BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-15501, 36-02551, AND 36-07694	)	**ORDER APPROVING INTERIM MITIGATION**
IN THE MATTER OF THE APPLICATION OF THE NORTH SNAKE GROUND WATER DISTRICT AND MAGIC VALLEY GROUND WATER DISTRICT FOR APPROVAL OF A PRELIMINARY MITIGATION PLAN	)	

These consolidated matters come before the Director of the Department of Water Resources ("Director" or "Department") for the limited purpose of reviewing *The Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004* (the "Agreement"), dated March 20, 2004. The Agreement is between the State of Idaho, spring users in the Thousand Springs area of the Snake River Basin, and the North Snake Ground Water District and the Magic Valley Ground Water District (the "Ground Water Districts"). The Agreement is before the Director for approval as interim mitigation for the period March 15, 2004, through March 15, 2005. The Director enters the following Findings of Fact, Conclusions of Law, and Order approving the March 20, 2004 Agreement as interim mitigation.

FINDINGS OF FACT

1. The Director issued an *Amended Order* on March 10, 2004, in response to a water delivery call by Rangen, Inc. in the *Matter of Distribution of Water to Water Rights Nos. 36-15501, 36-02551, and 36-07694.* The *Amended Order* requires the holders of certain

consumptive ground water rights subject to administration in Water District 130 not to divert ground water beginning April 1, 2004, unless sufficient replacement water is provided as set forth in the *Amended Order*.

2. The Ground Water Districts on October 10, 2003, submitted an *Application for Approval of Preliminary Mitigation Plan* ("Application") to the Department. The Application proposes a plan to mitigate for injury to earlier priority surface water rights that may result from depletions under later priority ground water rights by delivering replacement water to augment spring flows from the Thousand Springs area tributary to the Snake River.

3. In an effort to resolve the issues presented by the Rangen delivery call proceeding and the Ground Water Districts' mitigation plan proceeding, and to address other issues related to the diversion and use of water from the Eastern Snake Plain Aquifer ("ESPA") and from spring discharges in the Thousand Springs area, the State of Idaho, acting through the Governor, the Speaker of the House, and the President Pro Tem of the Senate, entered into *The Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004* with the spring users in the Thousand Springs area and the Ground Water Districts on March 20, 2004. The Agreement focuses, in part, on ways to mitigate or compensate for the effects of ground water depletions upon spring flows in the Thousand Springs area of the Snake River for a period of one year.

4. In an *Order of Limited Consolidation* entered in the above-captioned proceedings on March 22, 2004, the Director took official notice of the Agreement for the purpose of considering the Agreement for approval as interim mitigation for the period from March 15, 2004, through March 15, 2005.

5. The Agreement provides that the Ground Water Districts agree to implement specific mitigation and compensatory measures for the benefit of the spring users, and the State of Idaho agrees to undertake specific funding and implementation measures to address decreasing spring flows and provide other benefits for the spring users.

6. Among other significant programmatic and financial commitments, the State of Idaho agreed to provide funds to the Idaho Water Resource Board in FY 2004 to lease 40,000 acre feet of storage water for to provide replacement water for delivery in Water District No. 130 for the benefit of spring users in the Thousand Springs area.

7. Among other significant physical and financial commitments, the Ground Water Districts agreed to convert an estimated 4,700 acres from ground water irrigation to surface water irrigation during 2004, which is in addition to the 4,300 acres previously converted, and to provide up to 10,000 acre feet of substitute surface water supply, out of the 40,000 acre feet of storage water leased by the Idaho Water Resource Board, to Billingsley Creek water users through the existing Sandy pipeline project.

8. In return for the consideration provided by the State of Idaho and the Ground Water Districts, the signatory spring users agreed to stay all pending delivery calls against the holders of ground water rights from the ESPA and to not make additional delivery calls against the aquifer for the period from March 15, 2004, through March 15, 2005.

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. Idaho Code § 42-226.

2. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

> 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 to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

3. The Director created Water District No. 130 on February 19, 2002, and extended the boundaries of the district on January 8, 2003, to provide for the administration of ground water rights in the area overlying the ESPA in the Thousand Springs area, pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights.

4. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

> The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

5. It is the duty of a watermaster, acting under the supervision of the Director, to distribute water from the public water supplies within a water district among those holding rights to the use of the water in accordance with the respective priority of the rights subject to applicable Idaho law, including applicable rules promulgated pursuant to the Idaho Administrative Procedure Act. See Idaho Code § 42-607.

6. Chapter 52, Title 42, Idaho Code, governing the creation and operation of Ground Water Districts, authorizes the districts "To develop, maintain, operate and implement mitigation plans designed to mitigate any material injury caused by ground water use within the district upon senior water uses with and/or without the district." Idaho Code § 42-5224(11).

7. House Bill 848, Fifty-seventh Idaho Legislature, Second Regular Session, 2004, Section 3, provides:

> It is the intent of the Legislature to ensure that the burden of providing mitigation for ground water diversions from the Eastern Snake River Plain Aquifer causing material injury to senior priority water rights is equitably shared by the holders of all such junior ground water rights subject to administration within water districts created pursuant to Chapter 6, Title 42, Idaho Code. It is, therefore, hereby provided that beginning April 1, 2004, all holders of such ground water rights not otherwise covered by a mitigation plan and that are not members or applicants for membership of a ground water district created pursuant to Chapter 52, Title 42, Idaho Code, with a mitigation plan approved by the Director of the Department of Water Resources, shall be deemed a nonmember participant solely for mitigation purposes and shall be required to pay for mitigation, pursuant to Section 42-5259, Idaho Code, in the ground water district situated nearest the lands to which the water right is appurtenant, as determined by the Director of the Department of Water Resources in case of dispute.

8. The Director concludes that *The Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004,* entered into between the State of Idaho, acting through the Governor, the Speaker of the House, and the President Pro Tem of the Senate, and the spring users in the Thousand Springs area and the Ground Water Districts, satisfies the requirements for interim mitigation for the Ground Water Districts for the period from March 15, 2004 through March 15, 2005.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that *The Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004,* is approved by the Director according to it terms as interim mitigation for the period from March 15, 2004 through March 15, 2005.

IT IS FURTHER ORDERED that the Watermaster for Water District No. 130 shall administer the rights to the use of water within the water district, under the supervision of the Director, in accordance with the terms of the approved mitigation and the governing provisions of chapter 6, title 42, Idaho Code.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, this is an interlocutory order that does not decide substantive issues presented in the above-captioned matters and is not subject to review by reconsideration or appeal. This interlocutory order shall not be deemed precedent for purposes of any future proceedings in these matters regarding the extent of mitigation required or the adequacy of the proposed mitigation plan. The Director may review this interlocutory order pursuant to Rule 711, IDAPA 37.01.01.711.

Dated this 24th day of March 2004.

Karl J. Dreher
Director