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

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DEPARTMENT OF WATER RESOURCES

A&B IRRIGATION DISTRICT,

Petitioner,

vs.

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

Respondents,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC., and THE CITY OF POCATELLO,

Respondents-Intervenors.

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA

CASE NO. CV-2011-512

PETITIONER A&B IRRIGATION DISTRICT'S REPLY BRIEF
On Appeal from the Idaho Department of Water Resources

Before Honorable Eric J. Wildman

ATTORNEYS FOR PETITIONER

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
(208) 733-0700 – Telephone
(208) 735-2444 – Facsimile
- Attorneys for A&B Irrigation District

ATTORNEYS FOR INTERVENORS

Randall C. Budge
Candice M. McHugh
RACINE OLSON NYE BUDGE & BAILEY
201 East Center Street
P.O. Box 1391
Pocatello, Idaho 83201
(208) 232-6101 – Telephone
(208) 232-6109 – Facsimile
- Attorneys for Idaho Groundwater Appropriators, Inc.

ATTORNEYS FOR RESPONDENTS

Garrick Baxter
Chris M. Bromley
IDAHO DEPT. OF WATER RESOURCES
P.O. Box 83720
Boise, Idaho 83720-0098
(208) 287-4800 – Telephone
(208) 287-6700 – Facsimile
- Attorneys for Director Gary Spackman and Idaho Department of Water Resources

Sarah A. Klahn
Mitra M. Pemberton
WHITE & JANKOWSKI LLP
511 Sixteenth St., Suite 500
Denver, Colorado 80202
(303) 595-9441 – Telephone
(303) 825-5632 – Facsimile

A. Dean Tranmer
CITY OF POCATELLO
P.O. Box 4169
Pocatello, Idaho 83201
(208) 234-6149 – Telephone
(208) 234-6297 – Facsimile
- Attorneys for City of Pocatello

Courtesy Copy to:

Jerry R. Rigby
RIGBY ANDRUS & RIGBY
25 N 2nd East
P.O. Box 250
Rexburg, Idaho 83440
- Attorneys for Fremont-Madison Irr. Dist. et al.

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INTRODUCTION

The Idaho Department of Water Resources and Director Gary Spackman ("*IDWR Br.*), the Idaho Ground Water Appropriators, Inc. ("*IGWA Br.*"), and the City of Pocatello ("*Poc. Br.*") (hereinafter collectively referred to as "Respondents") filed response briefs. A&B Irrigation District ("A&B" or "District") files this reply to support its opening brief and address the Respondents' arguments.

As set forth below, the Director failed to properly apply the CM Rules and perform a lawful injury analysis on remand. The Director failed to honor A&B's decreed quantity, instead creating a "dual water right" theory based upon water use in a "call" and "non-call" setting. This theory was expressly rejected by the Court's *Memorandum Decision and Order on Petition for Judicial Review* (Case No CV-2009-647, May 4, 2010). *See Memorandum Decision* at 7. Next, despite IDWR's admission and the undisputed evidence in the record that A&B's landowners beneficially use 0.88 miner's inch/acre, the Director concluded that quantity would be "wasted." This decision is clearly erroneous and must be set aside pursuant to Idaho's APA.

In addition, the Director erroneously relied upon undefined "crop maturity" and a minimum quantity to "accomplish irrigation" criteria to find no injury. The Director failed to apply the injury standard required by Idaho's water distribution statutes and CM Rules and instead tried to justify A&B's reduced diversions on the fact crops were raised and not lost. Again, this Court previously rejected such a theory by recognizing "Injury to a water right is injury." *Memorandum Decision* at 42. The Director's new standard disregards A&B's actual water right and is contrary to Idaho law.

Finally, the Director failed to properly evaluate junior water use in his injury analysis under CM Rule 40 and violated the scope of this Court's ordered remand. The Court should therefore reverse and set aside the Director's *Remand Order*.

ARGUMENT

I. The Court Should Deny the Respondents' Request to Dismiss this Appeal.

The Respondents request the Court to dismiss A&B's appeal. They claim the lack of an interconnection study precludes judicial review of the Director's *Remand Order*. *IDWR Br.* at 5, *IGWA Br.* at 12.[1] This "jurisdictional" or "mootness" argument would void the Director's *Remand Order* and all underlying decisions in this case. In other words, if an interconnection study was truly a "precondition" to the filing and consideration of A&B's delivery call on the merits, then the entire case would have to be restarted at the agency level. This is not what the Director or this Court previously decided. The Respondents misinterpret this Court's prior decision, fail to acknowledge the status of this proceeding, and ignore the fact the Director accepted and reviewed A&B's delivery call on the merits. The request to dismiss the appeal should therefore be denied.

A&B appealed the Director's failure to consider depletions to the individual points of diversion listed on water right 36-2080. The District Court denied A&B's appeal of this issue and found:

> The Director concluded that A&B must make reasonable efforts to maximize interconnection of the system and placed the burden on A&B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.
>
> * * *
>
> 4. The decision of the Director to evaluate material injury to the 36-2080 water right based on depletion to the cumulative quantity as opposed to determining injury based on depletions to individual points of diversion is **affirmed**. The decision of the Director to require A&B to take reasonable steps to move water from performing to underperforming areas or alternatively demonstrate physical or financial impracticability is **affirmed**.

Memorandum Decision at 39, 50 (emphasis in original).

[1] IGWA mischaracterizes A&B's obligation as a "requirement to interconnect." *IGWA Br.* at 10-11. The Director did not require A&B to interconnect all of its separate wells or points of diversion.

The Idaho Supreme Court also affirmed the Director's decision. *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 284 P.3d 225, 241 (2012). Contrary to the Respondents' present arguments, this Court did not "dismiss" A&B's prior appeal or hold that a delivery call could not be filed and decided by IDWR.[2] This Court remanded the "no injury" decision back to IDWR for further review consistent with its decision. IDWR did not appeal that order.[3] Moreover, the Idaho Supreme Court recently confirmed that A&B has a right to seek judicial review of the *Remand Order*. *See A&B Irr. Dist. v. Idaho Dept. of Water Resources*, ___ P.3d ___, 2012 WL 4055353 * 4 (Idaho 2012).

Importantly, the Hearing Officer and Director did not refuse to consider A&B's delivery call on the basis that an interconnection study had not been completed at the time of the hearing. The Hearing Officer concluded that "it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury." R. 3096 (emphasis added). However, the Hearing Officer also found A&B had an obligation to move water within the system or complete an interconnection study "before it can seek curtailment or compensation from junior users." *Id.*

This finding confirms that if the Director determines A&B's senior water right is injured, based upon a proper analysis as ordered by this Court, the Director can then withhold an order for curtailment or mitigation until the interconnection study is completed.[4] Notably, this is

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[2] Although the Idaho Supreme Court used the phrase "before a delivery call can be filed," that was not what the Director or District Court decided. The phrase simply restated A&B's issue on appeal. While the condition must be fulfilled before curtailment or mitigation can be ordered and implemented, it is not jurisdictional to preclude consideration of A&B's call or judicial review of the Director's *Remand Order*. Since the District Court's decision was "affirmed," the Supreme Court did not require dismissal of A&B's call or "moot" the entire case as suggested by the Respondents.

[3] The Court's *Memorandum Decision* and *Order Granting Motion to Enforce in Part and Denying Motion to Enforce in Part* in Case No. CV-2009-647 is "law of the case." *See Taylor v. Maile*, 146 Idaho 705, 709 (2009).

[4] The Director used the same language as the Hearing Officer ("prior to seeking curtailment"), confirming that curtailment or mitigation would not be ordered unless the interconnection study was complete and A&B identified

exactly how IDWR handled Clear Springs Foods, Inc.'s delivery call at its Crystal Springs facility.[5] *See Order* at 36, ¶ 40, 38-39 (*In the Matter of Distribution of Water Rights Nos. 36-04013A* et al., July 8, 2005). *See* Attachment A.

If IDWR believed A&B could not even "file" a delivery call before completing the interconnection study then the agency should have dismissed the call in 1994. After all, what was the point of a contested case spanning some 14 years, the Director's initial January 2008 order, and the resulting administrative hearing and final order issued in 2009? If the lack of a study precluded A&B from even filing a delivery call, and that was a condition or de-facto jurisdictional requirement as the Respondents now suggest, then no order could have been issued and no administrative hearing could have been held.[6] Stated another way, the Director cannot accept A&B's call, hear the case, find "no injury," and then claim that decision is now insulated from judicial review on jurisdictional grounds.

Clearly, the Director did not believe what the Respondents currently argue since A&B's delivery call was accepted and considered. The Director decided the merits of the injury question in the *Remand Order*. Moreover, the Director specifically provided that "any party aggrieved by the final order may appeal the final order to district court." R. 3490. A&B exercised its statutory right to appeal to this Court. The Director cannot ignore the merits of the *Remand Order* and evade judicial review at this point in the proceedings.

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how it would curtail its enlargement water rights (assuming the acres were not alternatively evaluated as this Court directed). R. 3490; *see Memorandum Decision* at 41. The Director did not "dismiss" A&B's delivery call outright, or identify the study was "jurisdictional" precluding a review of the case on the merits.

[5] The Director evaluated the injury to Clear Springs' senior surface rights at Crystal Springs, identified the impacts caused by junior ground water pumping, but then withheld any further curtailment until Clear Springs submitted its feasibility study on improving and extending the collection canal. *See Order* at 22-25, 39; Attachment A.

[6] IDWR did not believe its own argument, even as late as October 2012 when IDWR asked the Court to remand the case again so that the agency could issue a new "final order that is supportable." *See Motion to Remand Proceeding to IDWR* (Oct. 26, 2012).

Contrary to IGWA's argument, the injury to A&B's water right is not "moot."[7] *IGWA Br.* at 11. The Director decided the merits of A&B's delivery call on remand. The final agency order is reviewable pursuant to Idaho's APA. I.C. § 67-5270. A decision in this case will provide A&B the relief requested, protection of its water right and proper administration under the law.[8] Moreover, assuming for argument's sake that the case is moot, the Court may still review the *Remand Order* under certain exceptions. For example, if the Director's decision "is likely to evade judicial review and thus capable of repetition," the case can still be reviewed. *See The American Lung Assoc. of Idaho/Nevada v. Idaho State Dept. of Ag.*, 142 Idaho 544, 546 (2006); *see also*, *Webb v. Webb*, 143 Idaho 521, 524 (2006). Here, unless the Court decides the merits of the *Remand Order*, the Director's failed injury analysis is capable of repetition and likely to evade judicial review.

At a minimum, a decision on the merits will resolve the quantity A&B is protected to for purposes of the interconnection study. If the decreed diversion rate (0.88 miner's inch/acre) is protected as required by law, A&B can study whether its existing wells are capable of producing that quantity and whether it is financially and technically feasible to interconnect certain well systems and deliver that amount to all 62,604.3 acres under water right 36-2080. On the other hand, if the Director's decision to only recognize 0.75 miner's inch/acre is affirmed, A&B can

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[7] IGWA's claim about A&B failing to preserve an issue for appeal is misplaced. *IGWA Br.* at 12-13. What A&B is required to do prior to implementation of a curtailment order does not bar judicial review of the *Remand Order*. How A&B will use its authorized points of diversion will be addressed in the interconnection study. In addition, curtailing enlargement water rights is not a jurisdictional bar either. *IGWA Br.* at 12-13; *IDWR Br.* at 15. If A&B is ordered to curtail its enlargement water rights (along with other private enlargement water rights), A&B will have to comply (or provide mitigation).

[8] IGWA also wrongly claims that since "curtailment" is A&B's only "redress" or "relief," no "substantial right" has been affected. *IGWA Br.* at 11, 21, n. 5. Certainly if junior ground water rights are ordered to be curtailed as a result of causing injury to A&B's water right they would have the option of filing a mitigation plan under CM Rule 43. In addition, the Director would also have to identify a reasonable ground water pumping level. *See Memorandum Decision* at 24 ("To the extent the Director erred in either of these determinations it may require that the Director revisit the issue of the reasonableness of the pumping levels.").

tailor its study to address that quantity instead.[9] A&B needs to know what quantity of water is protected for purposes of an interconnection study. Otherwise, the District will be forced to spend unnecessary time and resources on a meaningless report.

Finally, the Respondents' arguments should be rejected based upon the Court's *Order Granting Motion to Enforce in Part and Denying Motion to Enforce in Part* (Case No. CV-2009-647) ("*Order*"). Since the Director initially refused to follow the Court's ordered remand A&B was forced to file a motion to seek enforcement. Given the uncertainty with the remand, A&B asked the Court to order IDWR to consider its pending interconnection study. A&B described the context of its request and how the Director's failure to proceed on remand provided no certainty with regards to the agency's review of a proposed interconnection study:

> In response to the Court's decision and the Hearing Officer's recommendation on this issue A&B requested confirmation that the Director would consider A&B's feasibility study in conjunction with the ordered remand. *See* Ex. A to *Thompson Aff.* Since IDWR was required to re-evaulate A&B's delivery call and material injury to its senior water right, A&B believed it would be efficient and expeditious for IDWR to consider the feasibility report as part of its new injury determination.
>
> However, prior to engaging technical consultants and spending time and resources on the study, A&B wanted assurance that the Director would actually consider and not disregard the prior report. *See id.* In response, IDWR's counsel only stated that "the Department is willing to field questions A&B may have about its study. *See* Ex. B to *Thompson Aff.* Accordingly, it is unclear whether the Director would even consider A&B's proposed feasibility study, particularly since IDWR refuses to proceed with the ordered remand.

Memorandum in Support of A&B's Motion to Enforce Orders at 7 (Case No. CV-2009-647, Jan. 28, 2011).

IDWR opposed and this Court denied A&B's motion. *See Order* at 5. The Court found that the "evidence A&B seeks to introduce to the Director regarding the interconnectivity of its

[9] The Respondents all admit that A&B is protected to at least 0.75 miner's inch/acre, not 0.65 miner's inch/acre as indicated in the Director's *Remand Order*. *See IDWR Br.* at 23, n. 11; *IGWA Br.* at 16, 26; *Poc. Br.* at 20-21.

system is outside the scope of the *Order of Remand*." *Id.* Although IDWR represented[10] that a contested case on the *Remand Order* would have allowed the Director to decide whether additional evidence on an interconnection study would be taken, the Director never acted on A&B's request for hearing.[11] R. 3505. Accordingly, A&B had no avenue to complete and submit a study in the context of this case. Since a feasibility study is beyond the scope of the remand, and cannot be included in this record, it cannot be used to preclude judicial review of the agency's final order.

Finally, it is Idaho's long-standing policy that courts should decide cases on their merits. *See Dorion v. Keane*, 153 Idaho 371, 376 (Ct. App. 2012); *Nelson v. Pumnea*, 106 Idaho 48, 50 (1983); *Bunn v. Bunn*, 99 Idaho 710, 711 (1978). Since the Director accepted and decided the question of injury on remand, the agency cannot seek to evade judicial review now. Moreover, given this Court's prior ruling on the scope of this proceeding, IDWR's request to dismiss A&B's appeal due to the lack of a feasibility study should be denied. This Court should resolve the merits of this case so that A&B can receive the lawful administration it is due. Again, if the Director properly applies the law and finds injury to A&B's water right, he can then withhold implementing an order for curtailment or mitigation until the interconnection study is completed. *See Order* at 39 (Attachment A).

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[10] *See IDWR Opposition to A&B's Motions* at 9 (Case No. CV-2009-647, Feb. 4, 2011) ("When remand occurs, a new contested case will be commenced. . . . At that time, the decision to take additional evidence will be within the discretion of the presiding officer.").

[11] The Director implicitly denied the request since he refused to grant a stay of the administrative proceedings and advised the parties that "By order of the district court, the Department is required to issue a final order, which is therefore subject to judicial review. Idaho Code § 67-5246." R. 3514.

II. The Director Erred in Applying a "Dual Water Right" Standard on Remand and the "Waste" Finding is Clearly Erroneous.

The Court gave the Director explicit instructions on remand. The Director was required to re-evaluate material injury to A&B's senior water right applying the legal standard of clear and convincing evidence. *Memorandum Decision* at 49. The Director committed two fundamental errors. First, he erred as a matter of law and wrongly applied a "dual water right" theory to support his decision. This unconstitutional application of the CM Rules must be reversed and set aside.

Second, the Director's "waste" conclusion is contrary to the facts in the record. R. 3489. The undisputed evidence demonstrates A&B's landowners can and will beneficially use the decreed quantity. There are no findings of fact in the *Remand Order* that affirmatively establish A&B's landowners would waste 0.88 miner's inch/acre for irrigation of their lands. Therefore, the Director's conclusion is clearly erroneous and must be set aside for this reason as well.

The arguments to this Court boil down to two essential frameworks. A&B advocates that the quantity in its senior decreed water right can be beneficially used and must be protected in administration. The Respondents, on the other hand, ask this Court to recognize a new "dual water right" system, where a water user is entitled to use his full decreed quantity in a non-call setting but must endure a reduced quantity in administration. Stated another way, the Respondents admit A&B can beneficially use the full water right as long as the District does not file a delivery call. Idaho law does not recognize two separate theories regarding beneficial use and waste when a water right is exercised. Moreover, there is no "dual water right" standard of beneficial use conditioned upon whether or not a water right is administered.

Since the Director erroneously concluded A&B would "waste" its decreed quantity contrary to the undisputed evidence in the record, he unconstitutionally applied the CM Rules and violated the Idaho APA. The Director's decision therefore must be set aside.

Each of the Respondents admits that A&B's landowners can beneficially use the water right's decreed quantity (0.88 miner's inches/acre).[12] IDWR and the Director admit that A&B "holds a decreed water right for 1,100 cfs" and "maintains the ability to divert 1,100 cfs for the irrigation of 62,604.3 acres." *IDWR Br.* at 20, 31. IGWA also admits that nothing in the *Remand Order* "prohibits A&B from delivering or diverting the full quantity on [*sic*] its water right of 1,100 cfs." *IGWA Br.* at 16. Finally, Pocatello agrees that A&B, an appropriator, "is entitled to divert all of the water right confirmed by his partial decree." *Poc. Br.* at 20.

The Respondents' admissions are confirmed by the testimony of all landowners who actually apply water to beneficial use on the ground. *See* Tr. Vol. IV, pp. 815-16 (Timothy Eames testifying that he can beneficially use more than 0.75 miner's inches per acre and that the delivery rate is critical for his irrigation operations and water-sensitive crops), Ex. 229A; Tr. Vol. V, pp. 888-89 & 893, lns. 2-13 (Timm Adams testifying that he needs the decreed rate of delivery and can beneficially use even more than what is decreed under A&B's water right #36-2080), Ex. 230A; Tr. Vol. V, p. 956-57; p. 960, lns. 13-25; p. 961, lns. 1-6, 13-16 (Ken Kostka testifying that he could use the decreed rate of delivery per acre), Ex. 231A; Tr. Vol. V, pp.

[12] Pocatello misinterprets the Supreme Court's decision in *AFRD #2 v. IDWR*, 143 Idaho 862 (2007). First, the Court's recitation of the Director's order in the "factual and procedural background" did not establish any "dual water right" rule. 143 Idaho at 868. Moreover, although depletion does not automatically equal material injury in a case where a water user cannot beneficially use the decreed quantity that is not the case here. Since A&B's landowners can beneficially use the full decreed quantity (0.88 miner's inch/acre), the District is entitled to receive that quantity in administration. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811 (2011) ("Subject to the rights of senior appropriators, they are entitled to the full amount of water they have been decreed for that use.").

1016-17, 1020-21 (Harold Mohlman confirming he beneficially used 0.92 and 0.97 miner's inches per acre); Ex. 234A.[13]

Contrary to IDWR's argument, A&B is not claiming the Director should have "stopped his investigation" with the A&B witnesses.[14] *IDWR Br.* at 18. However, since the Director could not find, based upon clear and convincing evidence, that the decreed quantity of 0.88 miner's inches per acre would be wasted, he had an obligation to find injury to A&B's senior water right. The Director made no findings of waste. Just the opposite, the record is undisputed and confirms the decreed quantity would be put to beneficial use.

After reviewing the evidence, the Hearing Officer specifically found "A&B is entitled to the amount of its water right." R. 3108. He made multiple findings on this point which were accepted by the Director. R. 3089, 3102, 3110; R. 3322-23. Despite the above admissions and the undisputed evidence in the record, the Respondents attempt to justify the Director's erroneous decision on the basis that a water user's entitlement "changes" in a delivery call setting.[15] There is simply no support for this double standard in this use of a water right.

IDWR misinterprets the Court's prior decisions in support of its "dual water right" theory. *IDWR Br.* at 9. If a water user cannot beneficially use his decreed quantity, he is not entitled to divert and "waste" that amount, regardless if the right is involved in a delivery call or not. *See Memorandum Decision* at 31 ("Simply put, a water user has no right to waste water.");

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[13] Witnesses testifying for IGWA also confirmed they need and have applied quantities approaching the decreed diversion rate on their A&B project lands. Tr. Vol. X, p. 2073, lns. 21-24, p. 2097, ln. 21 -25 (Dean Stevenson testifying he used 0.87 in 2006 and 0.83 miner's inches per acre in 2007); Tr. Vol. X, p. 2146, lns. 3-6, (Orlo Maughan testifying he could beneficially use 0.85 miner's inches per acre that was delivered in 2006).

[14] The agency's own witness, Tim Luke, the water distribution section manager, confirmed a water right holder can beneficially use his decreed quantity and that A&B's landowners are in the best position to know how much water they need to apply for irrigation. Tr. Vol. VI, p. 1281, lns. 9-12.

[15] If a senior water user cannot beneficially use the decreed quantity, based upon a review of "post-adjudication" factors, the decreed quantity would be wasted and cannot be delivered in administration or otherwise. *AFRD #2*, 143 Idaho at 878.

Martiny v. Wells, 91 Idaho 215, 218-19 (1966). This Court addressed this very point in its first decision:

> The Director reasons that it is not a re-adjudication of A&B's right because A&B still has the right to divert up to the full 0.88 miner's inches when water is available but that the Director will only consider the administration of junior's based on the determination of actual need of the senior, which is the 0.75 miner's inch per acre. ***This Court fails to see the distinction.*** In a prior appropriation system a water right becomes meaningless if not honored in times of shortage.

Memorandum Decision at 36 (emphasis added).

The Court clearly rejected IDWR's present argument. Although the Director is authorized to review a senior's "present water requirements" in administration, the crucial inquiry is <u>if the decreed rate can be beneficially used, it must be honored in administration</u>. The Respondents cannot have it both ways in an effort to rationalize their admissions of beneficial use and the undisputed evidence in the record. Since the Director erroneously applied a "dual water right" theory in the *Remand Order*, the no injury decision must be set aside as a matter of law.

Despite the above undisputed findings of fact, the Director still concluded A&B would "waste" its decreed quantity in the *Remand Order*. R. 3489 ("the 1,100 cfs (0.88 miner's inches per acre) decreed to A&B under 36-2080 <u>exceeds the quantity being put to beneficial use</u> for purposes of determining material injury.") (emphasis added). Since each of the Respondents, including IDWR, admit A&B's landowners can beneficially use 0.88 miner's inches per acre, there is no evidentiary conflict in the record.[16] The Director simply got it wrong in his final conclusion. This clearly erroneous decision must be reversed and set aside under Idaho law.

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[16] Pocatello erroneously characterizes A&B's argument as alleging "there is conflicting evidence in the record." *Poc. Br.* at 10. To the contrary, there is no dispute in the record about the ability of A&B's landowners to beneficially use the decreed quantity (0.88 miner's inch/acre).

Idaho courts have consistently reversed agency decisions that are not supported by the record. For example, in *Galli v. Idaho County*, the Idaho Supreme Court determined a county's decision was clearly erroneous where it inferred a finding that was not supported by the record:

> The district court was correct in finding the Board's decision clearly erroneous because it is not supported by substantial and competent evidence. ***In the Board's findings, there is no express statement that Jutte affirmatively proved the existence and use of Kessler Creek Road and Race Creek Road for a period of five years*** prior to exiting the public domain. Although the Board clearly recognized that the right-of-way must have existed prior to the land exiting the public domain, it never expressly stated a length of time for which the Roads must exist.

Galli v. Idaho County, 146 Idaho 155, 159-60 (2008) (emphasis added).

Like the decision in *Galli*, here the Director's decision is "clearly erroneous because it is not supported by substantial and competent evidence." *Id.* The Director made no express or affirmative finding that 0.88 miner's inches per acre would be wasted. Just the opposite, the evidence is undisputed that A&B's landowners can <u>beneficially use</u> 0.88 miner's inches per acre. The Respondents, including IDWR, admit the same before this Court. Yet, the Director refused to find injury based on the unsupported conclusion that the decreed quantity would be "wasted."[17] R. 3489. There is no evidence in the record to support the Director's decision. Indeed, not one person testified that A&B's landowners would "waste" 0.88 miner's inches per acre if that quantity is delivered for their irrigation use.

In addition to *Galli*, the Supreme Court's decision in *Morgan v. Idaho Dept. of Health & Welfare*, 120 Idaho 6 (1991), provides another example analogous to the Director's actions in this case. In *Morgan* a patient sought reimbursement for a medical procedure and the agency denied her request based on the erroneous conclusion that she did not qualify for reimbursement.

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[17] The Director used the phrase "exceeds the quantity being put to beneficial use," which is another way to describe "waste." *See Memorandum Decision* at 31 ("Simply put, a water user has no right to waste water. If more water is being diverted than can be put to beneficial use, the result is waste.").

The patient suffered a condition that required weight loss as part of the treatment. The state agency refused to pay for the weight loss program on the basis that its regulations excluded coverage for treating obesity. *See* 120 Idaho at 8.

On appeal, the Idaho Supreme Court reversed the agency decision and found:

> ... clear evidence in the record establishes that the treatment prescribed is not a procedure to treat obesity as contemplated in the regulations. . . . The primary purpose for the treatment is to treat the pseudotumor cerebri and the prescribed program should be paid by the Department.
>
> ***In view of the absence of a finding that Morgan is obese***, as opposed to merely being overweight, ***the IDHW's conclusion that the weight loss program is a treatment or procedure for obesity and not subject to payment through the Medicaid plan is not supported by the evidence***. The agency's finding and conclusion that payment of the weight loss program is prohibited by the State's Medicaid plan is erroneous in view of the reliable, probative, and substantial evidence contained in the record that the condition of pseudotumor cerebri is the condition for which she is being treated.

120 Idaho at 11 (emphasis added).

Similar to decision in *Morgan*, here the Director refused to honor A&B's decreed water right <u>without any supporting evidence</u> that the District's landowners would "waste" 0.88 miner's inches per acre. In the "absence of a finding" that A&B's landowners would "waste" the decreed quantity, the Director's decision is not supported by the evidence and suffers from the same fatal error made by the agency in *Morgan*.

Finally, the Director's erroneous decision is similar to the agency's finding in *St. Joseph Reg'l Med. Ctr. v. Nez Perce County Commissioners*, 134 Idaho 486 (2000). In that case the Supreme Court reserved an agency's finding that was not supported by substantial and competent evidence. The county concluded that a patient "did not meet the statutory definition of 'medically indigent' with respect to both the medical and the financial components of the

definition." 134 Idaho at 488-489. The Supreme Court disagreed, and, after reviewing the evidence, held the following:

> ***The only competent medical testimony before the Board was that of Doctor Kadrmas***, which supports a conclusion affirming the necessity of immediate psychiatric hospitalization and treatment provided to B.T. ***According to his medical expert opinion, which stands uncontradicted in the record***, the services provided were required "in order to identify and treat [B.T.'s] illness." *See* I.C. § 31-1502(18)(A). The Board's conclusion that the services were not necessary medical services must be overturned as it is unsupported by substantial, competent evidence and is clearly erroneous.

Id. at 489 (emphasis added).

In the present matter, it is undisputed that A&B's landowners can beneficially use the full decreed quantity, 0.88 miner's inches per acre. The Respondents fail to identify any contradictory findings on this point. Since there is no evidentiary conflict, the Director's determination that A&B would "waste" its decreed diversion rate is "clearly erroneous" and must be reversed and set aside. As the Supreme Court observed in *St. Joseph*, where evidence "stands uncontradicted in the record" a contrary agency conclusion "must be overturned as it is unsupported by substantial, competent evidence and is clearly erroneous." 134 Idaho at 489.

In sum, the Director misapplied the CM Rules in evaluating injury to A&B's senior water right. Instead of evaluating whether A&B could beneficially use the decreed quantity (0.88 miner's inches per acre) to determine injury, the Director resorted to a "dual water right" system that is not supported by the law. Since A&B's landowners can beneficially use the decreed quantity, the Director had an obligation to recognize that amount for purposes of his injury analysis. The distinction between beneficial use in a "call" versus "no call" setting simply has no support in Idaho law. Finally, the Director's "waste" finding is not supported by any evidence in the record and therefore must be set aside for that reason as well.

III. The Director's Minimum Quantity to "Raise Crops" or "Accomplish Irrigation" Standard is Contrary to Idaho Law.

In addition to the erroneous "dual water right" standard, the Director also used a flawed minimum "crop maturity" or "accomplish irrigation" criteria instead of evaluating injury to A&B's water right.[18] IDWR admits this fatal error in the Director's injury analysis on remand. Rather than evaluate, and recognize based upon the undisputed evidence, that A&B's landowners can beneficially use the decreed quantity under water right 36-2080 (0.88 miner's inch/acre), the Director used a new standard based upon a "minimum" quantity to "raise crops" or "accomplish irrigation." *IDWR Br.* at 18-21.

IDWR states that the Director "looked at whether, with the present water supply, A&B was accomplishing the beneficial purpose of irrigation; namely raising crops." *IDWR Br.* at 18.[19] IDWR admits the Director was not evaluating the beneficial use of the stated quantity in A&B's water right on remand. Instead, IDWR admits the Director was trying to determine "whether A&B's crops were affected by reduced pumping." *Id.* at 19 (emphasis added). Idaho's water distribution statutes and CM Rules require administration of water rights, not administration of "raising crops" or "crop yields." *See* I.C. § 42-602, 607; CM Rule 10.14; 40.

Stated another way, A&B's landowners do not have to show "lost" or "affected crops," or even the failure of a farming operation to show injury to the District's senior water right.[20]

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[18] The Director's "crop maturity" standard is not insulated from judicial review as IDWR suggests. *IDWR Br.* at 20, n. 9. The Court ordered the Director to re-evaluate material injury to A&B's water right on remand. Consequently, the Director's prior no-injury determination, based upon a 0.75 miner's inch per acre standard which referenced "crop maturity" as justifying that quantity, was subject to further review. A&B did not have to appeal an issue it prevailed on before the District Court.

[19] IDWR repeats the erroneous standard throughout its brief. *See IDWR Br.* at 4 ("raised crops on its lands"); at 8 ("sufficient for purposes of irrigating crops"); at 19 ("whether A&B's crops were affected by reduced pumping . . . review of crop maturity"); at 20 ("determine if A&B, with its present water supply, could raise crops to maturity. . . beneficial purpose of irrigation could be accomplished"); at 21 ("impacted its ability to raise crops"). Pocatello and IGWA agree with this flawed standard. *See Poc. Br.* at 7-8, 10 ("A&B has grown crops to maturity"); *IGWA Br.* at 17 ("raise full crops"); at 23 ("water needed to raise crops"); at 24 ("raise the same or similar crops").

[20] This Court has already rejected any "failure of the project" standard. *See Memorandum Decision* at 42-43.

The Director has a legal duty to evaluate injury to A&B's water right, not some subjective injury to a "crop" or whether irrigation was prevented entirely.[21] *See Memorandum Decision* at 42 ("Injury to a water right is still injury").

Stated another way, the standard is not "what is the least amount of water that can be used to raise a crop" or "accomplish irrigation" with a depleted water supply.[22] Yet that is the erroneous framework the Director used on remand. IDWR admits the Director was simply asking whether A&B could "get by" on the depleted water supply. *IDWR Br.* at 18-19. That is not the lawful standard to evaluate injury to a water right. I.C. § 42-607; CM Rules 10.14, 40. If "raising a crop" or "accomplishing irrigation" was the standard for water right administration, the Director could disregard the decreed quantity and set the lowest possible amount for his analysis.

For example, IGWA witness Tim Deeg testified he irrigates with 0.41 miner's inch/acre to meet <u>his</u> needs on his American Falls farm. Tr. Vol. V, p. 1071, lns. 15-16. Although Mr. Deeg can "accomplish irrigation" with less than ½ miner's inch of water, that doesn't mean irrigators who use more than that quantity are "wasting" water.[23] Moreover, just "accomplishing irrigation" or "raising a crop" does not mean a water right is not injured. Indeed, water rights are not uniform throughout the ESPA. Water users have rights for different quantities. A&B holds a decreed right for 0.88 miner's inches per acre, and it is undisputed that its landowners can beneficially use that diversion rate.

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[21] Contrary to the Respondents' arguments (*IDWR Br.* at 19; *Poc. Br.* at 8; *IGWA Br.* at 24), IDWR's limited METRIC analysis did not evaluate injury to A&B's water right. Mr. Kramber testified he performed <u>no analysis in reference to A&B's decreed rate of delivery</u>. Tr. Vol. VI, p. 1130, ln. 21 – p. 1131, ln. 4 ("Q. And you didn't attempt to use this analysis to compare the water use to A&B's water rights; is that right? A. ***That's correct.***") (emphasis added).

[22] The Court previously found declining ground water levels reduced A&B's pumping capacity. *See Memorandum Decision* at 7.

[23] Mr. Deeg also testified that he has a water right for 0.90 miner's inches per acre on his Springfield farm and has beneficially used 1 miner's inch per acre at this farm. Tr. Vol. V, p. 1071, lns. 16-17, p. 1075, ln. 11 – p. 1076, ln. 6.

The Director's standard disregards the water right in favor of criteria that is contrary to Idaho law. Moreover, the Director's undefined subjective standard focused on "minimum" water use violates Idaho's prior appropriation doctrine and the CM Rules. *See* I.C. § 42-607; CM Rule 40; *Clear Springs Foods, Inc.*, 150 Idaho at 811; *Caldwell v. Twin Falls Salmon Land & Water Co.*, 225 F. 584, 596 (D. Idaho 1915). The Respondents provide no justification for the Director's error on this point. Since it is undisputed A&B's landowners can beneficially use the decreed quantity, the Director was required to honor that quantity in the *Remand Order*. The failure to use the appropriate standard resulted in an erroneous agency order that must be reversed and set aside.

IV. The Respondents Fail to Justify the Director's Erroneous Reasons for the No-Injury Finding on Remand.

A. 2006 Water Use and Director's Flawed Theoretical Average Evaluation

The Respondents rely heavily upon the Director's mischaracterization that A&B failed to pump and use available water during the peak season in 2006. *IDWR Br.* at 14, 23; *Poc. Br.* at 7, 10, 12, 14-15; *IGWA Br.* at 16. IDWR misrepresents A&B's actions in 2006 as choosing "not to pump" and "deliver" available water.[24] *IDWR Br.* at 14, 23. The Director's analysis is not based upon facts in the record and IDWR's continued representation of the actual A&B irrigation project should be rejected.[25]

First, IDWR falsely claims that "A&B could have diverted 970 cfs and delivered 0.75 miner's inches per acre to the field." *IDWR Br.* at 14, 23. The Director did not evaluate actual water use on the ground but instead used total well capacity (59,643 acre-feet) and <u>averaged</u> it

[24] Pocatello also wrongly claims that "A&B let available well capacity go to waste during the peak season." *Poc. Br.* at 12. Like IDWR, Pocatello misrepresents the facts on the ground.

[25] IDWR wrongly alleges that A&B "could have diverted 970 cfs <u>and delivered 0.75 miner's inches per acre to the field</u>" in 2006. IDWR knows this to be untrue since the A&B well systems are not interconnected across the project. R. 3095. Hence, any claim that quantity could be pumped and equally "delivered" to all landowners is false.

across the entire 62,604.3 acre project to claim the wells could have pumped 0.77 miner's inches per acre and all of A&B's landowners could have received 0.75 miner's inches per acre (adjusted for 3% conveyance loss). R. 3486-87. The Director's analysis is exactly the type of "extreme" evaluation the Hearing Officer rejected:

> Either approach taken to the extreme can produce results inconsistent with the history and understanding of the water right.
>
> * * *
>
> The geography of the land within Unit B, the design of the system, and the practices in utilizing the system prior to the entry of the partial decree indicate that ***the water right adjudicated is not satisfied by showing that the combined total of water that can be pumped from all the wells is equal to the amount necessary to avoid material injury if the water were equally distributed. . . . The theoretical right to apply the water from any pump to any land must be tempered by the reality of the system as it was designed and utilized and partially decreed.*** If the entire well system could be interconnected economically the issue of material injury would be gauged by the total capacity of the system to produce water.

R. 3093, 3095 (emphasis added).[26]

Although A&B's total diversion for the peak month in 2006 was 49,855.3 acre-feet, it is undisputed that certain wells produced more than 0.75 miner's inches per acre while others produced less. Ex. 132 (A&B 2765-69, Annual Pump Report Part 1 detailing "criteria available per acre at turnout"). Despite the Hearing Officer's above finding, and the reality of A&B's water delivery system, the Director misrepresented the events and actual water use to justify his no-injury conclusion. The impression is that A&B left producing wells idle and did not have a demand for its decreed diversion rate on an instantaneous basis. This is simply untrue.

A&B's Annual Report details the capacity and delivery rate of each well system. In 2006, A&B had 35 well systems that delivered 0.75 miner's inches per acre or less. Exs. 206L,

[26] A&B recognizes this issue overlaps the pending interconnection study. At a minimum the Director's finding must be set aside and re-evaluated once the study is complete. The Hearing Officer found "it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury." R. 3096.

206M. These well systems were limited by the available water supply and could not pump "additional water" during the peak demand period. Moreover, the well systems that produced greater than 0.75 miner's inches per acre delivered that higher quantity to the respective landowners for beneficial use. For example, landowner Tim Eames confirmed he beneficially uses quantities greater than 0.75 miner's inches per acre identified on his well systems. *See* Ex. 229A (showing 2006 criteria); Tr. Vol. IV, p. 814, ln. 23 – p. 815, ln. 18. IGWA's witnesses further confirmed they beneficially used 0.87 miner's inch per acre and 0.85 miner's inch per acre they received on their A&B lands in 2006. Tr. Vol. X, p. 2073, lns. 21-24; p. 2146, lns. 3-6.

IDWR's conversion of 970 cfs to equate to 59,643 acre-feet wrongly assumes the full diversion rate could have been pumped and delivered anywhere within the project. Again, well systems that produced more than 0.75 miner's inches/acre delivered that higher quantity based upon demand to the landowners on those systems. If those systems shut off, due to cropping patterns or particular demands, any "additional water" in those systems could not have been pumped and delivered to other lands that received less than 0.75 miner's inches/acre.[27] Accordingly, IDWR's misrepresentations about actual well production and water use in 2006 should be rejected.

B. Changes in Project Efficiency Do Not Reduce A&B's Landowners' Demand for the Decreed Diversion Rate.

IDWR erroneously overstates the conclusion about the effects of converting to sprinkler irrigation ("expected to reduce per acre water requirement by 19.6 percent"). *IDWR Br.* at 11. The Director's cited finding referred back the original January 2008 order that relied upon the USBR's 1985 study about water requirements for the new extension lands project that was never

[27] IGWA also misrepresents A&B's actual project by alleging that "it's simply a matter of pumping the wells longer . . ." *IGWA Br.* at 16. A&B cannot pump water from any well and deliver it to any acre on the project.

completed. R. 1115. The study evaluated a theoretical total acre-feet per acre requirement for the new lands, and misstated the actual instantaneous rate of delivery from A&B's existing wells.[28] The Hearing Officer recognized the error and rejected the study's characterization of 0.75 miner's inches per acre as representing a "maximum rate of delivery":

> **4. The USBR characterization of the 0.75 miner's inches as a maximum rate of delivery ignores its own history and the water right. . . .** Acceptance of the conclusion that 0.75 is a maximum rate of delivery for the system would in effect rewrite the water right down from 0.88 miner's inch rate of delivery to 0.75. A&B is entitled to the higher rate of delivery if its delivery system can produce the higher rate and that amount can be applied to beneficial use. . . .

R. 3101-3102 (emphasis in original).

Although conversion to sprinkler may reduce the total volume of water used over the course of an irrigation season, it does not reduce the instantaneous demand or delivery rate requirement on the ground, particularly during the peak of the summer when water is needed most.[29] Evidence in the record regarding actual water use demonstrates that for those wells that can produce sufficient water A&B's landowners require and use the decreed diversion rate for several days during the peak season.[30] R. 1962, 1965-66 (Examples of peak season pumping in 2003 and 2007).[31] Accordingly, IDWR's characterization of sprinkler conversion, and its reliance upon an erroneous USBR study for an extension lands project that was never completed,

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[28] Accordingly, the study relied upon by the Director does not stand for the proposition inferred by IDWR, i.e. that conversion to sprinkler was expected to reduce the instantaneous diversion or delivery rate demand.

[29] IDWR further ignores the fact that 86% of the project had been converted to sprinkler at the time A&B's water right was decreed in the SRBA in 2003. Ex. 200G.

[30] *See* referenced landowner testimony at Part II.

[31] Wells not capable of producing at least 0.75 miner's inch per acre are not included in this review because they cannot pump the required amount of water needed by the landowners. At page 15 of its response Pocatello wrongly mixes the concept of "pumping rate" in Figure 3-13 in A&B's opening *Expert Report* (Ex. 200) with the review of actual water pumped and used in the *Rebuttal Report of Expert Report and Direct Testimony of Gregory Sullivan.* R. 1962, 1965-66. The daily average pumping rate used in 2003 and 2007 was taken from the Water and Power "daily diversion records," not based upon the evaluation of available well capacity only as Pocatello suggests.

does not reflect actual conditions on the A&B project and does not support the Director's no-injury finding in the *Remand Order*.

Focused on total annual diversions, IDWR alleges A&B diverts less water solely due to improved efficiencies. *IDWR Br.* at 11-14. IDWR correlates reduced annual diversions with changes to sprinkler irrigation over time, alleging this is dispositive of the issue. *Id.* Contrary to the record, and the Court's prior findings, the agency wholly ignores the ground water level declines and the resulting reduced pumping capacities at A&B's wells over that same time period.[32] Notably, the Hearing Officer identified actual ground water level measurements and concluded that the "total water level decline since the wells were installed ranges from 8.5 feet to 46.4 feet" and that the average decline between 1999 and 2006 was "12.6 feet." R. 3087; *see also*, *Memorandum Decision* at 7. Exhibit 225 details the average low pumping depth across the project in July of each year, and how the at level has dropped dramatically since the early 1970s.

The Court affirmed this finding and described the effect that reduced ground water levels have on A&B's pumping capacity during the peak demand period:[33]

> The declines in aquifer levels have resulted in A&B being unable to pump the full amount of its authorized rate of diversion during peak demand periods. The declines reduced cumulative withdrawals from 1,100 cfs (0.88 miner's inches per acre) to 974 cfs (0.78 miner's inchers per acre) for the entire project. Depletions have also resulted in some wells being abandoned. The shortages are not uniform throughout the project.

Memorandum Decision at 7.

IDWR ignores its own prior findings on the subject, including the Court's findings on reduced well capacities. Whereas the Director acknowledged that ground water levels have

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[32] A&B's wells had the capacity to pump 1,100 cfs prior the onset of ground water level declines. Ex. 200, p. 3-57. Dan Temple confirmed that lowered ground water levels reduced A&B's pumping rates. Ex. 200 at 3-9; Tr. Vol. III, p. 531, lns. 12-20. Even IDWR's own witness Dr. Dale Ralston testified that that declining ground water levels can impact pumping discharge. Tr. Vol. I, p. 127, lns. 14-20, p. 128, lns. 18-25.

[33] No party, including IDWR, appealed this finding, hence it is "law of the case."

declined, it is undisputed that the declines have caused reduced pumping and even abandonment of certain wells. Consequently, IDWR's current mischaracterization of the cause for A&B's reduced diversions based upon sprinkler conversions and does not justify the no-injury decision in the *Remand Order*.

In sum, increased efficiency and conversion to sprinkler does not support the finding that A&B's landowners would "waste" the decreed rate of diversion. The agency's argument on this point should therefore be rejected.

C. A&B Cannot Pump and Deliver Water From Abandoned Wells.

The Respondents mischaracterize the state of A&B's 11 unused wells. *IDWR Br.* at 15-16; *IGWA Br.* at 13; *Poc. Br.* at 11. Although the wells are authorized points of diversion on the water right, IDWR erroneously represents the wells can be used by A&B to deliver water. *IDWR Br.* at 16. The Director erroneously concluded that A&B is not injured because it could put the 11 wells "into production." R. 3489. This finding is not supported by the evidence in the record and should be set aside.

Contrary to IDWR's argument, six of the 11 wells <u>cannot be used</u> because they were <u>abandoned</u>. R. 3081, Tr. Vol. III, p. 467; Ex. 208. For example, well 3A1022 was abandoned because the "pump bowls were becoming dewatered." Ex. 208. Well 9A922 was abandoned because after drilling over 400 feet the well pumped sand and "additional water was not encountered." *Id.* Well 33B922 was abandoned because "the pump intake was beginning to become dewatered." *Id.* Further, no additional water was found in wells 20A922, 22A922, and 33C922. It is undisputed that A&B abandoned those wells due to a lack of water supply. Tr. Vol. III, p. 555, 565-66; *see also*, R. 3081, 3090.

Contrary to the Respondents' theory, dry holes cannot be put "into production."[34] The abandoned wells do not constitute "existing facilities" that can deliver water to A&B's landowners. No reasonable person would accept this finding. The Director's failure to recognize the facts regarding the 11 unused wells is erroneous and should therefore be set aside.

V. The Director Exceeded the Ordered Remand by Reconsidering the Prior Finding that A&B's Wells are a Reasonable Means of Diversion.

IDWR dismisses A&B's reference to the mandate rule as a "legal theory gleaned from an 1895 United States Supreme Court decision, and various reported and unreported federal cases." *IDWR Br.* at 22. IDWR then argues the rule does not apply in Idaho. *Id.* While a United States Supreme Court decision that does not address a federal question is not binding on an Idaho state court, it is nonetheless persuasive authority and particularly useful in this case. Regardless, the substance of A&B's argument is that the Director could not exceed the scope of the Court's ordered remand, which IDWR does not dispute. *Id.*

The substance of the mandate rule, which has been applied to administrative remands, is embodied in Idaho's law of the case doctrine which "provides that where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling in the lower court and on subsequent appeals." *Urrutia v. Blaine County*, 134 Idaho 353, 360 (2000). IDWR accepts this doctrine. *IDWR Br.* at 6, 9, 33. This doctrine "prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal, *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756 (1999), and the

[34] Pocatello misinterprets the CM Rules to argue that A&B's authorized points of diversion constitute "existing facilities" that must be put into use. *Poc. Br.* at 11. Contrary to Pocatello's suggestion, A&B does not have to drill "new" wells "at another location" or file a transfer. *Id.* An authorized point of diversion on a water right does not equal an existing water-producing "facility." As documented above, A&B abandoned certain wells due to a lack of water. This evidence is undisputed and shows the Director's finding on this issue is clearly erroneous. Finally, Pocatello and IGWA misread Rule 42.01.h which only applies to senior-priority surface water rights. *See Poc. Br.* at 11,n. 2; *IGWA Br.* at 20. This case concerns A&B's ground water right 36-2080. (Regardless, A&B does not agree that CM Rule 42.01.h is constitutional if the Director ever attempted to apply it and force a senior surface water right holder to drill a well to justify a no-injury finding).

challenging of factual findings that were affirmed in the earlier appeal, *Insurance Assoc. Corp. v. Hansen*, 116 Idaho 948, 782 P.2d 1230 (1989)." *Rockefeller v. Grabow*, 139 Idaho 538, 543 (2003).[35]

In *Gilbert v. Tony Russell Const.*, the Idaho Court of Appeals vacated the trial court's conclusion on remand after it failed to follow the appellate court's direction on remand:

> Based upon our review, we concluded that the trial record did not yield a finding of economic waste or disproportionality. *Id.,* at 396, 732 P.2d at 365. We therefore remanded the case back to the district court to determine if such evidence did in fact exist. *Id.* In doing so, we suggested that the district court, "*may* take additional argument and evidence as deemed necessary to determine the appropriate measure of damages [emphasis added]." *Id.*
>
> ***On remand, the district court declined to consider additional evidence.*** Instead, the court concluded, based upon the original record, that:
>
>> The evidence at trial supports the conclusion that the measure of damages asserted by the plaintiff would be disproportionate to any loss in value to the plaintiff's property as well as to any benefit to plaintiff's property from completely reexcavating and refilling the sewer line. This Court deems that it did impliedly, if not explicitly, conclude that the less costly approach of the defendant, Tony Russell Construction, Inc., was more appropriate under the evidence adduced at trial. The Court adheres to that view.
>
> We disagree with the district court's conclusion. ***As we stated in Gilbert I, the evidence adduced at trial did not conclusively show that the Gilbert's measure of damages was disproportionate or economically wasteful.*** On remand, we invited the district court to take additional argument and evidence to determine whether such a situation did exist. However, the district court decided that, based upon the record before it, the Gilberts' estimate of repairs was disproportionate to the benefits they would receive. ***Because the district court decided not to consider additional evidence in its consideration of the Gilberts' damages, we fail to see how the court could make this determination based upon the lack of evidence of disproportionately adduced at trial.***

Gilbert v. Tony Russell Const., 115 Idaho 1035, 1039-40 (Ct. App. 1989) (emphasis added).

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[35] "Like stare decisis it protects against relitigation of settled issues and assures obedience of inferior courts to decisions of superior courts." *Swanson v. Swanson*, 134 Idaho 512, 516 (2000) (quoting *NAACP, Detroit Branch v. Police Officers Ass'n*, 676 F.Supp. 790, 791 (E.D.Mich. 1988)).

Regardless if the Court applies the mandate rule or law of the case doctrine, it is beyond the scope of remand for the Director to reconsider A&B's means of diversion and now conclude the location and construction of the wells was unreasonable. Like the district court in *Gilbert*, here the Director failed to follow this Court's order. This Court held "that in order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence." *Memorandum Decision* at 38. Accordingly, the Court remanded the case to the Director for that limited purpose. This Court further noted that "[a]bsent the application of an evidentiary standard of clear and convincing evidence this Court has difficulty distinguishing how this is not a re-adjudication of A&B's right." *Memorandum Decision* at 37.

Yet on remand, the Director effectively re-adjudicated A&B's water right, refusing to honor the decreed quantity for purposes of an injury analysis.[36] The Director justified this maneuver, in part, with the reconsidered "reasonable diversion" finding. In support of this new position, IDWR misreads the Hearing Officer's decision.[37] *IDWR Br.* at 26 (citing R. 3111-13). Crucially, the Hearing Officer did not find that A&B's southwest wells constituted an "unreasonable means of diversion." Rather, the finding cited by the Department related to the establishment of a reasonable pumping level. The Hearing Officer specifically stated the southwest wells could not be solely used to define "reasonable pumping levels and set an unreasonable standard for determining injury." R. 3113. The Hearing Officer did not state the construction or siting of the wells constituted an unreasonable means of diversion. The Hearing

[36] None of the Respondents allege the Director's *Remand Order* limited A&B's beneficial use to 0.65 miner's inches per acre, hence any argument on that quantity is settled and will not be addressed further. *See IDWR Br.* at 24; *IGWA Br.* at 23; *Poc. Br.* at 15.

[37] Without citing any evidence in the record Pocatello also misrepresents the facts by claiming the Director and Hearing Officer found A&B's means of diversion were unreasonable. *Poc. Br.* at 16. Instead, Pocatello relies upon initial findings from the January 2008 order that were later overturned after the hearing by the Hearing Officer and Director. *See infra* n. 38.

Officer did not find that A&B's conveyance facilities were unreasonable either. Just the opposite, he concluded the drilling methods and wells developed by USBR were "reasonable." R. 3097, 3111. IDWR admits these facts.[38] *IDWR Br.* at 25.

IDWR also misreads the Hearing Officer's analogy to *Schodde v. Twin Falls Land and Water Co.* and the discussion of a reasonable pumping level.[39] *IDWR Br.* at 26. Contrary to the Hearing Officer's finding, the Director misinterpreted the analogy on remand. R. 3482, 3488. Since the Hearing Officer found the wells were sited and constructed reasonably, the Director had no basis to reconsider these findings on remand. Moreover, the fact that ground water declines made certain southwest wells unusable over time is no basis for the Director to state they now constitute "unreasonable" means of diversion. This is an unlawful hindsight approach to administration and does not address the construction and development of the wells.

The Director bases his conclusion on the finding "[w]ells placed in a poor hydrogeologic environment do not constitute a reasonable means of diversion. CM Rule 42.01.g, h. To curtail junior-priority ground water rights because of a poor hydrogeologic environment would countenance unreasonableness of diversion and hinder full economic development of the State's water resources."[40] R. 3488. As noted in the previous section of this brief, the Director's finding is contrary to the record and the Hearing Officer's findings.

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[38] Pocatello forgets the applicable findings and conclusions in this case as it relies upon erroneous statements in the initial January 2008 order that were overturned by the Hearing Officer and Director in the 2009 final order. *See Poc. Br.* at 17-18 (alleging A&B has an "inefficient well and delivery system" and used inappropriate "drilling techniques."); *compare* R. 3098-99 ("A&B uses acceptable drilling techniques . . . The current system wide conveyance loss of water is between three and five percent."); R. 3322-23; *see also, IDWR Br.* at 25, n. 14 ("The Department does not question the reasonableness of A&B's implemented irrigation efficiencies.").

[39] In *Schodde*, the senior water right was required to change his diversion structure, but the priority and full amount of his water right was still protected. *See Clear Springs Foods, Inc.*, 150 Idaho at 810; *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 397 (1929). In this matter, the Director refuses to protect A&B's decreed quantity.

[40] Contrary to the Director's finding, Rule 42.01.h does not apply to A&B's senior <u>ground</u> water right 36-2080.

Moreover, the reconsidered finding disregards the fact that ground water levels have declined since the installation of A&B's wells, thereby reducing pump capacity. *Supra*, at 21. Indeed, the wells in the southwest area produced the required diversion rate until significant ground water declines occurred in later years. R. 3113 ("There was a substantial period of time in the 1960's and 1970's when the wells delivered more than three-quarters of an inch. Most delivered above that level until 1990."); R. 1802; Ex. 200 at 3-69. The well yields in the southwest area at the time they were constructed in the 1970s were essentially the same as those in the central and eastern parts of the project. Ex. 200, Appendix C (southwest well yields between 718 and 4,264 gallons per minute with an average of 2,238 gpm; central and eastern well yields between 673 and 4,712 gpm with an average of 2,459 gpm).

Although the Director authorized the southwest area wells in the permit and license, and later recommended them as authorized points of diversion to the SRBA Court, he now wrongly claims they are "unreasonable" for purposes of administration. Such a decision contradicts the Hearing Officer's finding and cannot stand in light of the Court's ordered remand.

In sum, the Director wrongly reconsidered the "reasonable means of diversion" finding on remand, contrary to the mandate rule, the law of the case, and this Court's prior order. The Court should reverse and set aside this agency error accordingly.

VI. Director Failed to Apply CM Rule 20 and 40 to Junior Ground Water Rights.

This Court found the Director's original injury analysis to be in error. The Court remanded the Director's no-injury finding back to IDWR for further analysis applying the proper burdens and evidentiary standards. *See Memorandum Decision* at 49. As part of the analysis on remand the Director was required to evaluate the use of water by junior rights. CM Rule 40.03. Contrary to the Respondents' arguments, the issue of evaluating junior ground water rights on

remand was not "waived" or an issue that required appeal by A&B. *See IDWR Br.* at 33; *Poc. Br.* at 6, 22. A&B prevailed on the Director's failed injury analysis in Case No. CV-2009-647. Accordingly, there was no issue A&B needed to appeal in the first case.

When evaluating injury to A&B's senior water right on remand, the CM Rules required the Director to evaluate the use of water under junior water rights on the common water resource. *See* CM Rule 20.05; 40.03. In determining whether junior rights would be regulated, Rule 40 specifically requires the Director to evaluate whether both A&B and junior water rights are using water "efficiently and without waste." In other words, the analysis of junior water rights is required as part of the injury analysis of A&B's senior water right.

On remand the Director failed to perform the required analysis of junior water rights. A&B specifically raised the issue in its petition for reconsideration. R. 3503-04. The Director failed to decide A&B's petition within the statutory deadline hence it was deemed denied by operation of law. *A&B Irr. Dist.,* 2012 WL 4055353. Accordingly, the Director's error must be set aside.

The Respondents seek to avoid judicial review of this issue because the Director failed in substance. The Respondents point to no analysis performed by the Director as required by CM Rules 20 and 40. Instead, IDWR claims the Hearing Officer's limited comparison of water use by private systems outside the A&B project that "raise crops to full maturity on less water" is sufficient.[41] *IDWR Br.* at 33. IDWR admits no analysis was performed on remand. Regardless, the referenced prior "consideration" did not evaluate whether junior ground water rights would be used "efficiently and without waste."

[41] The legal flaws in this standard are explained in Part III, *supra*. Moreover, the Hearing Officer admitted the hardships caused by reduced diversion rates. R. 3107 ("This may result in increased costs in power to the irrigators who may be required to run their pumps longer and increased labor to manage the water.").

Without any factual findings or specific details, the inference is the Director accepted the juniors' use of their decreed diversion rates as "efficient" and "without waste." Whereas the well capacities for private ground water users in Water District 130 varies, with 59% exceeding 0.75 miner's inches per acre, 44% greater than 0.85 miner's inches per acre, and 25% exceeding 1 miner's inch per acre, the Director performed no analysis whatsoever to determine whether those quantities were being "wasted" as was alleged for A&B's landowners, employing the same irrigation methods growing the same crops. R. 1963, 1970. Consequently, the Director's so-called "consideration" is not supported by the record and therefore must be set aside.

VII. The Court Should Deny the Intervenors' Request for Attorney Fees.

The Intervenors' request for attorney fees should be denied because A&B has a reasonable basis for bringing this appeal. The Intervenors claim attorneys fees pursuant to the following statute:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, ***if it finds that the nonprevailing party acted without a reasonable basis in fact or law.***

I.C. § 12-117(1) (emphasis added).

The Idaho Supreme Court has described the purpose of I.C. § 12–117 "to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made." *Spencer v. Kootenai County*, 145 Idaho 448, 458-59 (2008) (citing *Canal/Norcrest/Columbus Action Comm. v. City of Boise,* 136 Idaho 666, 671, 39 P.3d 606, 611 (2001)).

In *Spencer*, the Court denied the county's request for attorney fees because "the County made its decision upon unlawful procedure, we cannot say Spencer brought this appeal without a reasonable basis in fact or law." *Spencer*, 145 Idaho at 459. Similarly, A&B has appealed the *Remand Order* because the Director erred in his analysis of injury to A&B's senior water right, both as a matter of law and based upon the undisputed evidence in the record. The Director's analysis did not follow the CM Rules resulting in substantial prejudice to A&B's decreed senior water right. Furthermore, the Director's analysis is clearly erroneous where IDWR admits, and the testimony and evidence show that A&B's landowners can beneficially use the decreed quantity (0.88 miner's inches per acre). Certainly it is not "frivolous" to appeal such an erroneous agency decision that impacts an entity's property right interests in this manner.

Moreover, A&B has an express right of appeal as stated in the *Remand Order*, "... any party aggrieved by the final order may appeal the final order to the district court...." R. 3490. A&B petitioned the Director to correct his errors on reconsideration, thus avoiding further judicial review. R. 3492. It is not A&B's fault the Director failed to act on this petition. Consequently, A&B had a right and duty to seek judicial review to correct the agency's errors. Unlike IGWA and Pocatello, the Department acknowledges as much in its response. *See IDWR Br.* at 6, n. 2 ("A&B is authorized to seek judicial review of the Final Order on Remand."). In other words A&B had a "reasonable basis" to file this appeal, hence attorneys fees are not warranted under I.C. § 12-117.

Finally, the Intervenors' requests for attorney fees do not fall under the umbrella of the statute's stated purpose. IGWA and Pocatello have not "borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should

never have made." *Spencer, supra.* As "intervenors," Pocatello and IGWA were not required to participate in this judicial review proceeding.

Because Intervenors voluntarily chose to participate in this proceeding, and because the statute under which they seek attorney fees does not contemplate awarding fees to parties in their situation, their requests must be denied. Moreover, A&B has a reasonable basis in fact and law for its appeal in this case. Whereas the Director refuses to properly administer the District's senior water right for the benefit of its landowners, A&B has a right to seek judicial review of the agency's erroneous decision.

CONCLUSION

It has been a long and winding road for A&B and its landowners through the agency and Idaho's judiciary. The District's request for proper administration has been repeatedly denied by IDWR based upon fundamental errors in the evaluation of A&B's decreed senior water right. On remand, the Director erroneously found no-injury based upon a misapplication of the CM Rules and a decision not supported by facts in the record. Since A&B's landowners can beneficially use the decreed quantity (0.88 miner's inch/acre), a fact that is undisputed and admitted by the Respondents, the Director's *Remand Order* should be reversed and set aside.

DATED this 8th day of March, 2013.

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson
Paul L. Arrington

Attorneys for Petitioner A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of March, 2013, I served true and correct copies of **A&B IRRIGATION DISTRICT'S REPLY BRIEF** upon the following by the method indicated:

Deputy Clerk SRBA District Court 253 3rd Ave N. P.O. Box 2707 Twin Falls, Idaho 83303-2707	____ U.S. Mail, Postage Prepaid ✓ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Garrick Baxter Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email

By U.S. Mail and Electronic Mail:

Jerry R. Rigby Rigby Andrus and Rigby 25 N 2nd East Rexburg, ID 83440 jrigby@rex-law.com	Randall C. Budge Candice M. McHugh Racine Olson P.O. Box 1391 201 E Center Street Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com
A. Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us		

Travis L. Thompson

Attachment
A

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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)	)	**ORDER**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of two letters dated May 2, 2005 ("Letters"), from Larry Cope of Clear Springs Foods, Inc ("Clear Springs"). The Letters request water rights administration in Water District No. 130 pursuant to Idaho Code § 42-607 in order to effectuate the distribution of water to the water rights identified in the above caption that are held by Clear Springs for the diversion and use of water at its Snake River Farm and Crystal Springs Farm.

Based upon the Director's consideration of this matter, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

The Eastern Snake River Plain Aquifer and the Department's Ground Water Model

1. The Eastern Snake River Plain Aquifer ("ESPA") is defined as the aquifer underlying an area of the Eastern Snake River Plain that is about 170 miles long and 60 miles wide as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," U. S. Geological Survey ("USGS") Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply. *See* IDAPA 37.03.11.050.

2. The ESPA is predominately in fractured Quaternary basalt having an aggregate thickness that may, at some locations, exceed several thousand feet, decreasing to shallow depths in the Thousand Springs area. The ESPA fractured basalt is characterized by high hydraulic conductivities, typically 1,000 feet/day but ranging from 0.1 feet/day to 100,000 feet/day.

3. Based on averages for the time period from May of 1980 through April of 2002, the ESPA receives approximately 7.5 million acre-feet of recharge on an average annual basis from the following: incidental recharge associated with surface water irrigation on the plain (3.4

Factors Considered in Determining Material Injury To and Reasonableness of Surface Water Diversions Under Water Rights Nos. 36-07083 and 36-07568

78. The water rights held by Clear Springs for its Crystal Springs Farm, described in Finding 38, authorize the combined or total diversion of 335.10 cfs for fish propagation purposes, with the first right for 300.00 cfs (no. 36-07083) having a priority date of July 8, 1969, and the second right for 200.00 cfs (no. 36-07568) having a priority date of September 6, 1975.

79. The Department's water right file for water right no. 36-07568 includes a letter from C. E. Brockway, P.E., dated December 1, 1977, listing three points of diversion to the Crystal Springs Farm and measuring devices. The letter includes measured diversions at the three points of diversions at various times during 1977 indicating a total diversion of water to the Crystal Springs Farm of 335.10 cfs. The year 1977 is subsequent to the latest priority of the two rights held by Clear Springs for its Crystal Springs Farm and demonstrates that the total amount of water authorized for diversion and use (335.10 cfs) under water rights nos. 36-07083 and 36-07568 has been diverted and presumably applied to beneficial use at times when available. Additionally, the history of measured diversions included with the letter described in Finding 35 pertaining to the Crystal Springs Farm showed that 335.10 cfs or more was diverted and presumably applied to beneficial use at the Crystal Springs Farm from 1984 through 1990 at times that spring discharges were at seasonal highs.

80. Attachment D shows the time history of measured diversions, included with the letter described in Finding 35 pertaining to the Crystal Springs Farm, taken on monthly intervals since 1978 from Crystal Springs, the source of water for the water rights held by Clear Springs for its Crystal Springs Farm. The measured diversions show that discharges from the springs and the diversions to the Crystal Springs Farm typically peak during October and November, with the lowest flows typically occurring during April and May.

81. The time history of spring discharge and diversions to the Crystal Springs Farm depicted in Attachment D shows that spring discharge and diversions have declined since peaking in 1987. The seasonal maximum spring discharge and diversion in 2004 was 259.81 cfs at the time of the monthly measurement on September 21, 2004, which is 75.3 cfs less, or about 22 percent less, than the total authorized diversion under Clear Springs' water rights nos. 36-07083 and 36-07568. *See* IDAPA 37.03.11.042.01.a

82. Based on the records of flow measurements included with the letter described in Finding 35 pertaining to the Crystal Springs Farm and taking into account the seasonal variations in spring flows that have existed since the dates of appropriation for these rights, the quantity of water diverted from the source using the existing diversion facilities for water rights nos. 36-07083 and 36-07568 with the priority dates of July 8, 1969, and September 6, 1975, respectively, is currently insufficient to fill these rights even when the spring discharge providing the source for the rights is at seasonal highs. The quantity of water available using the existing diversion

facilities for water rights nos. 36-07083 and 36-07568 is expected to continue to be insufficient during 2005.

83. The existing diversion facilities for water rights nos. 36-07083 and 36-07568, held by Clear Springs for its Crystal Springs Farm, include an unlined collection canal that extends approximately 1,200 feet north and west of the hatchery facilities across land presently owned by the State of Idaho. Clear Springs holds an easement dated November 28, 1969, on the State of Idaho's land for its collection canal.

84. The U. S. Fish & Wildlife Service ("USFWS") owns a steelhead hatchery known as the Magic Valley Hatchery that was constructed by the U. S. Army Corps of Engineers ("USCOE"). The Magic Valley Hatchery is located on the south side of the Snake River approximately 3,000 feet across from and west of the Crystal Springs Farm.

85. The diversion facilities for the Magic Valley Hatchery consist of a lined collection canal that extends north and west from a point that is laterally about 100 feet from the northwest end of the existing collection canal for the Crystal Springs Farm. The collection canal for the Magic Valley Hatchery is approximately 1,500 feet long and as with the collection canal for the Crystal Springs Farm described in Finding 76, the collection canal for the Magic Valley Hatchery is sited on land presently owned by the State of Idaho pursuant to an easement dated April 11, 1972.

86. Based on two letters to Colonel Robert B. Williams of the USCOE from Larry Cope dated June 3, 1985, and October 1, 1985, the eastern-most portion of the Magic Valley Hatchery collection canal, which is laterally within about 100 feet of the western-most portion of the Crystal Springs Farm collection canal, was excavated during the first half of June in 1985. The letter of October 1, 1985, included measurements of spring discharge collected by the Crystal Springs Farm collection canal taken on June 7 and June 10, 1985. The measurements indicated that excavation of the eastern-most portion of the collection canal for the Magic Valley Hatchery reduced spring discharge into the collection canal for the Crystal Springs Farm by 12 cfs.

87. As a result of the 12 cfs reduction in spring discharge to the Crystal Springs Farm collection canal following excavation of the eastern-most portion of the collection canal for the Magic Valley Hatchery, the USCOE placed a temporary pipe connecting the collection canals for both facilities so that water could be delivered from the collection canal for the Magic Valley Hatchery to the Crystal Springs Farm collection canal a few days following June 10, 1985, to replace spring discharge diverted by the Magic Valley Hatchery that otherwise would have been diverted by the Crystal Springs Farm.

88. Based on a letter from Lieutenant Colonel Terrence C. Salt of the USCOE to Larry Cope dated October 29, 1985, the USCOE agreed to construct a permanent control structure and pipeline between the collection canals for the Magic Valley Hatchery and Crystal Springs Farm capable of delivering 13 cfs of spring discharge collected by the Magic Valley Hatchery to the Crystal Springs Farm collection canal.

89. Attachment E shows the Crystal Springs Farm facilities and a portion of the Magic Valley Hatchery facilities along with the location of the spring discharge collection and conveyance facilities for each. A control structure that regulates the quantity of collected spring discharge that is conveyed through an inverted siphon across the river to the Magic Valley Hatchery is located approximately 450 feet along and from the eastern end of the collection canal for the Magic Valley Hatchery. Collected spring discharge that is not conveyed through the inverted siphon spills from the Magic Valley Hatchery collection canal through a pipe, the discharge end of which is located approximately 200 feet northwest of the control structure. The pipe discharges into a pre-existing spring discharge channel.

90. The USCOE remains the right holder of record for the three water rights held for fish propagation at the Magic Valley Hatchery. The three water rights held by the USCOE for the Magic Valley Hatchery are as follows pursuant to decrees issued by the SRBA District Court:

Water Right No.:	36-07033	36-07164	36-07653
Source:	Crystal Springs	Crystal Springs	Crystal Springs
Priority Date:	07/10/1968	03/05/1971	11/03/1976
Beneficial Use:	Fish Propagation	Fish Propagation	Fish Propagation
Diversion Rate:	50.00 cfs[9] 6.00 cfs[11] 39.00 cfs[13]	6.49 cfs[9]	25.00 cfs[10] 69.00 cfs[12]

91. The source for water rights nos. 36-07083 and 36-07568 held by Clear Springs for its Crystal Springs Farm and the source for water rights nos. 36-07033, 36-07164, and 36-07653 held by the USCOE for the Magic Valley Hatchery is decreed as "Crystal Springs." Except for smaller springs located from about 700 feet to 1,000 feet southeast of the eastern end of the collection canal for the Crystal Springs Farm, the main source for the rights held for both the Crystal Springs Farm and Magic Valley Hatchery is the same complex of springs spanning a distance of approximately one-half mile northwest of the Crystal Springs Farm.

92. The Department has previously determined that the source for water rights nos. 36-07083 and 36-07568 held by Clear Springs for its Crystal Springs Farm and the source for water rights nos. 36-07033, 36-07164, and 36-07653 held by the USCOE for the Magic Valley Hatchery is the same source. *See*, e.g., *Proposed Memorandum Decision and Order in the*

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[9] From July 1 through following April 30

[10] From July 1 through August 31

[11] From May 1 through May 31

[12] From September 1 through following April 30

[13] From June 1 through June 30

Matter of Applications for permit Nos. 36-8330 & 36-8374 (Crystal Springs) to Establish a Minimum Streamflow in the Name of the Idaho Water Resource Board, December 2, 1988 (Adopted as Final Order on December 23, 1988).

93. On May 5, 2005, Cindy Yenter, the watermaster for Water District No. 130, and Brian Patton, a registered professional civil engineer, conducted a field inspection of the diversion facilities and measurement devices utilized by Clear Springs at its Crystal Springs Farm. Clear Springs generally has sufficient measuring devices in place at its Crystal Springs Farm. *See* IDAPA 37.03.11.042.01.f.

94. During the field inspection on May 5, 2005, described in Finding 93, an estimated 75 cfs of collected spring discharge was being spilled to the Snake River from the collection canal for the Magic Valley Hatchery. Department staff reviewed the diversion records submitted by the Magic Valley Hatchery for the years 2003 and 2004 and although the Magic Valley Hatchery diversions in 2003 and 2004 were generally within the combined authorized rates of diversion for water rights nos. 36-07033, 36-07164, and 36-07653, approximately 30 cfs to 40 cfs was diverted from Crystal Springs between September 1 and April 30 by the Magic Valley Hatchery under water rights nos. 36-07164 and 36-07653 having priority dates of March 5, 1971, and November 3, 1976, respectively, both of which are junior in priority to the priority date of July 8, 1969, for water right no. 36-07083 and the latter of which is junior to the priority date of September 6, 1975, for water right no. 36-07568, both held by Clear Springs for the Crystal Springs Farm. Between April 30 and September 1 of 2003 and 2004, as much as an additional 44 cfs was available but spilled to the Snake River due to seasonal reductions in the authorized diversion rate for water rights nos. 36-07033, 36-07164, and 36-07653 held by the USCOE for the Magic Valley Hatchery.

95. No factors have been identified that would preclude Clear Springs from extending the collection canal for the Crystal Springs Farm generally westerly along the hillside below the collection canal for the Magic Valley Hatchery for a distance of about 800 feet, more or less, to capture additional discharge from Crystal Springs at the spill point from the collection canal for the Magic Valley Hatchery, which can be regulated using the existing control structure on the Magic Valley Hatchery collection canal in accordance with the rights held by the USCOE. Because a significant amount of water is available for diversion from Crystal Springs to the Crystal Springs Farm under water rights nos. 36-07083 and 36-07568, Clear Springs has not expended reasonable efforts or expense to divert water for rights nos. 36-07083 and 36-07568 from Crystal Springs for use at the Crystal Springs Farm. *See* IDAPA 37.03.11.042.01.a and IDAPA 37.03.11.042.01.b.

96. Based on the Department's water rights data base and simulations using version 1.1 of the Department's ground water model for the ESPA described in Findings 13, 14, 17 and 19, the diversion and consumptive use of ground water under water rights having priority dates later than the priority dates for water rights nos. 36-07083 (July 8, 1969) and 36-07568 (September 6, 1975) in Water District No. 120, and which at steady-state conditions reduce spring discharge in the Devil's Washbowl to Buhl Gage spring reach by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is

the uncertainty in model simulations, *see* Finding 17), has insignificant effects on the quantity and timing of water available from springs discharging in the Devil's Washbowl to Buhl Gage spring reach, which includes Crystal Springs. However, the diversion and consumptive use of such rights in Water District No. 130 does affect the quantity and timing of water available from springs discharging in the Devil's Washbowl to Buhl Gage spring reach based on simulations using the ground water model for the ESPA. *See* IDAPA 37.03.11.042.01.c.

97. Based on the records of flow measurements included with the letter described in Finding 35 pertaining to the Crystal Springs Farm, as well as the field investigations on May 5, 2005, described in Finding 86, Clear Springs is currently diverting and using surface water at the Crystal Springs Farm within the authorized diversion rate for water rights nos. 36-07083 and 36-07568. *See* IDAPA 37.03.11.042.01.e.

98. Based on the results from the field inspection on May 5, 2005, described in Finding 93, Clear Springs may not be employing reasonable diversion and conveyance efficiencies for the Crystal Springs Farm. In addition to extending the collection canal used to divert water from Crystal Springs, lining the collection canal to the Crystal Springs Farm would also increase the quantity of water at Crystal Springs Farm, although the amount of the increase has not been determined. Other than extending the collection canal and perhaps lining the canal, no other means for using the existing facilities and water supplies for the Crystal Springs Farm were identified that Clear Springs should be required to implement given the decreed elements of water rights nos. 36-07083 and 36-07568. *See* IDAPA 37.03.11.042.01.g.

99. Based on the results from the field inspection on May 5, 2005, described in Finding 93, other than extending the collection canal for the Crystal Springs Farm there are no alternate reasonable means of diversion or alternate points of diversion that Clear Springs should be required to implement at the Crystal Springs Farm to provide water for rights nos. 36-07083 and 36-07568 during times the rights would not otherwise be satisfied given the decreed elements of water rights nos. 36-07083 and 36-07568. *See* IDAPA 37.03.11.042.01.h.

Effects of Curtailing Ground Water Diversions Under Rights Junior to Water Rights Nos. 36-07083 and 36-07568

100. Version 1.1 of the Department's ground water model for the ESPA, described in Findings 13, 14, 17, and 19, was used to simulate the effects of curtailing the diversion and use of ground water for the irrigation of 80,650 equivalent[12] acres on an ongoing basis under water rights within Water District No. 130 that (1) authorize the diversion and use of ground water for consumptive uses from the area of common ground water supply described in Finding 1, (2) have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969), and (3) based on model simulations reduce spring discharge in the Devil's Washbowl to Buhl Gage spring reach by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is the uncertainty in model simulations, *see* Finding 17). The results of the simulation show that curtailing the diversion and use of ground water for the irrigation of these lands would increase the discharge of springs in the Devil's Washbowl to

Buhl Gage spring reach, which includes the springs from which Clear Springs diverts surface water for its Crystal Springs Farm, by an average of 69 cfs, varying from a seasonal low of about 51 cfs to a seasonal high of about 86 cfs, at steady state conditions.

101. Based on the simulations using the ESPA ground water model described in Finding 100 and assuming that 31 percent of any increase in reach gains in the Devil's Washbowl to Buhl Gage spring reach would accrue to the Crystal Springs Farm diversions (*see* Finding 16), it is estimated that curtailing the diversion and use of ground water for the irrigation of 80,650 equivalent acres on an ongoing basis under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969) would increase the discharge of springs providing the water supply for water right nos. 36-07083 and 36-07568 held by Clear Springs by an average of 21 cfs, varying from a seasonal low of about 16 cfs to a seasonal high of about 27 cfs, at steady state conditions. The amount of 27 cfs is about one-third of the shortage described in Finding 81.

102. Only ground water diverted and used for agricultural irrigation purposes was included in the modeled curtailment simulation described in Finding 100. Using the Department's ground water model for the ESPA to simulate increases in reach gains and spring discharges resulting from the curtailment of the diversion and use of ground water solely for agricultural irrigation purposes provides reasonable quantification of the increases in reach gains and spring discharges resulting from the curtailment of the diversion and use of ground water for all purposes. *See* Finding 73.

103. The Department's ground water model for the ESPA (version 1.1) was used to simulate the effects of the conversions verified by the Department, including 18 percent incidental recharge from percolation, and documented voluntary curtailment implemented by the North Snake and Magic Valley ground water districts described in Finding 76 in response to the order described in Finding 75. Based on these simulations, excluding conversions and voluntary curtailment that based on model simulations contribute 10 percent or less of the non-depletion to the spring discharge in the Devil's Washbowl to Buhl Gage spring reach (10 percent is the uncertainty in model simulations, *see* Finding 17), the actions taken by the North Snake and Magic Valley ground water districts in 2005, which must be ongoing as described in Finding 76, will increase spring discharge in the Devil's Washbowl to Buhl Gage spring reach, which includes the springs from which Clear Springs diverts surface water for its Crystal Springs Farm, by an average of 12.2 cfs at steady state conditions.

104. Assuming that 31 percent of any increase in reach gains in the Devil's Washbowl to Buhl Gage spring reach would accrue to the Crystal Springs Farm diversions (*see* Finding 16), it is estimated that the effects of the ongoing conversions and voluntary curtailment implemented by the North Snake and Magic Valley ground water districts for 2005 and described in Finding 76 will increase the discharge of springs providing the water supply for water right nos. 36-07083 and 36-07568 held by Clear Springs by an average of 3.8 cfs at steady state conditions.

105. Assuming that 31 percent of any increase in reach gains in the Devil's Washbowl to Buhl Gage spring reach would accrue to the Crystal Springs Farm diversions (*see* Finding 16),

it is estimated that the effects of the ongoing curtailment and substitute curtailment implemented in phases over five years in the North Snake and Magic Valley ground water districts as described in Finding 76 will increase the discharge of springs providing the water supply for water right nos. 36-07083 and 36-07568 held by Clear Springs by an average of about 15 cfs (31 percent of 48 cfs) at steady state conditions.

106. Matters expressed herein as a Finding of Fact that are later deemed to be a Conclusion of Law are hereby made as a Conclusion of Law.

CONCLUSIONS OF LAW

1. 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.

2. 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.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

3. The issue of how to integrate the administration of surface and ground water rights diverting from a common water source in the Eastern Snake Plain area has been a continuing point of debate for more than two decades. To date, no Idaho court has directly and fully addressed the issue of how to integrate the administration of the surface and ground water rights that were historically administered as separate sources. The progress made in adjudicating the ground water rights in the Snake River Basin Adjudication and the development of the reformulated ground water model for the ESPA used by the Department to simulate the effects of ground water depletions on hydraulically-connected tributaries and reaches of the Snake River now allow the State to address this issue during this period of unprecedented drought.

4.3 cfs, at steady state conditions. The amount of 4.3 cfs is about one-sixth of the shortage described in Finding 60.

30. Notwithstanding the disrepair of the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm, the out-of-priority diversion of up to 0.9 cfs by the Clear Lake Ranch P.U.D. Master Association under water right no. 36-08329, and the unauthorized irrigation of 6 to 7 acres of grass and landscaping at the Snake River Farm, when superimposed on the effects of changes in surface water irrigation, described in Finding 6, and drought, the diversion and consumptive use of ground water under water rights junior in priority to water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm are reducing the quantity of water available to water rights nos. 36-04013B and 36-07148, thereby causing material injury.

31. The material injury to water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm caused by the diversion and consumptive use of ground water under junior priority water rights in Water District No. 130 is both delayed and long range.

32. Conditioned on repair of the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm acceptable to the Director, the Director should order the curtailment of junior priority ground water rights causing material injury to water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm phased-in over a five-year period to lessen the economic impact of immediate and complete curtailment pursuant to IDAPA 37.03.11.040.01.a, offset by verified substitute curtailment (conversions and voluntary curtailment) provided through the ground water district(s) or irrigation district through which mitigation can be provided. Involuntary curtailment and substitute curtailment together should be implemented in 2005, 2006, 2007, 2008, and 2009, such that based on simulations using the Department's ground water model for the ESPA, phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach at steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively.

33. The Director should order ongoing curtailment of junior priority ground water rights causing material injury to water rights nos. 36-04013B and 36-07148, offset by verified substitute curtailment, until there is no longer material injury. Material injury will cease when the total amount of water available for beneficial use by Clear Springs at its Snake River Farm under rights no. 36-02703, no. 36-02048, no. 36-04013C, no. 36-04013A, no. 36-04013B, and no. 36-07148 at the seasonal maximum spring discharge reaches 117.67 cfs.

34. Based on the records of spring discharge diverted to the Crystal Springs Farm included with the pertinent letter described in Finding 35, the quantity of water available at the source for water rights nos. 36-07083 and 36-07568 having priority dates of July 8, 1969, and September 6, 1975, respectively, was 75.3 cfs less than the combined authorized diversion rate for these rights of 335.1 cfs at the seasonal maximum spring discharge in 2004, which is expected to be similar in 2005.

35. Because no factors have been identified that would preclude Clear Springs from extending the collection canal for the Crystal Springs Farm generally westerly along the hillside below the collection canal for the Magic Valley Hatchery for a distance of about 800 feet, more or less, to capture an estimated additional 30 cfs to 74 cfs of seasonally-dependent and varying spring discharge from the source for water rights nos. 36-07083 and 36-07568, Clear Springs has not gone to reasonable effort or expense to divert water from the source, used reasonable diversion and conveyance practices, or used reasonable alternate points of diversion for water rights nos. 36-07083 and 36-07568 as required by Rules 42.01.b., 42.01.g., and 42.01.h. of the Conjunctive Management Rules. *See* IDAPA 37.03.11.042.01.b, .g, and .h.

36. Based on simulations using the Department's reformulated and recalibrated ground water model, curtailing the diversion and use of ground water on an ongoing basis under rights for agricultural irrigation that (1) are in the area of common ground water supply described in Finding 1 and Water District No. 130, (2) have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969) held by Clear Springs for its Crystal Springs Farm, and (3) reduce spring discharge in the Devil's Washbowl to Buhl Gage spring reach by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is the uncertainty in model simulations, see Finding 17), would increase the discharge of springs in the Devil's Washbowl to Buhl Gage spring reach, which includes the springs from which Clear Springs diverts surface water to the Crystal Springs Farm, by a total average amount of 69 cfs at steady state conditions.

37. Assuming that 31 percent of any increase in reach gains in the Devil's Washbowl to Buhl Gage spring reach would accrue to the Crystal Springs Farm diversions (*see* Finding 16), it is estimated that curtailing the diversion and use of ground water on an ongoing basis under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969) would increase the discharge of springs providing the water supply for water right nos. 36-07083 and 36-07568 held by Clear Springs by an average of 21 cfs, varying from a seasonal low of about 16 cfs to a seasonal high of about 27 cfs, at steady state conditions. The amount of 27 cfs is about one-third of the shortage described in Finding 81.

38. Assuming that 31 percent of any increase in reach gains in the Devil's Washbowl to Buhl Gage spring reach would accrue to the Crystal Springs Farm diversions (*see* Finding 16), it is estimated that the effects of the ongoing curtailment and substitute curtailment implemented in phases over five years in the North Snake and Magic Valley ground water districts as required by the order issued by the Director on May 19, 2005, providing for the administration of certain junior priority ground water rights to supply the prior rights of Blue Lakes Trout as described in Findings 75 and 76, will increase the discharge of springs providing the water supply for water rights nos. 36-07083 and 36-07568 held by Clear Springs by an average of about 15 cfs (31 percent of 48 cfs) at steady state conditions, which is 12 cfs less than what is estimated would result from curtailing the diversion and use of ground water on an ongoing basis under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969).

39. Employing reasonable effort or expense to divert water from the source and using reasonable diversion practices and alternate points of diversion for water rights nos. 36-07083 and 36-07568, by extending and improving the collection canal for the Crystal Springs Farm to capture and convey additional seasonally-dependent spring discharge from the source for water rights nos. 36-07083 and 36-07568, as required by Rules 42.01.b., 42.01.g., and 42.01.h. of the Conjunctive Management Rules, would immediately provide more water to Crystal Springs Farm, varying from at least about 30 cfs to 74 cfs, than would be provided from curtailing the diversion and use of ground water on an ongoing basis under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969).

40. The Director should not order additional curtailment of the diversion and use of ground water under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969) held by Clear Springs for its Crystal Springs Farm unless Clear Springs extends and improves the collection canal for the Crystal Springs Farm to capture and convey the additional seasonally-dependent spring discharge that exists at the source and under the priority dates for water rights nos. 36-07083 and 36-07568 and material injury is occurring to water rights nos. 36-07083 and 36-07568 from the diversion and use of such junior priority ground water rights, or unless Clear Springs demonstrates to the satisfaction of the Director that extending and improving the collection canal for the Crystal Springs Farm is infeasible.

ORDER

In response to the water delivery calls made by Clear Springs Foods, Inc. for its Snake River and Crystal Springs Farms, and for the reasons stated in the foregoing Findings of Fact and Conclusions of Law, the Director orders as follows:

IT IS HEREBY ORDERED that by July 22, 2005, Clear Springs must present evidence acceptable to the Director of a legal basis to continue irrigation of the grass and landscaping at its Snake River Farm facilities. If an acceptable legal basis to continue irrigation is not provided by July 22, 2005, then beginning on July 25, 2005, the Director will instruct the watermaster for Water District No. 130 to curtail the irrigation of grass and landscaping at the Snake River Farm on all but one acre, which is authorized collectively under water rights nos. 36-04013C and 36-07148.

IT IS FURTHER ORDERED that the watermaster for Water District No. 130 is instructed to provide a copy of this order to the Clear Lake P.U.D. Master Association and provide notice that the Association shall have until June 1, 2006, to obtain use of water pursuant to a water right having a priority date earlier than the priority date for water right no. 36-04013C (February 4, 1964) held by Clear Springs for its Snake River Farm, and cease its out-of-priority diversions under water right no. 36-08329. If the Association fails to obtain use of such water right by June 1, 2006, and the water supply available at the source for water rights held by Clear Springs for diversion and use at its Snake River Farm is less than the total amount of 117.67 cfs,

the watermaster shall immediately curtail diversions by the Association under water right no. 36-08329 as necessary to distribute water to Clear Springs' prior rights.

IT IS FURTHER ORDERED that when repair of the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm is made to the satisfaction of the Director, ground water diversions under certain rights for consumptive uses later in priority than February 4, 1964, determined by the Director to cause material injury to water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm, are subject to ongoing curtailment, until further order of the Director, as follows:

(1) Ground water rights for consumptive uses subject to curtailment include rights for agricultural, commercial, industrial, municipal, or other consumptive uses, excluding ground water rights used for de minimis domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for de minimis stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(12), pursuant to IDAPA 37.03.11.020.11.

(2) Involuntary curtailment will be phased-in over a five-year period, offset by substitute curtailment (conversions and voluntary curtailment) provided through the ground water district(s) or irrigation district through which mitigation can be provided and verified by the Department. Involuntary curtailment and substitute curtailment together must be implemented in 2005, 2006, 2007, 2008, and 2009, such that based on simulations using the Department's ground water model for the ESPA, phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach, which includes the springs that provide the source of water for the water rights held by Clear Springs for its Snake River Farm, at steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively.

(3) The actions taken by the Idaho Ground Water Appropriators in 2005 on behalf of its members, consisting of acquisition and use of surface water for irrigation of certain lands in lieu of irrigation using ground water ("conversions") in the North Snake Ground Water District and voluntary curtailment of ground water irrigation of certain lands in the Magic Valley Ground Water District, and thus far approved by the Director as ongoing, are recognized as increasing spring discharge in the Devil's Washbowl to Buhl Gage spring reach by an average of 7.8 cfs at steady state conditions based on simulations using the Department's ground water model for the ESPA. Once Clear Springs has completed repair of the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm, additional ongoing voluntary curtailment within the North Snake and Magic Valley ground water districts must be identified to increase the simulated spring

discharge in the Devil's Washbowl to Buhl Gage spring reach to at least 8 cfs, or a corresponding amount of involuntary curtailment in 2005 by priority date will be ordered by the Director.

(4) Unless approved mitigation or substitute curtailment is provided on behalf of the holder of an affected water right for irrigation by an irrigation district, the holder of a ground water right for irrigation that is not a member of a ground water district when such district is providing approved substitute curtailment considered to be for "mitigation purposes" under provision (3) above, shall be deemed a nonmember participant for mitigation purposes pursuant to H.B. No. 848 (Act *Relating to the Administration of Ground Water Rights within the Eastern Snake River Plain,* ch. 352, 2004 *Idaho Sess. Laws 1052*) and shall be required to pay the ground water district nearest the lands to which the water right is appurtenant for mitigation purposes pursuant to Idaho Code § 42-5259.

(5) If at any time the mitigation or substitute curtailment is not provided as required herein, the water rights subject to curtailment as provided herein shall be immediately curtailed by the watermaster for Water District No. 130, based on the priorities of the rights, to the extent mitigation or substitute curtailment has not been provided.

(6) The holder of a ground water right subject to curtailment as provided herein where the purpose of use is commercial, domestic, industrial, municipal, or stockwater, who is not a member of a ground water district when such district is providing approved substitute curtailment, may participate in such mitigation purposes as a nonmember participant in the ground water district for mitigation purposes and pay the ground water district nearest the place of use for the water right an equitable share of the costs for mitigation. In any event, diversions of ground water under water rights for commercial, domestic, industrial, municipal, or stockwater, shall not be subject to curtailment in 2005, and the holders of such rights shall have until June 1, 2006, to obtain water rights that have priority dates earlier than February 4, 1964, subject to the provisions of Idaho Code § 42-222 or § 42-222A when the place of use is within a county where a declaration of a drought emergency exists on the date of the temporary transfer. Holders of ground water rights for domestic or municipal purposes having priority dates later than February 4, 1964, may also be able to exercise their constitutional preference as provided in Article XV, § 3 of the Idaho Constitution. The time period in which to obtain water rights that have priority dates earlier than February 4, 1964, shall be in lieu of a phased-in period for curtailment.

IT IS FURTHER ORDERED that no additional curtailment of the diversion and use of ground water under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969) held by Clear Springs for its Crystal

Springs Farm will be ordered, beyond what is already required pursuant to this order and the Director's order of May 19, 2005, issued in response to the delivery call made by Blue Lakes Trout Farm, Inc., unless Clear Springs extends and improves the collection canal for the Crystal Springs Farm to capture and convey the additional seasonally-dependent spring discharge that exists at the source and under the priority dates for water rights nos. 36-07083 and 36-07568 and material injury is occurring to water rights nos. 36-07083 and 36-07568 from the diversion and use of such junior priority ground water rights, or unless Clear Springs demonstrates to the satisfaction of the Director that extending and improving the collection canal for the Crystal Springs Farm is infeasible.

IT IS FURTHER ORDERED that pursuant to Idaho Code § 67-5247 this Order is made effective upon issuance due to the immediate danger to the public welfare posed by the lack of certainty existing among holders of water rights for the diversion and use of ground water for irrigation from the Eastern Snake Plain Aquifer as to whether water will be available under the priorities of their respective rights during the 2005 irrigation season.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

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

DATED this 8 th day of July 2005.

KARL J. DREHER
Director