendants' Memorandum. Further, in the absence of a stay, the Director may be required to engage in what is likely to be

pointless rulemaking, because any rulemaking prior to the resolution of the appeal is an exercise in guesswork.

The Plaintiffs tend to argue as if there was no appeal pending and the Defendants are seeking to permanently stay the Judgment and continue applying the CM Rules in perpetuity. But the fact is an appeal is pending, the questions raised therein are ones on which reasonable minds can differ, and the Court's Order and Judgment addressed many issues and contain many substantive and procedural rulings in support of the ultimate conclusion that the CM Rules are unconstitutional. Under these circumstances, to observe there is a substantial likelihood that the Supreme Court's resolution of this appeal will differ in some ways from the Judgment, perhaps reaching somewhat different conclusions than this Court or even vacating or reversing parts of it, is simply to recognize the nature of the law and facts of this case, and that it is essentially impossible to predict how the Idaho Supreme Court will resolve the appeal.

Plaintiffs' hodge-podge citation of various constitutional and statutory authorities and factual scenarios under which the Director could conceivable conjunctively administer the Plaintiffs water rights even in the absence of a comprehensive set of administrative rules fails. The question before the Director now is not one of simply responding to the Plaintiffs' delivery call, but of having a coherent system for constitutionally responding to <u>all conjunctive administration delivery calls</u>. *See Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 540, 545, 96 P.3d 637, 641, 646 (2004), *cert. denied*, 125 S.Ct. 1299 (2005) (a facial challenge involves a determination of whether any set of circumstances exists under which the challenged statute or regulation would be valid).

As previously discussed, the Judgment does not require any particular administrative response to the Plaintiffs delivery call other than that the CM Rules no longer be prospectively

applied.[4] Even more to the point, responding to the Plaintiffs' delivery call does not respond to or adequately address the issues raised by the Judgment, and does not satisfy the Director's obligation to devise a coherent system for responding to all conceivable conjunctive administration calls during the pendency of the appeal now that the CM Rules have been declared facially invalid. It is also clear that the *ad hoc* system of administration the Plaintiffs appear to contemplate under the variety of authorities and possibilities they cite and discuss will not satisfy this requirement.

C. Plaintiffs' Suggestion that the Court May Instruct the Details of How the Director is to Distribute Water Among Water Users Is Misplaced

Plaintiffs suggest that the Court must instruct the Director on how to distribute water or conduct his administrative hearing. Thousand Springs Water Users Association's Brief in Opposition to Motion for Stay at 7; Trans. at 361-62. However, rulemaking is expressly an executive function. "[T]he power to make law lies exclusively within the province of the legislature, (Idaho Constitution, art. 3 §§ 1, 15) 'the legislature may constitutionally leave to administrative agencies the selection of the means and the time and place of the execution of the legislative purpose, and to that end may prescribe suitable rules and regulations.' *State v. Taylor,* 58 Idaho 656, 664, 78 P.2d 125, 128 (1938). Administrative agencies do this by enacting rules and regulations. *See* Idaho Code tit. 67, ch. 52." *Mead v. Arnell*, 117 Idaho 660, 664, 791 P.2d 410, 414 (1990). Rules that are duly promulgated have the "force and effect of law." *Id.* Conversely, rules that have not been duly promulgated are unenforceable. *Minidoka Memorial Hospital v. Idaho Department of Health and Welfare*, 108 Idaho 344, 699 P.2d 1358 (1985) (holding state policy, implemented as a rule without being promulgated as a rule, was unenforceable) and *Bingham Memorial Hospital v. Idaho Department of Health and Welfare*,

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[4] Such relief may be available on judicial review of a final order on the Plaintiffs' delivery call but not pursuant to a declaratory judgment that holds that the CM Rules are facially unconstitutional.

108 Idaho 346, 699 P.2d 1360 (1985). While the Court has the authority to pass on the constitutionality of rules promulgated by the Defendants, it does not have the authority to judicially promulgate rules for the Defendants. This Court is without authority to erode the power of the executive branch of government.

This Court acknowledges this limitation starting on page 98 of its Order, where it discusses its "view" on a procedural framework "by way of illustrating the deficiencies and providing context" to the Court's finding, that the CM Rules are facially deficient. In the discussion of the procedures the Court states in part that the Director would still consider what constitutes material injury. Order at 99-100. The futile call doctrine, which the Court conceded that the Director can review and apply, has not been fully addressed in the conjunctive management context and thus the legal standards and criteria developed, "may have to come from the legislature, subject to constitutional review by the Idaho Supreme Court." Order at 100. In fashioning relief or ruling on replacement water, the Director could take into account, among other things, "historical diversion levels or reasonable aquifer levels." Order at 102. The Court also acknowledges that replacement water can be an appropriate method to eliminate injury to senior water users. Order at 90, 102.

While a party or court may seemingly suggest how an agency might enact rules that do not violate Idaho's Constitution, until the agency follows the rulemaking procedures set forth in the Idaho Administrative Procedure Act, any statement by a party, a court, or an agency cannot have the "force and effect" of law. *Mead* at 664, 791 P.2d at 414. Therefore, Plaintiffs' reliance on this Court's suggested view of how to craft CM Rules that do not violate the Constitution is misplaced.

D. Plaintiffs' Suggested Standard is Wrong

Plaintiffs argue that the appropriate standard for analyzing whether a stay of this Court's judgment is proper is the standard for injunctive relief. However, Plaintiffs cite no authority for this position. On the other hand, Defendants have cited ample authority showing that the standard to be applied in a stay proceeding, although similar to that in an injunction proceeding, is not an identical standard. The proper standard is a balancing of the factors as cited in Defendant's Memorandum in Support of Motion For Stay Under IRCP 62(d) and Idaho Appellate Rule 13(b) "(Memorandum in Support") and will not be reiterated here. Suffice it to say, that Plaintiffs' attempt to say that the injunctive relief factors are prerequisites is not supported in case law; on the contrary, the case law supports a balancing of the factors as discussed previously in Defendants Memorandum in Support at 2-3. Finally, the applicable rules to be applied to Defendants' motion are I.R.C.P. 62(d) and I.A.R. 13(b); nothing suggests, other than Plaintiffs' misplaced argument, that consideration under I.R.C.P. 65 is appropriate.

E. Entry of Stay is Appropriate Given the Magnitude of this Case

The question of the constitutionality of the CM Rules is a crucial part of one of the most important issues that has ever arisen in Idaho water law. There are enormous interests and compelling arguments on both sides of the question, and the consequences of the ultimate outcome of this case will be dramatic and far-reaching. The importance of the legal issues raised by this lawsuit can scarcely be overstated, and this Court has noted on more than one occasion, an appeal to the Idaho Supreme Court was inevitable, regardless of the outcome in this Court. *See, e.g.*, Transcript of Hearing of Tuesday, November 29, 2005 at 63 ("whatever the decision is . . . it's not going to stop here. And it's most probably – in fact, I'd bet a lot of money it will go on to Boise, and we need to get that going and get this resolved").

In certain matters in the federal courts, a single Justice of the United States Supreme Court may be petitioned to enter a stay when a stay has been requested below and denied. *See* Supreme Court Rules 22 and 23. In a case involving the constitutionality of hearing procedures contained in the Medicare Act, a federal district court found particular procedures unconstitutional. *Schweiker v. McClure*, 452 U.S. 1301, 1302 (1981) (Rehnquist, J., in chambers), *prob. juris. noted*, 454 U.S. 890 (1981), *reversed and remanded*, 456 U.S. 188 (1982). In relief, the district court instituted its own procedures and later denied the government's request for stay of the original provision. 452 U.S. at 1302. Justice Rehnquist was subsequently petitioned for entry of a stay of the lower court's judgment. In response, Justice Rehnquist stated:

> In both form and substance, the District Court has declared unconstitutional an important part of the Medicare statute. Given the presumption of constitutionality granted to all Acts of Congress, I believe that there is a substantial likelihood that four Justices of this Court would vote to note probable jurisdiction of the applicants' appeal. *In addition, because the District Court's remedial order involves a drastic restructuring of the appeals procedure carefully designed by Congress, it will cause hardship to the applicants. . . . I thus believe that the applicants should be relieved of the burden placed on them by the District Court's order until this Court decides whether or not to note probable jurisdiction of the applicants' appeal.*

Id. at 1303 (emphasis added).

In a second application for stay, Chief Justice Rehnquist stated:

> *It has been the unvarying practice of this Court so long as I have been a Member of it to note probable jurisdiction and decide on the merits all cases in which a single district judge declares an Act of Congress unconstitutional. In virtually all of these cases the Court has also granted a stay if requested to do so by the Government.* "The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing the hardships." . . . "Given the presumption of constitutionality granted to all Acts of Congress," it is both likely that the Court will note probably jurisdiction here and appropriate that the statute remain in effect pending such review.

Bowen v. Kendrick., 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) (emphasis added), *prob. juris. noted*, 484 U.S. 942 (1987), *reversed and remanded*, 487 U.S. 589 (1988).

Former Chief Justice Rehnquist's guidance of implementing stays in cases of constitutional magnitude should apply in this matter, considering the potential ramifications that exist if the Director is petitioned for distribution of water without the ability to provide relief under the CM Rules. Prudence would therefore suggest that this Court enter an order staying the Judgment in order to allow the full panel of the Idaho Supreme Court to decide whether the CM Rules are violative of the Idaho Constitution.

IV. CONCLUSION

In an action of such far reaching magnitude it is important to proceed prudently. Defendants are aware of and understand the frustration of the Plaintiffs. Frustration does not, however, justify pursuit of yet another approach to conjunctive administration that will simply spawn additional uncertainty and will be challenged as arbitrary and capricious in light of the Court's holding in *Musser*. Granting the Defendants' Motion for Stay will not jeopardize the Plaintiffs as they contend, to the contrary, the replacement water that they have been provided will continue and thereby provide a measure of relief, albeit not the relief they contend they are entitled to receive. If the intention is truly to get a final determination on the CM Rules and to provide senior water rights with some relief, then a stay is the best option.

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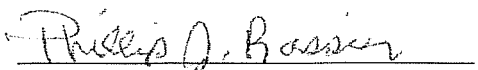
DATED this 4th day of August 2006.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

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



PHILLIP J. RASSIER
Deputy Attorney General

CERTIFICATE OF SERVICE

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W. Kent Fletcher FLETCHER LAW OFFICE 1200 Overland Ave. P.O. Box 248 Burley, ID 83318	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile: (208) 878-2548 ☒ E-mail: wkf@pmt.org ☐ Statehouse Mail

Jeffrey C. Fereday Michael C. Creamer Brad V. Sneed GIVENS PURSLEY LLP 601 Bannock Street, Suite 200 P.O. Box 2720 Boise, ID 83701-2720	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile: 388-1300 ☒ E-mail: jcf@givenspursley.com mcc@givenspursley.com ☐ Statehouse Mail
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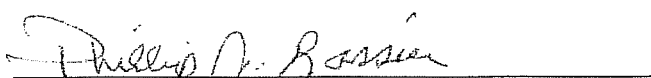


PHILLIP J. RASSIER
Deputy Attorney General

EXHIBIT "D"

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DESIGNATING THE THOUSAND SPRINGS 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 surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA in the vicinity of Hagerman, Idaho.

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 Thousand Springs area, cause significant reductions in spring flows tributary to the Kimberly to King Hill, or Thousand Springs, reach of the Snake River 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 demonstrate that ground water diversions occurring within a five (5) to ten (10) kilometer band from the canyon wall along the north side of the Snake River in the Thousand Springs reach result in seasonal spring flow 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 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 the flow of water from springs tributary to the Snake River in the Thousand Springs reach 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 the flow of water from springs tributary to the Snake River if, based on simulations using the Department's ground water model, the flow of water from the springs is 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 for use under senior surface water rights from spring sources in the Thousand Springs area is expected to be further diminished because of the drought 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 springs without mitigating the effects of the associated ground water depletions.

8. Based upon the depletionary effects of ground water withdrawals on the flow of

water from springs tributary to the Snake River in the Thousand Springs area and the inadequate water supply expected to be available for senior surface water rights, that portion of the ESPA in the Thousand Springs area may be approaching the conditions of a critical ground water area. The Director also bases this finding, in part, upon flow measurements showing a pronounced diminishment in spring flows in the Thousand Springs area during the current drought period.

9. On July 13, 2001, Clear Springs Foods, Inc. ("Clear Springs") submitted to the Department through its attorney a written request asking for the "designation of Basin 36 as a Groundwater Management Area 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 Clear Springs request as a petition for creation of a ground water management area including all of Basin 36 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 north of the Snake River that encompass or are adjacent to the five (5) to ten (10) kilometer band 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 Clear Springs petition.

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 Thousand Springs area in the vicinity of Hagerman, Idaho may be approaching the conditions of a critical ground water area.

10. The Director should designate a ground water management area for the Thousand Springs area of the ESPA 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 "Thousand Spring Ground Water Management Area."

That portion of the Eastern Snake Plain Aquifer within all or parts of the following townships north of the Snake River in Gooding and Jerome Counties:

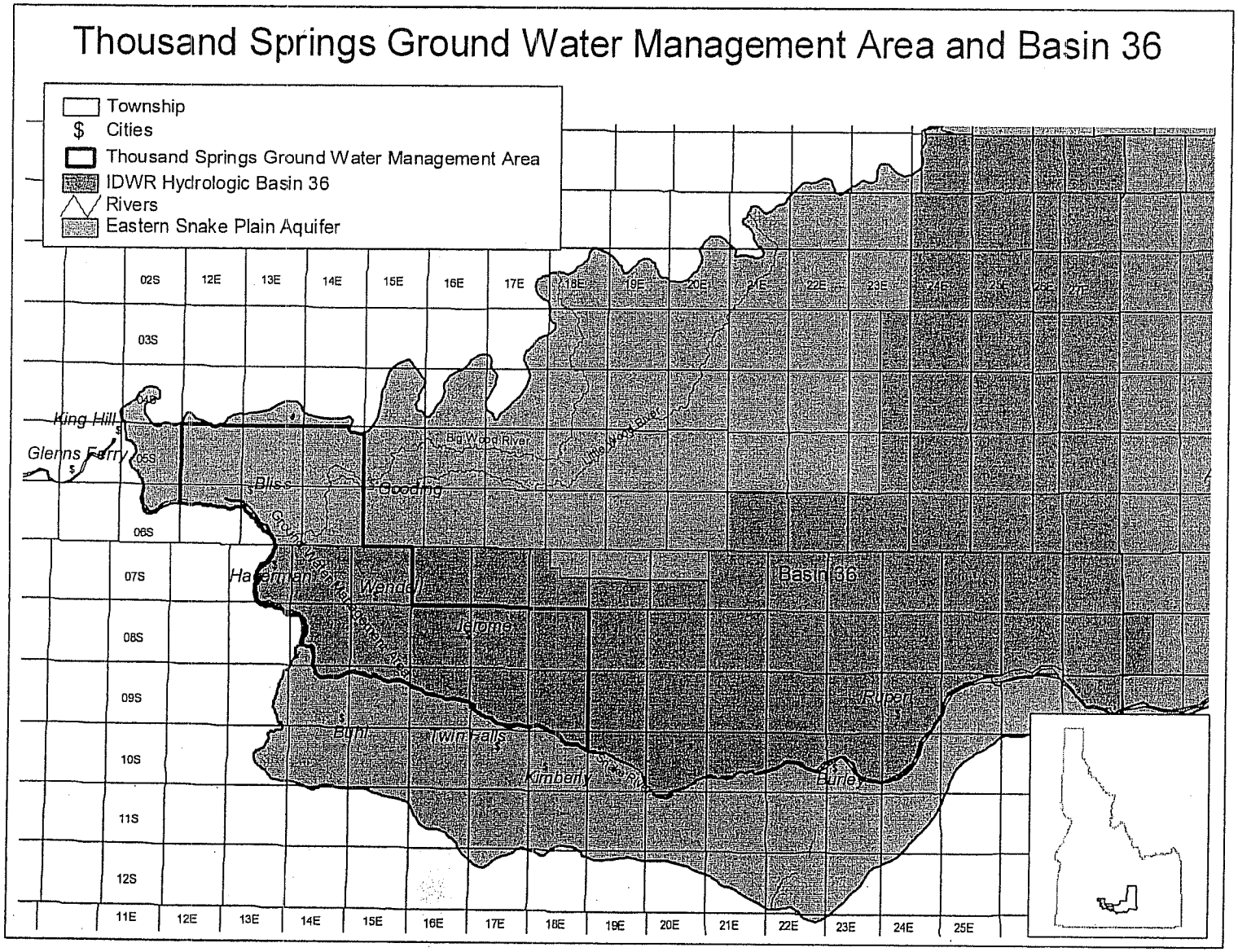
T5S and T6S, R12E, Boise Meridian (B.M.); T5S, T6S, T7S and T8S, R13E, B.M.; T5S, T6S, T7S, T8S and T9S, R14E, B.M.; T7S, T8S and T9S, R15E, B.M.; T8S and T9S, R16E, B.M.; T8S and T9S, R17E, B.M.; and T8S, T9S and T10S, R18E, B.M.

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

DATED this 3rd day of August 2001.

____Signed___
KARL J. DREHER
Director

Thousand Springs Ground Water Management Area and Basin 36



Attachment A

EXHIBIT "E"

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF CREATING THE THOUSAND SPRINGS AREA WATER DISTRICT, DESIGNATED AS WATER DISTRICT NO. 130, FOR THE ADMINISTRATION OF RIGHTS TO THE USE OF GROUND WATER AND SPRINGS DISCHARGING FROM THE EASTERN SNAKE PLAIN AQUIFER IN ADMINISTRATIVE BASINS 36 AND 43.	)	**FINAL ORDER CREATING WATER DISTRICT NO. 130**

The Director of the Idaho Department of Water Resources ("Director") is authorized by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. The authority to create water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree. During the pendency of a water rights adjudication, the district court is authorized by statute to approve interim administration of the water rights by the Director if reasonably necessary to protect senior water rights. The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with partial decrees entered by the court or in accordance with a Director's Report as modified by the court's order.

FINDINGS OF FACT

1. On August 3, 2001, the Director established the Thousand Springs Ground Water Management Area ("Thousand Springs GWMA") pursuant to Idaho Code § 42-233b. The Director designated the Thousand Springs 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 Thousand Springs 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. On August 31, 2001, the Director was advised by representatives of holders of

junior priority ground water rights and holders of senior priority surface water rights that agreements in principle had been reached that would provide replacement surface water for the next two irrigation seasons equal in amount to what would have resulted from the intended curtailment of certain junior ground water diversions within the Thousand Springs GWMA.

3. Based upon the representations that agreements in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the Thousand Springs GWMA, provided the agreements in principle were implemented through detailed written agreements.

4. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into detailed written stipulated Agreements with representatives of most holders of senior priority surface water rights. The Agreements were submitted to the Director for approval. The Director approved the Agreements on January 18, 2002.

5. Under the Agreements, the represented holders of senior priority surface water rights agreed not to exercise their senior priorities against the represented holders of junior priority ground water rights in exchange for commitments by the ground water right holders to provide specific quantities of replacement water during the two-year term of the stipulated Agreements. In the event the replacement water cannot be provided, the Agreements require an appropriate reduction of diversion under ground water rights or require that other mitigation be provided.

6. The signatories to the Agreements agreed to work with the Director to expeditiously create water districts to implement the terms of the Agreements.

7. Under the Agreements, the parties requested that the Director notify holders of ground water rights subject to interim administration who are not party to the Agreements, or other similar agreements or approved mitigation plans, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

8. On November 19, 2001, the State of Idaho filed with the SRBA District Court a motion requesting an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 36 and 43 overlying the Eastern Snake Plain Aquifer ("ESPA") in the Thousand Springs area.

9. On November 19, 2001, the SRBA District Court issued an order setting the State's motion for order authorizing interim administration for hearing on January 8, 2002. The Court designated the matter as SRBA Subcase 92-00021 (Interim Administration). The State of Idaho served copies of the Court's November 19, 2001, order and the State's motion and supporting briefing and affidavits on all affected parties by regular U. S. Mail on November 26, 2001.

10. 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 36 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.

11. On January 14, 2002, the Director mailed notice, by regular mail, of the proposed action creating a water district in the Thousand Springs area within the ESPA in Administrative Basins 36 and 43, pursuant to the provisions of Idaho Code § 42-604. Notice was mailed to each water user in the proposed district affected by the creation of the water district (herein established as Water District No. 130). The notice described the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held on February 4, 2002, concerning the proposed action, and provided a time period within which written comment on the action would be accepted.

12. In addition, the Director published notice of the proposed action creating the water district once a week for two (2) weeks in the following newspapers having general circulation within the area covered by the proposed district: *The Times News* of Twin Falls on January 17 and 24, 2002; the Burley *South Idaho Press* on January 17 and 24, 2002; and the *Minidoka County News* of Rupert on January 16 and 23, 2002.

13. The Director conducted the hearing concerning the proposed creation of the water district at the Jerome High School Auditorium in Jerome, Idaho, at 7:00 pm on February 4, 2002. Approximately fifty-five people attended the hearing.

14. Prior to commencing the hearing, the Director made a presentation and answered questions for approximately ninety minutes addressing the reasons for creation of the proposed water district and how the district would operate.

15. Persons attending the hearing were provided an opportunity to make an oral statement for the record. In addition, the Director held the record open through February 14, 2002, for the submission of written comments.

16. Only one person presented an oral statement for the record at the Jerome hearing. No one testified in opposition to the creation of the proposed water district. Jeff Martin presented a statement on behalf of the North Snake River Ground Water District in support of the establishment of a water district to administer ground water in accordance with the prior appropriation doctrine and State law.

17. Mr. Roger Ling, attorney for the A & B Irrigation District, stated that the questions he had were addressed by the Director during the presentation and discussion that occurred prior to going on the record.

18. The Director received no written comments from affected ground water users objecting to the creation of the proposed water district prior to the close of the February 14, 2002, comment period. Comments were received from Clear Springs Foods, Inc. of Buhl, Idaho, suggesting that water rights included within Water District 36-A (Billingsley and Riley Creeks and tributary springs) should be combined into the same water district or subdistrict with ground water rights so that the parties may continue to work together under the same watermaster. Water District 36-A submitted comments requesting that it remain autonomous

at this time while retaining the option of joining the newly formed water district in the future. The United States Fish and Wildlife Service submitted comments relating to future arrangements that may be made for the measuring and reporting of ground water usage at its affected facilities.

19. 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 surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA in the vicinity of Hagerman, Idaho.

20. The available water supply in all or portions of Administrative Basins 36 and 43 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.

21. The administration of ground water rights within the portion of Administrative Basins 36 and 43 overlying the ESPA is necessary for the protection of prior surface and ground water rights.

CONCLUSIONS OF LAW

Statutory Authorities

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

2. 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. See Idaho Code §§ 42-226 and 42-237a.g.

3. The Director has 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, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

4. The Director is authorized to establish water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. See Idaho Code § 42-604.

5. In addition, the district court having jurisdiction over a general water rights adjudication may permit the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with director's reports filed

with the court, with or without modification by the court, or in accordance with partial decrees that have superseded the director's reports. See Idaho Code § 42-1417.

District Creation

6. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should create a water district to administer water rights within those portions of Administrative Basins 36 and 43 overlying the ESPA, as shown on the map appended hereto as Attachment A, to protect senior priority water rights.

7. The Director concludes that the water district should be formed on a permanent basis and be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

Administration of Affected Water Rights

8. The Director concludes that immediate administration of water rights, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), pursuant to chapter 6, title 42, Idaho Code, is necessary for the protection of prior surface and ground water rights.

9. The Director concludes that compliance with the provisions of the interim stipulated Agreements will provide adequate replacement water to satisfy the need for any mitigation or curtailment of the rights to the use of ground water held by persons who are party to the Agreements or are represented by a party to the Agreements during the term of the stipulated Agreements.

10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of stipulated agreements approved by the Director; and

d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director.

11. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, models, and

the Director's best professional judgment.

12. The Director concludes that the water district created by this order shall include the following organizational features:

a. Election and appointment of a single watermaster for the water district. The water users may elect to have the district contract with IDWR to provide watermaster services. Under a district contract with IDWR, the watermaster will be a direct employee of IDWR.

b. Creation of subdistricts that match boundaries of existing ground water districts and irrigation districts, or as otherwise determined by the Director.

c. Selection of Water District Advisory Committee that includes, but need not be limited to, representation from boards of directors of ground water districts and irrigation districts.

d. Appointment of deputy watermasters by the watermaster, with approval from the Director. Deputy watermasters shall work pursuant to instructions of the watermaster. Deputy watermasters may be employees of existing ground water districts or irrigation districts that are located within the water district. Duties of appointed deputy watermasters that are also employees of an existing ground water district or irrigation district shall be limited primarily to measuring and reporting of diversions.

e. Water rights not included in an existing ground water district or irrigation district shall be assessed costs directly by the water district watermaster.

f. Ground water districts and irrigation districts that are organized as subdistricts may collect and pay the pro-rata expenses on behalf of the diversions and users within their respective district (this will avoid billing of individual water rights or diversions by both the subdistrict and the water district).

ORDER

IT IS ORDERED that:

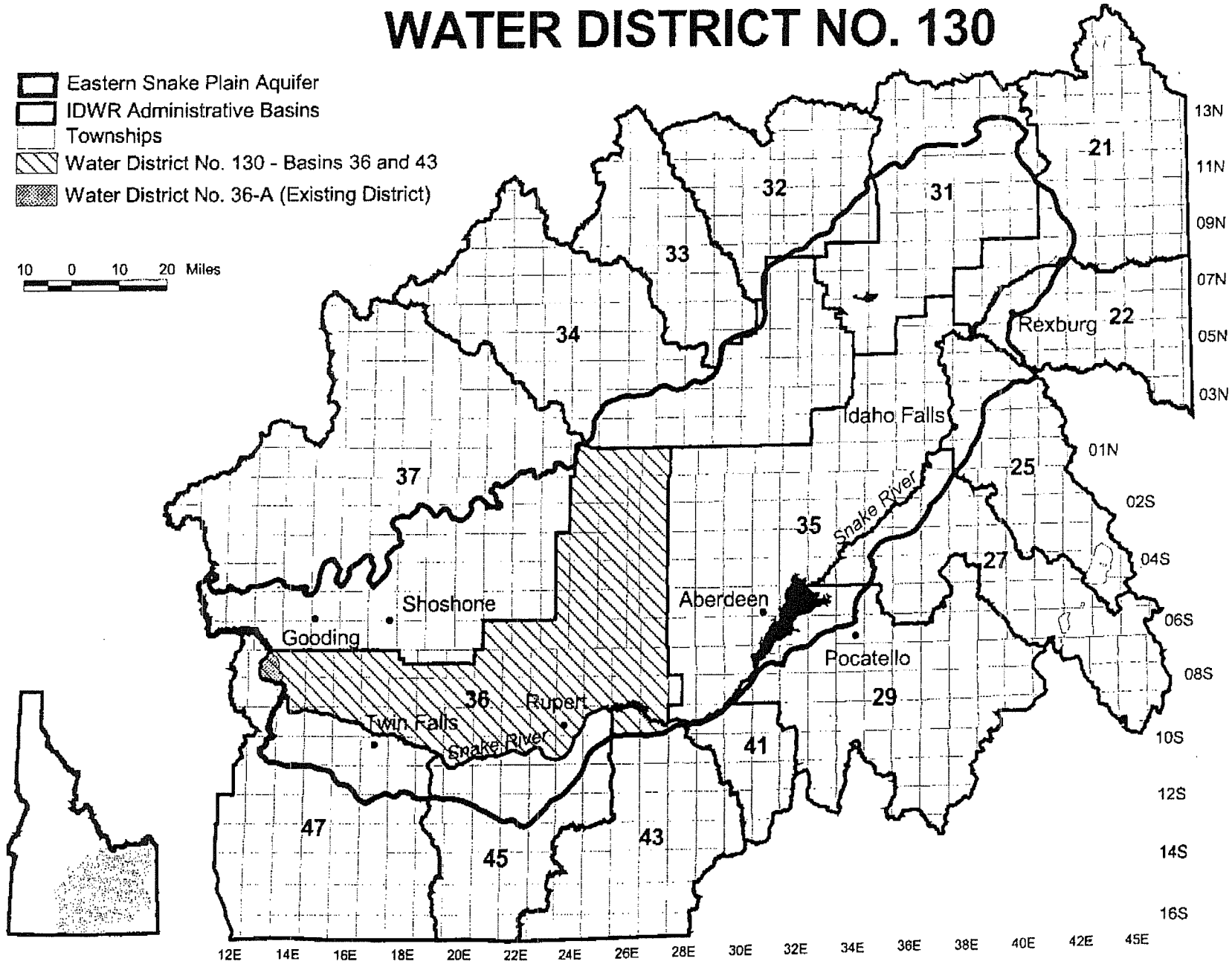
1. The Thousand Springs Area Water District, designated as Water District No. 130, is hereby created to include all ground water rights and all rights to divert from springs discharging from the ESPA that are not already included in Water District No. 36-A, other than small domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), within the area depicted on the map appended hereto as Attachment A and incorporated herein by reference.

2. For 2002, the water right holders within the Thousand Springs Area Water District No. 130 shall meet at a time and place to be announced by the Director to elect a watermaster, select an advisory committee, and set a budget to be collected to operate the district. In future years, the annual meeting shall be held as provided in Idaho Code § 42-605.

DATED this 19th day of February 2002.

KARL J. DREHER
Director

THOUSAND SPRINGS AREA
WATER DISTRICT NO. 130



ATTACHMENT A

EXHIBIT "F"

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Charles L. Honsinger (ISB #5240)
S. Bryce Farris (ISB#5636)
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Attorneys for Thousand Springs Water Users Association

COPY

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

AMERICAN FALLS RESERVOIR DISTRICT #2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT AND TWIN FALLS CANAL COMPANY, Plaintiffs-Respondents, and RANGEN, INC., CLEAR SPRINGS FOODS, INC., THOUSAND SPRINGS WATER USERS ASSOCIATION, and IDAHO POWER COMPANY, Intervenors-Respondents, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES AND KARL DREHER, its Director, Defendants-Appellants, and IDAHO GROUND WATER APPROPRIATORS, INC., Intervenors.	**AFFIDAVIT OF LINDA L. LEMMON**

STATE OF IDAHO)
) ss
COUNTY OF GOODING)

Linda L. Lemmon, being first duly sworn upon his oath, deposes and says that:

1. I am the Executive Secretary and member of the Thousand Springs Water Users Association (TSWUA), one of the Intervenors-Respondents in the above-captioned action.

2. I make this affidavit based upon my own personal knowledge and belief of the facts contained herein.

3. Attached hereto as Exhibit A is a spreadsheet I prepared to show the water rights and the latest 2006 water flows for TSWUA members whom I was able to contact within the past week. The current aggregate water shortage for these TSWUA members is 666.82 cfs, or approximately 47.7% from decreed amounts.

Dated this ~~30th~~ 31 day of July, 2006.

Further your affiant sayeth naught.

Linda L. Lemmon

STATE OF IDAHO)
)ss.
County of Gooding)

On this ~~2~~ 31st th day of July, 2006, before me, the undersigned, a notary public in and for said state, personally appeared Linda L. Lemmon, known to me to be the individual that executed the foregoing affidavit, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

JENNIFER R. NORIEGA NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Twin Falls
My Commission Expires: 08-17-2011

CERTIFICATE OF SERVICE

I certify that on the 31st day of July, 2006, I served copies of this document, including all attachments by hand delivery to the following:

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Charles L. Honsinger

EXHIBIT "A"

Appendix A - Affidavit of Linda L. Lemmon, TSWUA

Members filing claims	Water Right	Priority	Use	CFS DECREED	2003 CFS Low	2003 Total Loss	2003 % Loss	2006 CFS Low	2006 Total Loss	2006 % Loss
Aquarius Aquaculture	36-07092B	11/6/69	Fish	10	3	7	70.0	3.3	6.7	67.0
Aquarius Aquaculture	36-07159	2/18/71	Fish	10	0	10	100.0	0	10	100.0
Bar S Pipeline/Ditch Lateral Association	multiple	1888-1932	multi	15.81	6.5	9.31	58.9	6.5	9.31	58.9
Verl & Ancie Bell	37-07185	12/22/72	Fish	3.96	2.25	1.71	43.2	2.25	1.71	43.2
Big Springs Water Users Assoc.	36-00023	4/1/11	DIS	1.62	0.61	1.01	62.3	1.2	0.42	25.9
Billingsley Creek Ranch	36-02379	3/19/59	D Fish	5	0	5	100.0	0	5	100.0
Billingsley Creek Ranch	36-02465	1/18/61	IR Fish	4	0	4	100.0	0	4	100.0
Billingsley Creek Ranch	36-10870	5/1/33	IS	0.36	0	0.36	100.0	0	0.36	100.0
Birch Creek Trout, Inc.	37-7174	11/16/72	Fish	6	5.74	0.26	4.3	5.64	0.36	6.0
Birch Creek Trout, Inc.	37-7541	11/29/76	Fish	4	0	4	100.0	0	4	100.0
Blind Canyon Aquaranch Inc.	36-7066	1/5/70	Fish	10	7.55	2.45	24.5	6.51	3.49	34.9
Blind Canyon Aquaranch Inc.	36-8299	10/18/01	Fish	14.2	1.01	13.19	92.9	1.75	12.45	87.7
Blue Lakes Trout Farm, Inc.	37-7210	11/17/71	Fish	45	11	34	75.6	10.7	34.3	76.2
Blue Lakes Trout Farm, Inc.	37-7427	12/28/73	Fish	52.23	0	52.23	100.0	0	52.23	100.0
Buckeye Farms Inc.	36-00018	4/1/17	I	20	0	20	100.0	0	20	100.0
Canyon Springs (McCollum Enterprises, LTD.)	36-7239	4/24/72	IRA Fish	6	0	6	100.0	0	6	100.0
Clear Lakes Trout Co	36-07725	11/29/76	Fish	100	57.3	42.7	42.7	36.07	63.93	63.9
Clear Lakes Trout Co. - FDC	36-07080	8/22/69	Fish	11.54	7.64	3.9	33.8	8.81	2.73	23.7
Clear Lakes Trout Co. - FDC	36-07731	7/8/77	Fish	15	0	15	100.0	0	15	100.0
Clear Springs Foods Inc. - Crystal	multiple	multiple	multi	335.1	234.3	100.8	30.1	229.12	105.98	31.6
Clear Springs Foods Inc. - Snake River	36-04013A	9/15/55	Fish	15	9.29	5.71	38.1	7.02	7.98	53.2
Clear Springs Foods Inc. - Snake River	36-04013B	2/4/64	Fish	27	0	27	100.0	0	27	100.0
Estate of Earl M. Hardy (White Springs)	36-07176	5/18/71	Fish	38.8	25.16	13.64	35.2	26.7	12.1	31.2
Irle Ranch Inc.	36-7538	6/9/75	Fish	30	9.2	20.8	69.3	11.5	18.5	61.7
Charles Johnson	36-7278	2/14/73	Fish	4.69	1.3	3.39	72.3	1.3	3.39	72.3
Bill & Deloris Jones	36-7071	7/8/69	Fish	73.05	30.67	42.38	58.0	30.67	42.38	58.0
Dan & Dadhri Lee	36-7315	3/20/73	Fish	3.71	1.3	2.41	65.0	2.26	1.45	39.1
Magic Springs	26-7072	9/5/69	Fish	148.2	100.01	48.19	32.5	102.71	45.49	30.7
Pristine Springs Inc.	36-07757	10/27/77	Fish	215	139.2	75.8	35.3	158.15	56.85	26.4
Leo & Judy Ray	37-07082	12/16/70	Fish	15.84	10.5	5.34	33.7	8	7.84	49.5
Rim View Trout Co.	36-02680	6/6/66	Fish	60	57.3	2.7	4.5	41.4	18.6	31.0
Rim View Trout Co.	36-07167	3/18/71	Fish	50	0	50	100.0	0	50	100.0
Pearl Slane	37-07091	4/12/71	Fish	3.99	2.4	1.59	39.8	1.65	2.34	58.6
Stan Standal	37-4034	5/13/69	Fish	13	6.29	6.71	51.6	6.84	6.16	47.4
Stan Standal	37-7200	1/30/73	Fish	14.72	9.39	5.33	36.2	9.34	5.38	36.5
Western Legends	36-0004	9/10/1884	IS	15	10.99	4.01	26.7	11.61	3.39	22.6
			totals	1397.82 decreed	749.9 low value	647.92 total loss	62.1 Ave %	731 low value	666.82 total loss	62.1 Ave %
					% CFS loss from decreed right			% CFS loss from decreed right		
					46.4			47.7		

Use: Domestic (D), Irrigation (I), Stock (S), Wildlife (W), Storage (Stor), Industrial (Ind), Recreation (R), Astetics (A), Fish, Power, Municipal (M), Commercial C)