Jeffrey C. Fereday (Idaho State Bar # 2719)
Michael C. Creamer (Idaho State Bar # 4030)
Bradley V. Sneed (Idaho State Bar # 6254)
GIVENS PURSLEY LLP
601 Bannock Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300

Attorneys for Idaho Ground Water Appropriators, Inc.

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AUG 07 2006
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210 AND 36-07427 and IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHTS NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARM)	**IGWA'S BRIEF IN RESPONSE TO ORDER CONCERNING NATURE OF FURTHER PROCEEDINGS** **(BLUE LAKES DELIVERY CALL)** **(CLEAR SPRINGS DELIVERY CALL, SNAKE RIVER FARM)**

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP, and on behalf of its ground water district members Magic Valley Ground Water District ("MVGWD") and North Snake Ground Water District ("NSGWD") (collectively the "Ground Water Districts"), hereby submits its Response to the Director's July 28, 2006 Order Requesting Briefing on Nature of Further Proceedings ("Order").

Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. (sometimes referred to together as the "Spring Users") each filed delivery calls with the Director in 2005. They asked

the Director to shut off ground water pumps across Water District 130 because they believe ground water pumping is injuring their water rights in springs issuing from the Eastern Snake Plain Aquifer ("ESPA"). In response, and through emergency, pre-hearing orders, the Director has required certain ground water pumpers to provide replacement water or face curtailment. The Director has confirmed that a hearing will be provided in both cases. IGWA has petitioned to reconsider the Director's orders and has requested hearings in each case.

In conformance with these emergency orders, in 2005 and 2006 IGWA has provided replacement water to the ESPA, obtained voluntary curtailments of ground water irrigated acres, provided surface water to allow acres to be converted from ground water use, provided substitute supplies to certain spring right holders, and it has taken other measures to reduce ground water withdrawals or provide aquifer recharge. IGWA currently is taking steps to complete its efforts to comply with the Director's emergency order for 2006.

At the same time, IGWA has been working with the federal Farm Services Agency, the State of Idaho, and hundreds of ground water irrigators to implement a Conservation Reserve Enhancement Program ("CREP") across the ESPA. The goal is to idle up to 100,000 acres of ground water irrigated farmland. Like the replacement water and conversion projects, the CREP program is intended to increase spring outflows from the ESPA for the benefit of the Spring Users and others. See the Affidavit of Craig Evans, which was filed with IGWA's August 4, 2006 *Reply to Plaintiff's Responses to Motion for Stay* with the Idaho Department of Water Resources in the case of *American Falls Reservoir Dist. No. 2. v. Idaho Dept. of Water Resources*, Case No. CV-2005-0000600. A copy of Mr. Evans' Affidavit is attached hereto for the Director's convenience as Exhibit "A."

IGWA has done these things despite the fact that it has not yet had a hearing on the validity, effect, or proper extent of the Blue Lakes and Clear Springs delivery calls. The Spring Users have not asked that a hearing be scheduled. They simply demand that valid ground water rights be shut off. There is no question that IGWA and the Ground Water Districts are entitled to hearings on the delivery calls—under the Conjunctive Management Rules, under the law as interpreted in Judge Wood's recent order, or in any event under Idaho's statutes and Constitution—before curtailments or further obligations can be imposed. The Department should afford them this opportunity before requiring curtailment or additional replacement water.

Judge Wood's recent decision in the case of *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, Case No. CV-2005-0000600 (June 2, 2006) ("District Court Order"), does not change the rule that the ground water users are entitled to a full hearing on the spring users' delivery calls. In fact, it reinforces it. IGWA has recently briefed this point in their July 25, 2006 *Memorandum in Response to Surface Water Coalition's Petition for Reconsideration of Third Supplemental Order Amending Replacement Water Requirements Final 2005 and Estimated 2006* (filed in the Surface Water Coalition's delivery call currently scheduled for hearing before the Department), and IGWA's August 4, 2006 *Reply to Plaintiffs' Responses to Motion for Stay* in Case No. CV-2005-0000600 cited above. Both of these pleadings were filed with, or served upon, the Idaho Department of Water Resources; their arguments are incorporated herein. Copies of these are attached for the Director's convenience as Exhibits "B" and "C," respectively (exhibits submitted with the latter are not included).

While IGWA will continue to work toward full implementation of the CREP program and the provision of 2006 replacement water, IGWA's current position is that it and its member Ground Water Districts will not provide replacement water beyond that being provided in 2006,

and will exercise all available legal means to resist a curtailment order, unless they first have had full evidentiary hearings on the Spring Users' delivery calls. The hearings, whether before the Director or a local ground water board pursuant to I.C. §§ 42-237a-e, must determine, among other factors:

- Whether the Director must establish a reasonable pumping level in the ESPA that limits or conditions the amount of water either Spring User may demand in a delivery call.
- Whether the Spring User is employing a reasonable means of diversion and using water without waste, and whether they could obtain their water supplies by some other means that would minimize or eliminate the need to curtail junior well owners.
- Whether the curtailment of ESPA ground water rights, or the provision of replacement water, to supply spring rights using ESPA outflow (at least in the circumstances presented here), is consistent with the statutory requirement that the exercise of senior water rights not block full economic development of underground water resources.
- Whether either Spring User has suffered material injury due to ground water pumping.
- The extent to which the Spring Users' delivery calls must be considered futile.
- Whether, or to what extent, either delivery call must apply to and be answered by those using ESPA ground water for domestic and stockwater purposes.
- The extent to which the ESPA ground water model accurately describes the effects of ground water pumping on Clear Springs' and Blue Lakes' water rights.

In summary, IGWA is entitled to a hearing on each of the Spring Users' delivery calls. The Director has acted under the Administrative Procedure Act's emergency provisions for two years, granting relief to the Spring Users without providing the ground water users a hearing. The statute requires the Direct "to proceed as quickly as feasible" to carry out the hearing procedure after he has issued an emergency order. Idaho Code § 67-5247(4). The Director has not complied with this mandate.

IGWA respectfully requests that the Director schedule a hearing, either before the Director under applicable rules or before a ground water board, to occur in February 2007. The Director should establish appropriate pre-trial and discovery schedules immediately.

RESPECTFULLY SUBMITTED this 7th day of August, 2006.

GIVENS PURSLEY LLP

By: Jeffrey C. Fereday

Jeffrey C. Fereday
Michael C. Creamer
Brad V. Sneed
Attorneys for Idaho Ground Water Appropriators, 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 by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Mr. Karl J. Dreher Director Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098	_____ U.S. Mail _____ Facsimile _____ Overnight Mail __X__ Hand Delivery _____ E-mail
Gregory Kaslo Blue Lakes Trout Farm 1301 Vista Avenue Boise, ID 83705	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery _____ E-mail
Daniel V. Steenson, Esq. Ringert Clark, Chartered 455 S. Third Street P.O. Box 2773 Boise, ID 83701-2773	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery _____ E-mail
John Simpson Barker Rosholt P.O. Box 2139 Boise, ID 83701-2139	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery _____ E-mail
Michael S. Gilmore, Esq. Deputy Attorney General Civil Litigation Division Office of the Attorney General Len B. Jordan Bldg., Lower Level P.O. Box 83720 Boise, ID 83720-0010	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery _____ E-mail
Larry Cope Clear Springs Foods P.O. Box 712 Buhl, ID 83303-1237	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery _____ E-mail

Cindy Yenter Watermaster – Water District 130 Idaho Department of Water Resources Southern Regional Office 1341 Fillmore Street, Suite 200 Twin Falls, ID 83301-3380	_X_ U.S. Mail ___ Facsimile ___ Overnight Mail ___ Hand Delivery ___ E-mail
Frank Erwin Watermaster – Water District 36 2628 South 975 East Hagerman, ID 83332	_X_ U.S. Mail ___ Facsimile ___ Overnight Mail ___ Hand Delivery ___ E-mail
Scott L. Campbell, Esq. Moffatt Thomas Barrett Rock & Fields, Chtd. 101 S. Capitol Blvd., 10th Floor P.O. Box 829 Boise, ID 83701-0829	_X_ U.S. Mail ___ Facsimile ___ Overnight Mail ___ Hand Delivery ___ E-mail

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Facsimile: (208) 388-1300

Attorneys for Idaho Ground Water Appropriators, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

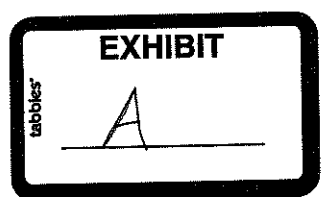
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

AMERICAN FALLS RESERVOIR DISTRICT #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 DREHER, its Director, Defendants.	Case No. CV-2005-600 **AFFIDAVIT OF CRAIG EVANS**

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

Craig Evans, being first duly sworn on oath, deposes and hereby states as follows:

1. I am on the Board of Directors of Idaho Ground Water Appropriators, Inc. ("IGWA"), one of the parties to this suit. I also am an officer and on the Board of Directors of



Bingham Ground Water District, also a party and one of the entities being represented by IGWA. I am over the age of 18 and state the following based upon my personal knowledge.

2. IGWA was instrumental in making the federal and state sponsored Conservation Reserve Enhancement Program ("CREP") program available to ground water irrigated lands on the Eastern Snake Plain Aquifer ("ESPA"), and has been working for approximately three years to structure and implement this project. CREP is a set-aside program whereby agricultural cropland using ground water from the Eastern Snake Plain Aquifer ("ESPA") will be idled for fifteen years to achieve various purposes, including reducing ground water pumping. Attached to this affidavit as Exhibit A is a newsletter from the federal Farm Services Agency ("FSA") explaining the commencement of, and details about, the CREP program.

3. I have been one of the IGWA Board members closely following the CREP effort and progress in various counties on the ESPA. I have met with officials from the State of Idaho and the FSA and reviewed records of those irrigators who have place their lands into consideration for enrollment in CREP. Since the CREP enrollment period began earlier this year, it is my understanding that the owners of ground water irrigated farmland have initially listed over 200,000 acres for consideration as CREP-enrolled acres, and that lands are now being reviewed and accepted into the program.

4. While not all of these initially listed acres are expected to be enrolled, IGWA has a goal of enrolling the maximum acres permitted under this program for Idaho, which is 100,000 acres of ground water irrigated land. IGWA is continuing to work with the State Department of Agriculture and the FSA, as well as ground water districts and individual farmers, to promote enrollment.

5. To further encourage irrigators to idle their ground water irrigated land, ground water districts, including Bingham Ground Water District, are providing a financial incentive, in the

form of a $30 per acre one-time sign-up bonus, for those irrigators who enroll and whose acres are accepted into CREP.

DATED this 4th day of August, 2006.

Craig Evans

SUBSCRIBED AND SWORN TO before me this 4th day of August 2006.

Notary Public for Bingham Ground Water District
Residing at Blackfoot, Idaho
My commission expires 10/20/2011

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2006, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

C. Tom Arkoosh, Esq. Arkoosh Law Offices, Chtd. 301 Main Street P.O Box 32 Gooding, ID 83330	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
W. Kent Fletcher, Esq. Fletcher Law Office 1200 Overland Avenue P.O. Box 248 Burley, ID 83318-0248	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Roger D. Ling, Esq. Ling, Robinson & Walker 615 H St. P.O. Box 396 Rupert, ID 83350-0396	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
John A. Rosholt, Esq. John K. Simpson, Esq. Travis L. Thompson, Esq. Barker, Rosholt & Simpson, LLP 113 Main Avenue West, Ste. 303 P.O. Box 485 Twin Falls, ID 83301-6167	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Mr. Karl J. Dreher Director Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098	 X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Phillip J. Rassier, Esq. Candice McHugh, Esq. Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098	 X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail

J. Justin May, Esq. May Sudweeks & Browning, LLP 1419 W. Washington P.O. Box 6091 Boise, ID 83707	_____ U.S. Mail _____ Facsimile _____ Overnight Mail __X__ Hand Delivery __X__ E-mail
Daniel V. Steenson, Esq. Charles L. Honsinger, Esq. S. Bryce Farris, Esq. Jon C. Gould, Esq. Ringert Clark Chartered P.O. Box 2773 Boise, ID 83702	_____ U.S. Mail _____ Facsimile _____ Overnight Mail __X__ Hand Delivery __X__ E-mail
Josephine P. Beeman, Esq. Beeman & Associates PC 409 West Jefferson Boise, ID 83702-6049	_____ U.S. Mail _____ Facsimile _____ Overnight Mail __X__ Hand Delivery __X__ E-mail
Sarah A. Klahn, Esq. William A. Hillhouse, Esq. Amy W. Beatie, Esq. White & Jankowski, LLP 511 16th Street, Suite 500 Denver, CO 80202	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery __X__ E-mail
James S. Lochhead, Esq. Brownstein Hyatt & Farber, P.C. 818 Colorado Avenue, Suite 306 Glenwood Springs, CO 81601	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery __X__ E-mail
Adam T. DeVoe, Esq. Brownstein Hyatt & Farber, P.C. 410 17th Street Twenty-Second Floor Denver, CO 80202	__X__ U.S. Mail _____ Facsimile _____ Overnight Mail _____ Hand Delivery __X__ E-mail
James C. Tucker, Esq. Idaho Power Company 1221 West Idaho P.O. Box 70 Boise, ID 83707	_____ U.S. Mail _____ Facsimile _____ Overnight Mail __X__ Hand Delivery __X__ E-mail

Jeffrey C. Fereday

Jeffrey C. Fereday

USDA
Farm Service Agency
Newsletter

The Idaho Eastern Snake Plain Aquifer Conservation Reserve Enhancement Program

May 2006

Sign-up To Begin May 30, 2006, for the Idaho Conservation Reserve Enhancement Program (CREP)

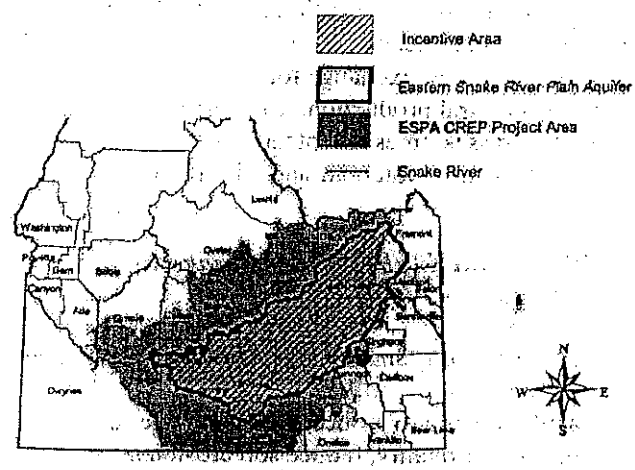
The long-awaited Idaho CREP is soon to be a reality with signup scheduled to begin May 30, 2006. CREP is a voluntary water conservation program targeted toward landowners in the Eastern Snake Plain Aquifer area. The goal is to conserve water by offering landowners an alternative to their current cropping operation. By entering this program, the landowner can receive irrigated rental rates and incentive payments while conserving Idaho's ground water.

Enrolling up to 100,000 acres of irrigated cropland in the Idaho Eastern Snake Plan Aquifer CREP is projected to reduce irrigation water use by up to 200,000 acre-feet annually. CREP will improve the Snake River's water quality and flow by increasing groundwater levels and reduce the application of agricultural chemicals and sediments. Establishing permanent vegetative cover will provide habitat for many wildlife species.

The Eastern Snake River Aquifer CREP project area of eastern Idaho includes all or parts of the following 22 counties: Ada, Bingham, Blaine, Butte, Camas, Cassia, Clark, Custer, Elmore, Fremont, Gooding, Jefferson, Jerome, Lemhi, Lincoln, Madison, Minidoka, Owyhee, and Twin Falls. In addition, all or parts of Bannock, Bonneville, and Power counties will *be eligible if the total CRP enrollment drops below* 25% of the counties' total cropland before the CREP project reaches the 100,000-acre enrollment target.

CREP signup is scheduled to begin May 30, 2006, and will continue until enrollment goals are met (100,000 acres) or through December 31, 2007, whichever comes first.

ESPA CREP Incentive Area



Come in Early and Sign the Register – Important Dates

Beginning at **8:00am on Tuesday, May 30, 2006**, each FSA County Office in the CREP Project Area will begin registering individuals interested in applying for CREP. Since enrollment is based on a first-come, first-enrolled basis, it is important that producers sign the register **in person** as early as possible.

In addition, in order to be eligible for CREP, possible participants must have signed the register **prior to** being notified of any mandatory water curtailment. Given the likelihood that the Idaho Department of Water Resources may issue water curtailment orders in early June 2006, those individuals possibly impacted by such orders must ensure that they have visited their local FSA County Office and signed the register **prior to being notified of the curtailment.**

Individuals on the register will be contacted (in order of signatures on register) by their local FSA County Office in mid- to late- June to arrange for one-on-one appointments during which time they can complete the CREP applications.

Exhibit A

The following questions and answers are provided to assist in determining if CREP is for you.

1. What is the Conservation Reserve Enhancement Program?

The Conservation Reserve Enhancement Program (CREP) is a federal-state cooperative conservation program that addresses targeted agricultural-related environmental concerns. CREP participants voluntarily enroll in 14- to 15-year Conservation Reserve Program (CRP) contracts with USDA's Commodity Credit Corporation (CCC). Participants receive financial incentives, cost-share assistance and rental payments in exchange for removing cropland from agricultural production. Converting enrolled land to native grasses, trees and other vegetation improves soil retention and water, air and wildlife habitat quality.

2. What is the Idaho Eastern Snake Plan Aquifer (ESPA) CREP?

The Idaho Eastern Snake Plain Aquifer CREP targets the enrollment of up to 100,000 acres of eligible irrigated cropland to reduce irrigation water use, increase water quality, reduce soil erosion and sedimentation, and increase wildlife populations. In addition to CREP payments, Idaho State water authorities will enter into State Water Use Contracts with participants on CREP-enrolled land to help ensure that irrigation water is conserved during the 14- to 15-year CRP contract periods.

3. What are the potential benefits of CREP?

Enrolling up to 100,000 acres of eligible cropland will significantly reduce irrigation water consumption. CREP will improve water quantity and quality in the Snake River and its tributaries by reducing agricultural chemicals and sediments. Establishing permanent vegetative cover will provide wildlife habitat for terrestrial and aquatic species.

4. What are the specific goals?

The goals of the Idaho ESPA CREP when fully enrolled include:

- Reduce irrigation water use by up to 200,000 acre-feet annually by reducing or ceasing water application on up to 100,000 irrigated cropland acres;
- Improve the Snake River's water quality and flow by increasing the aquifer's groundwater levels and tributary spring water discharge by up to 180 cubic feet per second;
- Establish permanent vegetative covers to increase wildlife habitat and reduce the amount of agricultural chemicals, non-point source contaminants and sediment entering the water;
- Improve habitat and populations of sage grouse, sharp-tailed grouse, and other grassland-nesting birds by establishing up to 100,000 acres of native grassland habitat in the priority area;
- Enhance habitat for fish species by increasing stream flow;
- Improve water quality by reducing soil erosion and non-point pollution adjacent to streams and rivers; and,
- Reduce irrigation water pumping power consumption by 300-350 million kilowatt hours annually.

5. What are the eligibility requirements?

The Eastern Snake River Aquifer CREP project area of eastern Idaho includes all or parts of the following 22 counties: Ada, Bingham, Blaine, Butte, Camas, Cassia, Clark, Custer, Elmore, Fremont, Gooding, Jefferson, Jerome, Lemhi, Lincoln, Madison, Minidoka, Owyhee, and Twin Falls. Bannock, Bonneville, and Power counties will be eligible if the total CRP enrollment drops below 25% of their total cropland before the CREP project reaches the 100,000 acre enrollment target.

Cropland must be eligible for the CRP under normal CRP rules. In this CREP project area irrigated cropland must be located within a State CRP Conservation Priority Area, or meet CRP's highly erodible land eligibility requirements. In addition, cropland must:

- Have been irrigated by ground or surface water sources other than the main stem of the Snake River, at a rate no less than ½-acre-foot per acre for 4 out of the 6 years, 1996-2001;
- Have been irrigated or included in an Idaho Department of Water Resources (IDWR) mitigation plan within 24 months prior to offer submission; and,
- Be physically and legally capable of being irrigated in a normal manner at the time offers are submitted.

Before CCC can approve a CREP contract, the producer must enter into a water use contract with the State of Idaho. The contract, "Agreement Not to Divert Water from the Eastern Snake Plain Aquifer," covers all irrigated cropland to be enrolled in CREP. Other conditions also apply.

6. When is the sign-up and how long does land remain under contract?

The CREP sign-up is expected to begin May 30, 2006, and will continue until enrollment goals are attained, or through December 31, 2007, whichever comes first. Enrolled land remains under contract for 14 to 15 years, as specified in the contract.

7. What conservation practices are approved for CREP?

To better serve program goals, CCC has approved the following CRP conservation practices (CP) for the Idaho Eastern Snake Plain Aquifer CREP:

- CP2 – Establishment of Permanent Native Grasses
- CP4D – Permanent Wildlife Habitat, Noneasement
- CP12 – Wildlife Food Plot
- CP22 – Riparian Buffer (cropland only)
- CP25 – Rare and Declining Habitat

8. What payment is CCC offering?

Subject to contract terms and certain limitations, CREP participants will be eligible for the following types of CCC payments:

- **Signing Incentive Payment:** One-time additional payment of $100 per acre for land enrolled in CP22. This payment is made after the contract has been signed and approved.
- **Practice Incentive Payment:** One-time additional rental payment equal to 40 percent of the eligible reimbursable cost to establish CP22.
- **Cost-share Assistance:** Up to 50 percent cost-share of reimbursable costs to install approved conservation practices.
- **Annual Rental Payment:** Annual payment based on posted irrigated rental rates for each enrolled irrigated acre in which an "Agreement Not to Divert Water from the Eastern Snake Plan Aquifer" has been secured under the CREP at the *per-acre rates.* The per-acre **maximum irrigated** rental rate is the sum of:
  - The posted per-acre weighted-average irrigated cropland rental rate; and
  - A per-acre maintenance incentive payment.

9. What payments and assistance are the State of Idaho offering?

ubject to contract terms and certain limitations, the tate of Idaho will provide the following payments and ssistance:

Idaho Incentive Payment: One-time payment of $30 per acre to participants who:

- *Have been diverting groundwater from the* CREP project's incentive area; and enter into an "Agreement Not to Divert Water from the Eastern Snake Plain Aquifer" for the contract' duration.

- **Water Rights Acquisition:** Provide $5 million to purchase permanent private water rights within the CREP Project area, most of which will not pertain to CRP acreage enrolled under this CREP.
- Pay all costs associated with the CREP annual monitoring programs.
- Provide technical assistance to help participants develop conservation plans.
- Contribute substantial additional funding for water management activities, natural resource planning, CREP operations staffing, and related functions consistent with the goals of the CREP project.

10. What is the cost?

The total cost over a 15-year period is estimated at $258 million with CCC contributing $183 million, or 71 percent; and the State of Idaho funding $75 million, or 29 percent. The $258 million does not include any costs that may be assumed by producers.

11. Can I still enroll in general and continuous sign-up CRP?

Yes. CREP is another option under CRP that farmers may select to enhance their land. Applicants may still enroll eligible land in the general CRP or continuous sign-up CRP. However, CREP provides additional *benefits not available through general and/or* continuous sign-up.

12. Can I hay or graze my CREP land?

Haying and grazing are permitted under normal CRP rules.

13. Where can I get more information?

Producers are encouraged to attend one of the public *meetings scheduled to roll out CREP. Dates, times,* and locations are:

- Wednesday, May 24th, 7-9pm – JEROME – Central Elementary School Auditorium, 311 North Lincoln;
- Thursday, May 25th, 7-9pm – PAUL – West Minico *Jr. High School Auditorium, 158 South 600 West;*
- Wednesday, May 31st, 7-9pm – THOMAS – Snake River High School Auditorium, 922 West Highway 39;
- Thursday, June 1st, 7-9pm – ROBERTS – Mustang Events Center, 653 North 2858 East.

More information is available at your local FSA office or on FSA's website at: www.fsa.usda.gov/dafp/cepd/default.htm.

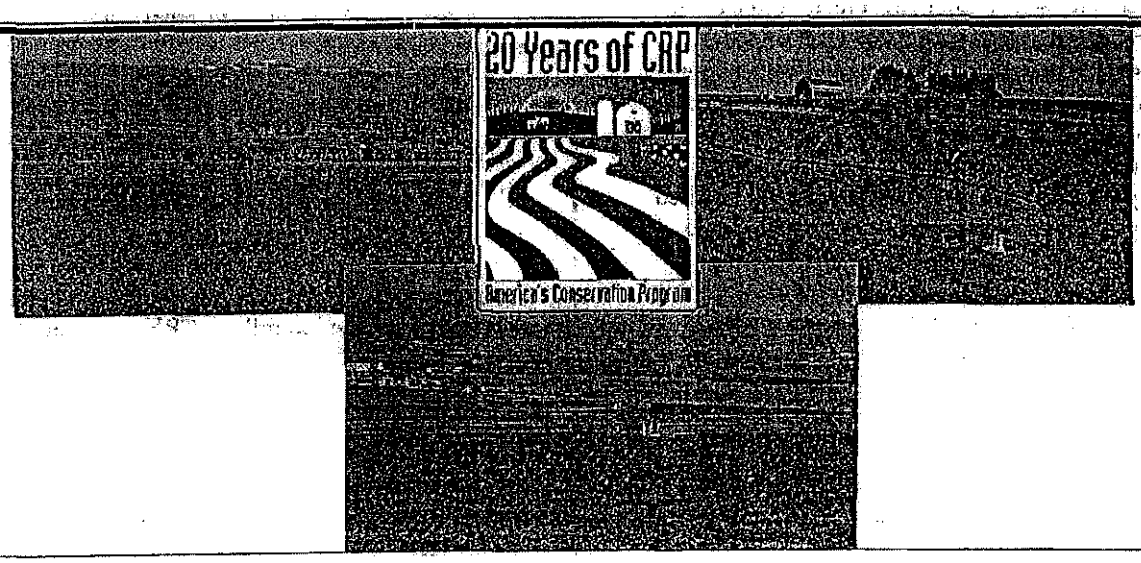
Idaho Farm Service Agency
9173 West Barnes Street, Ste B
Boise, ID 83709

Conservation Reserve Enhancement Program (CREP) Newsletter

Presorted/Standard
US Postage Paid
Boise, Idaho
Permit No: 615

CREP INFORMATIONAL MEETINGS:

- JEROME, Wednesday, May 24th, 7-9pm, Central Elementary School Auditorium, 311 North Lincoln.
- PAUL, Thursday, May 25th, 7-9pm, West Minico Jr. High School Auditorium, 158 South 600 West.
- THOMAS, Wednesday, May 31st, 7-9pm, Snake River High School Auditorium, 922 West Highway 39;
- ROBERTS, Thursday, June 1st, 7-9pm, Mustang Events Center, 653 North 2858 East.



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To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 1400 Independence Avenue, SW, Washington, DC 20250-9410, or call 202-720-5964 (voice or TDD).

The USDA is an equal opportunity provider and employer.

CONFIRMATION COPY

Jeffrey C. Fereday (Idaho State Bar # 2719)
Michael C. Creamer (Idaho State Bar # 4030)
Brad V. Sneed (Idaho State Bar # 6254)
GIVENS PURSLEY LLP
601 Bannock Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300

Attorneys for Idaho Ground Water Appropriators, Inc.

RECEIVED
JUL 25 2006
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	**IGWA'S MEMORANDUM IN RESPONSE TO SURFACE WATER COALITION'S PETITION FOR RECONSIDERATION OF *THIRD SUPPLEMENTAL ORDER AMENDING REPLACEMENT WATER REQUIREMENTS FINAL 2005 AND ESTIMATED 2006***

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP, and on behalf of its Ground Water District members, hereby files this memorandum in response to the Surface Water Coalition's ("SWC") Petition for Reconsideration of *Third Supplemental Order Amending Replacement Water Requirements Final 2005 and Estimated 2006.*

EXHIBIT
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IGWA opposes SWC's efforts to vacate the hearing schedule in this matter and require the Department to immediately administer water rights. IGWA's grounds for opposition to any vacations or further postponement of a hearing are: (1) the parties are nearly prepared for the scheduled administrative hearing, and the hearing should not be further delayed because of a pending appeal before the Idaho Supreme Court, which will have no effect upon the procedures employed by the Department; (2) the Gooding County District Court has not ordered the Department to administer water rights in the absence of conjunctive management rules and an adequate hearing; (3) there are substantial questions whether there has been any injury to the water rights of Twin Falls Canal Company (TFCC"); and (4) SWC and/or TFCC may present objections to the Department's June 29, 2006 Order at the scheduled administrative hearing.

Procedural Background

On January 14, 2005, the SWC filed its delivery call with the Idaho Department of Water Resources ("IDWR" or "Department"). On May 2, 2005, the Department issued an order concluding that the water rights held by some of the SWC districts or canal companies were likely to suffer material injury in 2005 due to junior ground water diversions. The May 2 Order required junior ground water users, including IGWA and its members, to submit a replacement water plan if they wished to avoid curtailment by the Department. IGWA timely sought reconsideration of the May 2 Order and requested a hearing. Its request for reconsideration and hearing notwithstanding, IGWA timely submitted a replacement water plan on behalf of its Ground Water District members, which the Department ultimately approved.

An unusual amount of precipitation fell in the early summer of 2005, requiring the Department to revisit the replacement water requirements imposed upon junior ground water users. On July 22, 2005, the Department issued a supplemental order amending IGWA's

replacement water requirements for 2005. On that same day, because the parties had requested a hearing on the May 2 Order, the Department issued a scheduling order setting the hearing to begin January 30, 2006.

On August 5, 2005, IGWA sought reconsideration of the Director's July 22 Order regarding its replacement water requirements and requested a hearing. IGWA has preserved the issues raised in that petition for the forthcoming administrative hearing.

On August 15, 2005, the SWC filed a complaint in the Fifth Judicial District of the State of Idaho, Gooding County, seeking a ruling that the Department's conjunctive management rules are unconstitutional, Case No. CV-2005-600 (the "Gooding County Case"). The parties since have pursued both the administrative proceedings before the Director and the judicial proceedings before the district court.

On October 7, 2005, SWC filed a motion with the Department asking that the date of the administrative hearing be extended six months. IGWA's October 13, 2005 response opposed any further delay of the hearing.

On October 14, 2005, the SWC filed a Motion for Summary Judgment in the Gooding County Case, giving rise to extensive briefing and motion practice into early 2006.

On October 17, 2005, the Director issued an Order Extending Time for Filing Expert Reports and for Hearing, extending the administrative hearing date to March 6, 2006.

On December 27, 2005, after reviewing preliminary diversion data for the 2005 irrigation season, the Director issued a second supplemental order amending IGWA's replacement water requirements for 2005. On January 11, 2006, IGWA filed a Petition for Reconsideration of the December 27 Order and again requested a hearing. IGWA's opportunity to address the issues raised in that petition are to be taken up in the forthcoming administrative hearing.

The contested case proceedings thereafter were stayed for a time by stipulation of the parties while they attempted to settle without the need for a hearing. On May 19, 2006, however, after the parties' settlement efforts failed, the Department rescheduled the administrative hearing to commence September 26, 2006.

On June 2, 2006, District Judge Barry Wood issued his Order on Plaintiffs' Motion for Summary Judgment, concluding that certain portions of the Department's conjunctive management rules are unconstitutional.

On June 14, 2006, in response to a Motion for Stay filed by Pocatello, the Department issued a Fourth Amended Scheduling Order and again rescheduled the administrative hearing—this time for October 30, 2006. IGWA supported a temporary stay of proceedings, including discovery pending the Department's resolution of the effect of the court's order in the Gooding County Case on the SWC delivery call.[1] While IGWA's Response to Pocatello's motion contemplated that even a temporary stay might affect the scheduled hearing date, IGWA did not propose or support any extended stay or the concept of vacating the scheduled hearing.

On June 29, 2006, the Director issued his Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006 ("Third Supplemental Order"). IGWA timely requested reconsideration of the Third Supplemental Order and renewed its request for a hearing.

On June 30, 2006, the District Court entered its Judgment Granting Partial Summary Judgment in the Gooding County Case. The District Court certified the Judgment as final on July 11, 2006. The State of Idaho filed its notice of appeal of the judgment that same day.

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[1] As stated in its Response to Pocatello's Motion for Stay, given the certainty that some form a stay of proceedings was imminent as a result of the court's order in the Gooding County Case, IGWA wanted a temporary stay of *all* proceedings, including expert depositions, to avoid having to make its experts available to be deposed, only to then be prejudiced by being prevented from deposing other parties' experts.

On July 12, 2006, the SWC filed its Petition for Reconsideration of the Third Supplemental Order, asking that the Director stay or vacate the administrative hearing and immediately administer water rights consistent with Idaho's Constitution and statutes.

Argument

A. An administrative hearing is both required and inevitable. It should proceed as scheduled, regardless of the outcome of the appeal to the Idaho Supreme Court.

Under Idaho's Administrative Procedure Act (Idaho Code § 67-5242) or the court's order in the Gooding County Case, IGWA and other junior water right holders are entitled to a hearing to determine their rights under the SWC delivery call and prior to any curtailment. A hearing is required and inevitable, no matter the outcome of the appeal of the District Court's Judgment currently before the Idaho Supreme Court. The only effect of the Idaho Supreme Court's forthcoming opinion would be to clarify what facts the Director may consider in answering the SWC's delivery call and/or the weight to be given the facts. The Director, therefore, can and should proceed to hearing on the broadest grounds possible (i.e., those contemplated by the Conjunctive Management Rules) while the facts concerning the 2005 water supply remain relatively fresh and key witnesses still are available and prepared to testify. As necessary,[2] all relevant portions of this comprehensive record then can be considered and addressed by the Director after giving appropriate weight to the permissible and relevant evidence.

A hearing is inevitable because even if the Idaho Supreme Court completely affirms the District Court's Judgment, that Judgment provides: "The parties who may be curtailed are

[2] It is entirely conceivable that the Judgment in the Gooding County Case will be reversed and remanded by the Supreme Court on purely procedural grounds. In that case, the judgment voiding the rules itself would be vacated, the Conjunctive Management Rules would remain valid, no substantive clarification concerning the prior appropriation doctrine would be forthcoming, and IGWA's ground water user members would still be under the weight of emergency curtailment orders without the prospect of being able to present their defenses.

entitled to at least minimal due process of law, notice of the proposed action, and the opportunity to be heard." June 2 Order, p. 101. The District Court also advised that the Director:

> conduct a hearing whereby juniors and seniors would have the opportunity to put on evidence and try to rebut the preliminary findings of the Director based on the results of either the ground water model or other suitable methods. Juniors would also have the opportunity to put on evidence to try and establish that the senior is wasting water contrary to the partial decree as well [sic] provide a mitigation plan for replacement water; or try to establish a futile call.

June 2 Order, p. 101. This is the type of hearing that IGWA has been preparing for during the last year. And the hearing procedures envisioned by the District Court in any event are quite similar to those provided for in the Department's own procedural rules. IDAPA 37.01.01. IGWA has, at considerable expense, been building its case to address just such issues in a hearing. These issues, along with all other issues concerning SWC's delivery call, are ripe for a hearing in the near future regardless of the Idaho Supreme Court's decision on appeal.

With the exception of about nine expert depositions (most of which are currently scheduled for August), and the preparation of expert rebuttal reports after the depositions, the parties are prepared to begin the administrative hearing on October 30, 2006. Given the considerable delay that already has occurred in this matter, the fact that the parties essentially are ready for the hearing, and that IGWA's members remain under significant mitigation obligations imposed by the Director, the current hearing schedule should be maintained.

Following the hearing, the Director can issue an order based on a complete factual record and impose by order (subject to judicial review) whatever requirements he finds appropriate. If the Idaho Supreme Court subsequently rules on the substantive prior appropriation doctrine issues in a way that requires modification of the Director's order, such modifications can be made then. This would not substantially different from what has occurred to date—subsequent

modifications of existing orders as the Director, applying his emergency powers, preliminarily determines and applies additional (albeit limited) facts during the course of the 2005 and 2006 irrigation seasons.

On the other hand, if the Director grants SWC's Petition for Reconsideration and vacates the current hearing schedule, it likely will be many months before the Idaho Supreme Court rules on the State of Idaho's appeal and before for the Director can reschedule the administrative hearing. This will require the parties to start this entire process over, and begin preparing anew for the hearing. This would be a waste of the resources of the State, the judiciary, and the parties.

SWC quotes IGWA as previously arguing that the "Department's approach to these matters is called into question by Judge Wood's recent order" (SWC Petition, p. 2) as if IGWA recognizes SWC's arguments for vacating the hearing. SWC ignores the next sentence of IGWA's brief stating that "[i]t would be prejudicial for IGWA and its members to have remedies imposed against them without the opportunity for hearing." IGWA's Reply to the Surface Water Coalition's Response to Pocatello's Motion for Stay, p. 2. SWC should not be permitted to have it both ways, i.e., administration of junior water rights without a hearing. Either all of the contested case proceedings based on the Conjunctive Management Rules must be stayed (including orders based on those rules requiring curtailment or replacement water) or none of the proceedings can be stayed (proceed to hearing as scheduled).

The administrative hearing can and should go forward, with the express understanding that the Director will make findings and conclusions following the hearing, subject to amendment or supplementation as may be appropriate if Idaho Supreme Court decides the pending appeal on the merits.

B. Immediate administration of water rights is not warranted or envisioned by the District Court's June 2 Order or June 30 Judgment.

SWC argues that: "the Director is in possession of the necessary information from prior submittals in the May 2, 2005 Amended Order administrative case, prior decrees and licenses, and from the Director's Reports for the Coalition members' water rights to begin lawful water right administration in 2006." SWC Petition, p. 6. This argument completely ignores those portions of the District Court's June 2 Order cautioning that junior water right holders are entitled to due process and that conjunctive management is complex. As discussed above, the District Court's June 2 Order specifically provides that junior right holders are entitled to a hearing before their rights are administered. The June 2 Order also states: "[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." June 2 Order, p. 99. The District Court recognized that "[r]ules for the administration of hydraulically connected ground and surface water sources are not only specifically authorized by the Legislature, *they are essential to proper administration* and to protect vested property rights." June 2 Order, p. 124 (emphasis added). The Court also observed that, as a constitutional matter, the Director has the authority to require the SWC members to provide by affidavit facts concerning their actual beneficial use and need (i.e., something the SWC has yet to provide, and something the Director has the authority to consider at hearing).

In other words, not all of the relevant facts are before the Director to properly respond to the SWC delivery call. But more to the point, neither the June 2 Order nor the Judgment entered on June 30th requires the Director to do anything. The District Court only has ruled on SWC's motion to find the Conjunctive Management Rules facially invalid. If one could construe the

District Court as mandating anything, it would be to conduct a hearing before juniors are subject to curtailment.

C. SWC's objections to the Third Supplemental Order should be heard at the scheduled administrative hearing.

As Pocatello correctly argues in its response to the SWC's Petition for Reconsideration, the issue of whether the Director's Third Supplemental Order is consistent with Idaho law is *an issue for the administrative hearing set to begin on October 30, 2006.* Much like the SWC, IGWA too is not satisfied with the Director's prior orders in this contested case, including the Third Supplemental Order.[3] IGWA has filed petitions for reconsideration concerning those several orders on the basis that certain findings or conclusions were not consistent with Idaho law—the same basis now asserted by SWC. IGWA has preserved these arguments for the

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[3] As asserted in its own petition for reconsideration filed on July 13, 2006, IGWA previously has filed the following petitions, briefs and/or affidavits with the Department in connection with previous orders issued in this proceeding:

1. Petition for Reconsideration and/or Clarification of Director's May 2, 2005 Amended Order; Request for Hearing; Motion for Stay of Amended Order, dated May 16, 2005;
2. Petition for Reconsideration of Order Approving of Order Approving IGWA's Replacement Water Plan for 2005 dated July 8, 2005;
3. Petition for Reconsideration of the July 22, 2005 Supplemental Order Amending Replacement Water Requirements dated August 5, 2005;
4. Petition for Reconsideration of the December 27, 2005 Second Supplemental Order Amending Replacement Water Requirements dated January 10, 2006;
5. Affidavit of Charles M. Brendecke in Support of IGWA's Petition for Reconsideration of Second Supplemental Order dated January 10, 2006;
6. IGWA and Pocatello's Joint Response to the Surface Water Coalition's Motion for Partial Summary Judgment dated April 28, 2006; and
7. Affidavit of Charles M. Brendecke in Support of IGWA's and Pocatello's Response to Motion for Partial Summary Judgment dated April 28, 2006.

Because the June 29, 2006 Order replicates the errors identified in the above-referenced IGWA filings, and fails to give due consideration to, or otherwise take into account, the issues, arguments and facts presented therein, IGWA has respectfully requested in its own petition for reconsideration that it be permitted to fully present such issues, arguments and facts beginning October 30, 2006, at the scheduled administrative hearing before the Director.

October 30, 2006 hearing. SWC likewise should be required to reserve its arguments concerning reconsideration until the hearing before the Director.

Conclusion

Because of the substantial delay that has already occurred in this contested case, the fact that the Idaho Supreme Court's decision will not affect the procedure employed by the Director at the administrative hearing, the parties are nearly prepared for the hearing, and IGWA's members are being prejudiced by existing administrative orders on which they have yet to be heard, the hearing should proceed as scheduled. Contrary to SWC's requested relief, the administration of ground water rights for the benefit of SWC cannot continue without an adequate opportunity for junior water right holders to be heard. Like all parties, SWC will have sufficient opportunity at the hearing to present evidence contesting the Director's orders entered thus far in the case as well as evidence they deem relevant under their theory of the law of prior appropriation, and to object to evidence offered by IGWA and its ground water district members.

For all of the foregoing reasons, IGWA requests that the Director deny SWC's Petition for Reconsideration and proceed to hearing on October 30, 2006.

Respectfully submitted this 25th day of July, 2006.

GIVENS PURSLEY LLP

Jeffrey C. Fereday
Michael C. Creamer
Brad V. Sneed
Attorneys for Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2006, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

Mr. Karl J. Dreher, Director Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098	_____ _____ _____ X _____	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
C. Tom Arkoosh, Esq. Arkoosh Law Offices, Chtd. 301 Main Street P.O Box 32 Gooding, ID 83330	X _____ _____ _____ X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
W. Kent Fletcher, Esq. Fletcher Law Office P.O. Box 248 Burley, ID 83318-0248	X _____ _____ _____ X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Roger D. Ling, Esq. Ling, Robinson & Walker 615 H St. P.O. Box 396 Rupert, ID 83350-0396	X _____ _____ _____ X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
John A. Rosholt, Esq. John K. Simpson, Esq. Travis L. Thompson, Esq. Barker, Rosholt & Simpson 113 Main Avenue West, Ste. 303 Twin Falls, ID 83301-6167	X _____ _____ _____ X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Kathleen Marion Carr, Esq. Office of the Field Solicitor U.S. Department of the Interior 960 Broadway Avenue, Suite 400 Boise, ID 83706	X _____ _____ _____ X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail

Matt J. Howard, Esq. U.S. Bureau of Reclamation Pacific Northwest Region 1150 N. Curtis Road Boise, ID 83706-1234	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Scott L. Campbell, Esq. Moffatt Thomas Barrett Rock & Fields, Chtd. 101 S. Capitol Blvd., 10th Floor P.O. Box 829 Boise, ID 83701-0829	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Michael S. Gilmore, Esq. Deputy Attorney General Civil Litigation Division Office of the Attorney General P.O. Box 83720 Boise, ID 83720-0010	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Josephine P. Beeman, Esq. Beeman & Associates PC 409 West Jefferson Boise, ID 83702-6049	X X	U.S. Mail Facsimile Hand Delivery E-mail
Sarah A. Klahn, Esq. William A. Hillhouse, Esq. Amy W. Beatie, Esq. White & Jankowski, LLP 511 16th Street, Suite 500 Denver, CO 80202	X X	U.S. Mail Facsimile Overnight Mail E-mail
Terry T. Uhling, Esq. J.R. Simplot Company 999 Main Street P.O. Box 27 Boise, ID 83707	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Mr. Ryan Madsen Idaho Department of Water Resources Eastern Regional Office 900 North Skyline Dr. Idaho Falls, ID 83402-6105	X 	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail

Mr. Allen Merritt	X U.S. Mail
Ms. Cindy Yenter	____ Facsimile
Idaho Department of Water Resources	____ Overnight Mail
Southern Regional Office	____ Hand Delivery
1341 Fillmore St., Ste. 200	____ E-mail
Twin Falls, ID 83301-3033	

Jeffrey C. Fereday
Michael C. Creamer
John M. Marshall
Bradley V. Sneed

Jeffrey C. Fereday (Idaho State Bar # 2719)
Michael C. Creamer (Idaho State Bar # 4030)
Brad V. Sneed (Idaho State Bar # 6254)
GIVENS PURSLEY LLP
601 Bannock Street, Suite 200
P.O. Box 2720
Boise, ID 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300

Attorneys for Idaho Ground Water Appropriators, Inc.

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 #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 DREHER, its Director, Defendants.	Case No. CV-2005-600 **IDAHO GROUND WATER APPROPRIATORS' REPLY TO PLAINTIFFS' RESPONSES REGARDING MOTION FOR STAY**

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its attorneys, Givens Pursley LLP, and on behalf of its members, including North Snake, Magic Valley, Aberdeen-American Falls, Bingham, Bonneville-Jefferson, and Madison Ground Water Districts, hereby replies, pursuant to Idaho Rule of Civil Procedure 7(b)(3)(E), to *Plaintiffs' Response to Defendants' Motion For Stay* filed by Twin Falls Canal Company and four irrigation districts ("TFCC Brief")

and to *Thousand Springs Water Users Association's Brief in Opposition to Motion for Stay* ("TSWUA Brief"). At issue is whether this Court's June 2, 2006 Summary Judgment Order ("June 2 Order") will be stayed, pursuant to the Idaho Department of Water Resources' ("IDWR" or "Department") July 20, 2006 *Motion for Stay under IRCP 62(d) and Idaho Appellate Rule 13(b)*, pending its appeal to the Idaho Supreme Court. IGWA has joined in IDWR's motion.[1]

The Department's Motion should be granted because it will allow an existing fact-finding process to proceed before the Director, Idaho Department of Water Resources ("Director," "IDWR," or "Department"). This will provide a factual record that will be relevant in any water rights administration that occurs, regardless the outcome of the appeal to the Idaho Supreme Court. A stay also will prevent irreparable harm to the people of Idaho, it will cause no harm to Plaintiffs, and it will remove any question about the junior water right holders' entitlement to hearing.

ARGUMENT

1. In considering the motion for stay, the Court should consider elements other than the "likelihood of success" on appeal because it already has taken an ultimate position on that question.

In deciding the stay motion, the Court should not consider the alleged or argued "likelihood of success" on appeal. The Court already has effectively foreclosed this inquiry by its very ruling in this case. It is assumed that the Court would not issue an order about which it believed the non-prevailing party would have a substantial likelihood of success on the merits. On the other hand, an appeals court logically would be in a position to evaluate the arguments

[1] TFCC's Brief erroneously asserts that IGWA is not seeking a stay in this matter. TFCC Br. at 9. To the contrary, IGWA's July 25, 2006 *Response to IDWR's Motion for Stay of Judgment* expressly agreed with and supported the State's motion for stay. In other words, IGWA, on behalf of its Ground Water Districts, has joined in the State's motion to stay this Court's judgment pending appeal.

from a separate vantage point and make a determination on this question. Therefore, IGWA respectfully suggests that the proper inquiry in this stay application should include the other factors the State has identified in its briefing, but not the "likelihood of success" element.

The Idaho Rules of Civil Procedure allow for a district court's judgment or order to be stayed pending an appeal to the Supreme Court "as provided by the Idaho Appellate Rules." I.R.C.P. 62(d). The Idaho Appellate Rules authorize the court to stay "any order, judgment, or decree" while an appeal is pending. I.A.R. 13(b). This authority is "vested in the sound discretion of the trial court." *Continental Cas. Co. v. Brady*, 127 Idaho 830, 834, 907 P.2d 807, 811 (1995). Idaho courts have not adopted a standard for granting a motion for a stay pending appeal.

Other state and federal appeals courts have included "likelihood of success" on appeal as one of the criteria in deciding whether to issue a stay of the lower court's decision pending appeal. *See, e.g., Mohammed v. Reno*, 390 F.3d 95, 100 (2nd Cir. 2002) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)) and *State ex rel. Dir. of Revenue v. Comklin*, 997 S.W.2d 121, 123 (Mo. App 1999). Nonetheless, each of these is an appeals court from which the stay was requested, and each has noted that the standard for granting a stay is flexible.

The Plaintiffs propose Rule 65(e) as the standard because some courts have noted the similarities between the four-criteria stay standard and the standards for preliminary injunctive relief. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). The Plaintiffs' proposed standard robs the court of the flexibility described. But more importantly, it ignores the inherent problem with the probability of success standard when the stay is being sought by the tribunal that itself issued the order being appealed. Indeed, the Arizona Appeals Court noted, in considering a stay of an administrative decision:

> This petitioner has just lost on the merits at the administrative level. To nonetheless require him to demonstrate at the inception of the review process a significant probability of success asks the near impossible. Except in the most egregious instances of agency error, this effort will fail.

P&P Mehta LLC, v. Jones, 123 P.3d 1142, 1144 (Ariz. App. Div. 1 2005). This conclusion must be even stronger where the petitioner is obligated, in the first instance, to seek a stay from the court or agency that just issued the decision subject to appeal.

Because substantial questions exist with regard to the correctness of the June 2 Order, and because this Court is being asked to impose a stay, IGWA contends that imposing any rigorous "likelihood of success" standard is inappropriate.

2. A stay will avoid irreparable injury to this State's economy and destruction of the property rights of thousands of ground water right holders.

As set forth in the Department's opening brief to the Court, the irreparable harm sought to be avoided is to the "State of Idaho at large," not merely junior water right holders. IDWR Brief, p. 10. There can be no question that irreparable harm will occur to ground water users and to communities across Water Districts 120 and 130 if this Court allows or orders blanket curtailment of ground water rights on the ESPA solely on Plaintiffs' allegations. Curtailment of ground water pumping "will unavoidably put ground water irrigators out of the irrigated farming business," and that "the most likely result will be that such a curtailment will spell the end of much of the agricultural economy dependent upon ESPA ground water." Expert Report of John Church, p. 21 (Exhibit A to the contemporaneously filed Affidavit of Jeffrey C. Fereday ["Fereday Affidavit"]). Approximately 16,323 ground water pumps could be idled across Water Districts 120 and 130 alone, including those of irrigators, municipal water providers, commercial users, and domestic water users. Affidavit of Charles Brendecke, ¶ 3. In short, a substantial part of southern Idaho's economy would come to a halt.

More specifically, "[t]he City of Jerome's current existence, and its future growth, depend on the use of ground water." Affidavit of Charles Correll, ¶ 2. Other communities in Jerome, Gooding, and Lincoln Counties also stand to suffer "harsh economic impacts" if curtailment proceeds as proposed by Plaintiffs. *Id.*, ¶ 7.

Throughout the proceedings before this Court and the Department, Plaintiffs have sought immediate and ministerial curtailment of ground water use on the ESPA based solely upon priority, without any regard for various essential facts necessary to support curtailment, much less regard for the rights of those water users they seek to have shut off. This has been Plaintiffs' aim from the beginning of their delivery calls in early 2005. Of course, we now know that if the Department had mechanically curtailed ground water users before the 2005 agricultural season, thousands of ground water users would have been unnecessarily and unjustly ruined. As it turned out, there was ample water during the 2005 irrigation season for the seven surface water entities, five of whom are Plaintiffs here. In fact, all but one of the seven surface water Plaintiffs themselves admitted in depositions taken after the 2005 irrigation season that they suffered no material injury in 2005 (and the seventh, Twin Falls Canal Company, could not identify what its injury was). Bingham, Tr. p. 81 Ls19-22; Thompson, Tr. p. 20 Ls. 3-8; Alberdi, Tr. p. 118 L. 20 – p. 120 L. 1; Barlogi, Tr. p. 107 L. 3 – p. 108 L. 10; Temple, Tr. p. 174 L. 3 – p. 176 L. 1; p. 186 Ls. 16-19; Harmon, Tr. p. 129 L. 21 – p. 130 L. 18; p. 179 L. 18 – p. 180 L. 9, (Exhibit B to Fereday Affidavit). Despite the fact that they had ample water, Plaintiffs filed delivery calls seeking the shut-off of thousands of wells.

So now Plaintiffs implore this Court to deny the Department's Motion for Stay so that Plaintiffs can again attempt somehow to force the Director—perhaps through some subsequent order of this Court—to curtail junior ground water users while the appeal is pending and without

any due process. This Court should grant the Department's Motion for Stay and thereby confirm that its Order does not permit the summary or automatic curtailment of thousands of ground water wells that Plaintiffs obviously have in mind.

As evidenced by the Court's June 2 Order, summary, pre-hearing curtailment is not contemplated or compelled by the Court. June 2 Order, p. 101. Nevertheless, Plaintiffs appear to believe that the June 2 Order somehow compels the Director, without any hearing or other inquiry, to shut off ground water wells throughout Water Districts 120 and 130—wells used for irrigation, commercial, industrial, municipal and domestic purposes. Plaintiffs unjustifiably seek to co-opt the June 2 Order into a mandate for particular action. Such a result cannot be read into the Court's June 2 Order.[2] A stay would prevent litigation and uncertainty resulting from Plaintiffs' attempts to achieve such a result, while keeping in place the replacement water plans and other measures taken to date under the Director's emergency orders.

3. A stay will not prejudice Plaintiffs, who already are receiving replacement water and other relief under emergency orders issued by the Department.

The procedures the Director has followed, including distribution of water under Chapter 6, Title 42, have resulted in timely emergency orders requiring ground water users to provide replacement water or curtailment of pumping, all for the benefit of Plaintiffs. I.C. § 67-5247. The ground water users, while disagreeing with many of the Director's conclusions, have complied with these emergency orders, despite the absence of any contemporaneous due process.[3] Plaintiffs are currently being provided with temporary relief, with the expectation that junior users will get their day in court in the future.

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[2] Such an interpretation is directly contrary to the Court's Order, considering this admonition: "The parties who may be curtailed are entitled to at least minimal due process of law, notice of the proposed action, and the opportunity to be heard." June 2 Order, p. 101.

[3] IGWA also is been working with the Farm Services Administration, the State of Idaho, and hundreds of ground water irrigators to implement a Conservation Reserve Enhancement Program ("CREP") across the ESPA.

In fact, this relief is being provided to Plaintiffs despite the fact that of the seven canal companies and irrigation districts who originally alleged injury due to ground water pumping in their January 2005 delivery calls, the Director has preliminarily concluded that only one of them—Twin Falls Canal Company—suffered injury to its natural flow right in 2005, and that it is unlikely to suffer any injury in 2006.[4] *Third Supplemental Order Amending Replacement Water Plan Requirements Final 2005 and Estimated 2006* (June 29, 2006) (Exhibit C to Fereday Affidavit). Again, the Department reached this conclusion without first conducting a hearing. Nevertheless, IGWA has complied with the Department's emergency orders based on the promise and expectation of a future hearing during which IGWA may present evidence to challenge Plaintiffs' injury claims and contest the Director's preliminary findings.[5]

The bottom line is that Plaintiffs are receiving relief, whether deservedly or not, at the ground water users' expense. Plaintiffs will not be prejudiced by a stay of the June 2 Order.

4. A stay will allow the fact-finding this Court itself recognizes as necessary.

Allowing the Department to proceed to hearing under the CM Rules is the only effective way to provide ground water users with due process and elicit the facts that this Court has recognized are necessary in any delivery call. The parties have engaged in substantial discovery,

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The goal is to idle up to 100,000 acres of ground water irrigated farmland. Like the replacement water and conversion projects, the CREP program is expected decrease ground water pumping on the ESPA for the benefit of surface water users. Affidavit of Craig Evans. Measures are underway that should be considered in the context of the request for stay.

[4] Even based upon the Department's preliminary findings, Twin Falls Canal Company had ample water that year anyway, due to its storage. *Third Supplemental Order Amending Replacement Water Plan Requirements Final 2005 and Estimated 2006* (June 29, 2006).

[5] The Director's emergency orders have been in place beyond the time IGWA believes meets the Legislature's intent in extending this statutory prerogative. After an agency has issued an emergency order, the statute requires the agency "to proceed as quickly as feasible" to conduct the required hearing. Idaho Code § 67-5247(4). IGWA believes delay in the hearing in Plaintiffs' delivery calls already has caused them to suffer harm by requiring them to provide replacement water and implement other measures that a hearing will prove to be unwarranted. Further delay in the hearing would cause further harm to IGWA and its members.

with the remaining depositions scheduled to occur in the coming weeks (though temporarily stayed by the Director in light of the uncertainty surrounding a stay of this appeal). The parties are essentially ready to proceed to hearing on October 30, 2006, and there is no reason to further delay the proceedings. This date has already been extended several times, primarily at Plaintiffs' behest.[6]

IGWA proposes that the Director conduct a hearing and issue an order based on a complete factual record, then impose by order (subject to judicial review) whatever requirements he finds appropriate. If the Idaho Supreme Court rules on the substantive prior appropriation

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[6] On January 14, 2005, the surface water plaintiffs and others ("Surface Water Coalition" or "SWC") filed their delivery call with the Department. On May 2, 2005, the Department issued an order concluding that the water rights held by some of these Plaintiffs were likely to suffer material injury in 2005 due to junior ground water diversions. The May 2 Order required junior ground water users, including IGWA and its members, to submit a replacement water plan if they wished to avoid curtailment by the Department. IGWA timely sought reconsideration of the May 2 Order and requested a hearing. Its request for reconsideration and hearing notwithstanding, IGWA timely submitted a replacement water plan on behalf of its Ground Water District members, which the Department ultimately approved.

An unusual amount of precipitation fell in the early summer of 2005, requiring the Department to revisit the replacement water requirements imposed upon junior ground water users. On July 22, 2005, the Department issued a supplemental order amending IGWA's replacement water requirements for 2005. On that same day, because the parties had requested a hearing on the May 2 Order, the Department issued a scheduling order setting the hearing to begin January 30, 2006.

On August 15, 2005, Plaintiffs filed a complaint in this Court, seeking a declaratory ruling that the Department's conjunctive management rules are unconstitutional. The parties thereafter pursued both the administrative proceedings before the Director and the judicial proceedings before this Court.

On October 7, 2005, SWC filed a motion with the Department asking that the date of the administrative hearing be extended six months. IGWA's October 13, 2005 response opposed any further delay of the hearing. On October 17, 2005, the Director issued an Order Extending Time for Filing Expert Reports and for Hearing, extending the administrative hearing date to March 6, 2006.

On December 27, 2005, after reviewing preliminary diversion data for the 2005 irrigation season, the Director issued a second supplemental order amending IGWA's replacement water requirements for 2005. On January 11, 2006, IGWA filed a Petition for Reconsideration of the December 27 Order and again requested a hearing.

The contested case proceedings thereafter were stayed for a time by stipulation of the parties while they attempted to settle without the need for a hearing. On May 19, 2006, however, after the parties' settlement efforts failed, the Department rescheduled the administrative hearing to commence September 26, 2006.

On June 14, 2006, in response to a Motion for Stay filed by Pocatello, the Department issued a Fourth Amended Scheduling Order and again rescheduled the administrative hearing—this time for October 30, 2006. IGWA supported a temporary stay of proceedings. While IGWA's Response to Pocatello's motion contemplated that even a temporary stay might affect the scheduled hearing date, IGWA did not propose or support any extended stay or the concept of vacating the scheduled hearing.

On June 29, 2006, the Director issued his Third Supplemental Order Amending Replacement Water Requirements Final 2005 & Estimated 2006 ("Third Supplemental Order").

doctrine issues in a way that requires modification of the Director's order, such modifications can be made then. This would not be substantially different from what has occurred to date—subsequent modifications of existing orders as the Director, applying his emergency powers, preliminarily determines and applies additional (albeit limited) facts during the course of the 2005 and 2006 irrigation seasons.

IGWA is prepared to put on evidence of all of the factors that this Court has recognized are a part of the prior appropriation doctrine and relevant in a delivery call. Even if a party produces evidence that later is somehow declared irrelevant, it is difficult to see how this would prejudice the other parties. Any hearing that may occur with respect to Plaintiffs' delivery calls is, at its core, a factual inquiry designed to uncover the very factors that this Court has identified as important in water right administration.

Despite the scheduled hearing and the many months of preparation by all parties, Plaintiffs seek the denial of a stay as a means to effect some sort of immediate, "shut and fasten" decision that would stop all ground water pumping across most of the ESPA without Plaintiffs ever having to submit to any factual inquiry concerning the basis for their injury claims. One must necessarily question the motives of a party who seeks immediate delivery of water based on claimed injury, but balks at the suggestion of any meaningful inquiry into the futility of its request, its present water needs and uses, the number of acres it actually irrigates, the adequacy of the replacement water being provided to it by junior users, the question whether spring users may "tie up the entire volume of water in an aquifer in order to maintain the natural flow of a spring," or any other factor this Court expressly identified in its June 2 Order. June 2 Order, pp. 89-90; 98-102.

5. Plaintiffs identify no procedure or standard the Department could follow if the stay is denied and delivery calls are filed.

It is unclear what would unfold before the Department, or in the courts, if the Motion for Stay is denied and the Plaintiffs (or others) file delivery calls.[7] Likely it would be chaos and inconclusive litigation. The June 2 Order contains certain "suggested procedures," but it is doubtful whether the Department could implement these procedures without first formally adopting them pursuant to statutory requirements. Furthermore, it is unclear how this Court's suggested procedures, even if they could be applied in conformance with law, would differ from those (including the contested case procedures) the Department is employing now. In any event, attempting to meet this Court's (and the Idaho Constitution's) due process requirement without an evidentiary hearing almost certainly would cause additional delay without getting to the essential questions presented by Plaintiffs' delivery calls.

As reiterated herein, the Court's June 2 Order concluded that the Department is not authorized simply to impose an automatic "shut and fasten" order without first providing due process to the holders of ground water rights. June 2 Order, p. 101. Due process requires a meaningful opportunity to be heard at a hearing.[8] Plaintiffs have not offered any explanation of how junior water right holders, whose rights are entitled to just as much constitutional protection as seniors, will receive due process, a hearing, and a meaningful opportunity to test the data allegedly supporting Plaintiffs' alleged injury to their water rights. Junior ground water users should be entitled to present evidence at a hearing concerning any factors this Court has deemed relevant to Plaintiffs' delivery call.

5. Immediate administration of water rights is not warranted or envisioned by the June 2 Order or June 30 Judgment.

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[7] If the stay is denied, IGWA believes that the Idaho Ground Water Act may be the only clear statutory guidance available to the Department. Idaho Code § 42-226, et seq.

[8] Contrary to the suggestion in the TFCC Brief (and quite apart from the problem that this case is a declaratory judgment action concerning the constitutionality of the CM Rules), the Court also should not order the Department to establish a Ground Water Management Area, and certainly not one that results in curtailment of ground water rights without due process or in violation of priority.

Plaintiffs erroneously believe that this declaratory judgment action places this Court in the position of administering water rights—something entrusted to the discretion of the Director. June 2 Order, p. 97 ("the Director or his watermasters are the only ones who can administer these water rights"). Rather, this is a case addressing one pure question of law: whether the CM Rules are unconstitutional on their face. The Court has ruled upon that issue and that issue alone. June 2 Order, pp. 125-126.

Even if immediate administration were ordered, the Director is not in possession of the information necessary to administer the water rights at issue in this case. This Court itself recognized as much by cautioning that junior water right holders are entitled to due process and an opportunity to present evidence on several issues in challenge to the delivery call:

> The Director could then conduct a hearing whereby juniors and seniors would have the opportunity to put on evidence and try to rebut the preliminary findings of the Director based on the results of either the ground water model or other suitable methods. Juniors would also have the opportunity to put on evidence to try and establish that the senior is wasting water contrary to the partial decree as well [sic] provide a mitigation plan for replacement water; or try to establish a futile call.

June 2 Order, p. 101.

Additionally, Plaintiffs assert "rules are not necessary for the Director to be able to conjunctively administer water rights in the ESPA" and "the Director can and must proceed with administration in the absence of new conjunctive management rules." TSWUA Brief, p. 5; TFCC Brief, p. 13. These assertions are directly contrary to this Court's Order, providing: "Rules for the administration of hydraulically connected ground and surface water sources are not only specifically authorized by the Legislature, *they are essential to proper administration* and to protect vested property rights." June 2 Order, p. 124 (emphasis added).

Not all of the relevant facts are before the Director for him to properly respond to the Plaintiffs' delivery calls, therefore, the Director may not act until such facts are developed at hearing. But more to the point, neither the June 2 Order nor the June 30 Judgment requires the Director to do anything. This Court has ruled only that the Conjunctive Management Rules are facially invalid. If one could construe the Court's Order and Judgment as mandating anything of the Director, it would be to conduct a meaningful administrative hearing before curtailing any water rights.

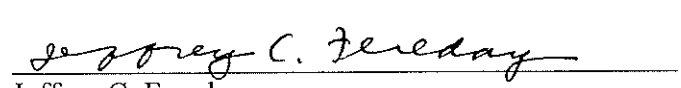
CONCLUSION

Plaintiffs speak of their senior water rights as if they were the only rights involved in this matter. But all water rights, including those of junior well owners potentially subject to curtailment, are property interests entitled to the same protections and due process procedures. The Court should refrain from being complicit in Plaintiffs' efforts to achieve an automatic shut-off order without ever having to submit to any kind of fact-finding. The Court should issue a stay until such time as the Idaho Supreme Court decides these complex issues of Idaho water law once and for all. It simply makes no sense for the Department to take swift, irreparable action against junior users without a hearing, solely based on an order and judgment that may be short lived. This is especially so considering the emergency orders that have been put in place to provide relief to Plaintiffs.

As explained at length by the Department in its briefing, any attempt to comply with rapidly changing, unstable legal pronouncements promises to lead to irreparable damage to Idaho's agricultural economy, procedural chaos and protracted litigation—all of which can be avoided by the requested stay.

DATED this 4th day of August, 2006.

GIVENS PURSLEY LLP



Jeffrey C. Fereday
Michael C. Creamer
Brad V. Sneed
Attorneys for Idaho Ground Water Appropriators, Inc.

CERTIFICATE OF SERVICE

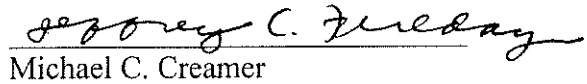
I hereby certify that on this 4th day of August, 2006, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

C. Tom Arkoosh, Esq. Arkoosh Law Offices, Chtd. 301 Main Street P.O Box 32 Gooding, ID 83330	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
W. Kent Fletcher, Esq. Fletcher Law Office 1200 Overland Avenue P.O. Box 248 Burley, ID 83318-0248	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Roger D. Ling, Esq. Ling, Robinson & Walker 615 H St. P.O. Box 396 Rupert, ID 83350-0396	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
John A. Rosholt, Esq. John K. Simpson, Esq. Travis L. Thompson, Esq. Barker, Rosholt & Simpson, LLP 113 Main Avenue West, Ste. 303 P.O. Box 485 Twin Falls, ID 83301-6167	X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Mr. Karl J. Dreher Director Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098	 X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail

Phillip J. Rassier, Esq. Candice McHugh, Esq. Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098	_____ _____ _____ X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
J. Justin May, Esq. May Sudweeks & Browning, LLP 1419 W. Washington P.O. Box 6091 Boise, ID 83707	_____ _____ _____ X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Daniel V. Steenson, Esq. Charles L. Honsinger, Esq. S. Bryce Farris, Esq. Jon C. Gould, Esq. Ringert Clark Chartered P.O. Box 2773 Boise, ID 83702	_____ _____ _____ X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Josephine P. Beeman, Esq. Beeman & Associates PC 409 West Jefferson Boise, ID 83702-6049	_____ _____ _____ X X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Sarah A. Klahn, Esq. William A. Hillhouse, Esq. Amy W. Beatie, Esq. White & Jankowski, LLP 511 16th Street, Suite 500 Denver, CO 80202	X _____ _____ _____ X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
James S. Lochhead, Esq. Brownstein Hyatt & Farber, P.C. 818 Colorado Avenue, Suite 306 Glenwood Springs, CO 81601	X _____ _____ _____ X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail
Adam T. DeVoe, Esq. Brownstein Hyatt & Farber, P.C. 410 17th Street Twenty-Second Floor Denver, CO 80202	X _____ _____ _____ X	U.S. Mail Facsimile Overnight Mail Hand Delivery E-mail

James C. Tucker, Esq.
Idaho Power Company
1221 West Idaho P.O. Box 70
Boise, ID 83707

_____ U.S. Mail
_____ Facsimile
_____ Overnight Mail
__X__ Hand Delivery
__X__ E-mail



Michael C. Creamer
Jeffrey C. Fereday
Brad V. Sneed