BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02356A, 36-07210, AND 36-07427	))))	**ORDER REGARDING IGWA REPLACEMENT WATER PLAN (BLUE LAKES DELIVERY CALL)**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of the *Ground Water Districts' Plan for Providing Replacement Water (Blue Lakes Delivery Call)*, submitted to the Department on May 27, 2005, by the Idaho Ground Water Appropriators' ("IGWA") on behalf of its members, which include Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water Districts, Magic Valley Ground Water District, Southwest Irrigation District, and North Snake Ground Water District (collectively referred to as "the Districts").

On May 19, 2005, the Director issued his order ("Order") in the above-entitled matter, finding that junior ground water diversions are materially injuring water rights held by the Blue Lakes Trout Farm, Inc. As part of the Order, the Director required ground water districts representing holders of certain junior priority ground water rights to submit a plan for replacement water of suitable water quality for review by the Director no later than May 30, 2005, or those ground water rights would be curtailed over a period of five years.

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

Procedural History

1. On March 22, 2005, the Director received a hand-delivered letter ("Letter") from Gregory Kaslo of Blue Lakes Trout Farm, Inc. ("Blue Lakes") demanding that the Director "direct the Watermaster for Water District 130 to administer water rights in the Water District as required by Idaho Code § 42-607 in order to supply Blue Lakes' prior rights."

2. The Letter stated: "Currently, Blue Lakes is receiving 137.7 cfs. At its low point in 2003, Blue Lakes received only 111 cfs. It is very likely that Blue Lakes will experience even greater shortages during 2005. The current and ongoing water shortages have significantly reduced Blue Lakes' production."

3. The water rights that Blue Lakes seeks protection of, by the administration of junior priority water rights, were decreed by the SRBA ("Snake River Basin Adjudication") District Court as follows:

Water Right No.:	36-02356A	36-07210	36-07427
Source:	Alpheus Creek	Alpheus Creek	Alpheus Creek
Priority Date:	May 29, 1958	November 17, 1971	December 28, 1973
Beneficial Use:	Fish Propagation	Fish Propagation	Fish Propagation
Diversion Rate:	99.83 cfs	45.00 cfs	52.23 cfs
Period of Use:	Jan. 1 – Dec. 31	Jan. 1 – Dec. 31	Jan. 1 – Dec. 31

4. On May 19, 2005, the Director issued his Order in response to Blue Lakes' delivery call. According to the Order, "Springs discharging in the Thousand Springs area do not discharge at a constant rate or at a rate that progressively increases or decreases from year to year. While there are overall increases or decreases in the discharge from individual springs between years (inter-year variations), there are also pronounced within-year or intra-year variations in discharge from individual springs." *Order* at p. 10, ¶ 45.

5. Based on the inherent variability in discharge rates in the Thousand Springs area, and even though the total authorized diversion rate for Blue Lakes' rights is 197.06 cubic feet per second ("cfs"), the Order found that "[t]he rates of diversion authorized . . . are not quantity entitlements that are guaranteed to be available to Blue Lakes Trout. Rather, the authorized rates of diversion are the maximum rates at which water can be diverted under these rights, respectively, when such quantities of water are physically available and the rights are in priority." *Id.* at p. 11, ¶ 50.

6. Therefore, the Order stated that "Blue Lakes Trout can only call for the distribution of water to its rights through the curtailment of junior priority ground water rights from the hydraulically-connected ESPA when such curtailment would result in a usable amount of water reaching Blue Lakes' points of diversion in time of need, and depletions causing material injury as a result of diversion and use of ground water under such junior priority rights have not been adequately mitigated." *Id.* at p. 11, ¶ 51.

7. According to the Order, the diversion structure on Alpheus Creek, by which Blue Lakes diverts its water rights, is also used by Pristine Springs, Inc. ("Pristine Springs) for water right no. 36-02603C. Water right no 36-02603C has a priority of April 16, 1974, an authorized diversion rate of 25.3 cfs, and is used for fish propagation. Pristine Springs is located downstream from Blue Lakes and its "right is junior in priority to Blue Lakes' first right but senior in priority to Blue Lakes' second and third rights." *Id.* at 11, ¶ 53. The Order found that Pristine Springs was diverting and beneficially using water right no. 36-02603C.

8. The Order stated that even though Blue Lakes is authorized to divert 197.06 cfs, "the maximum amount of water known to have been diverted from Alpheus Creek by Blue Lakes Trout, for which recorded measurements are available to the Department, under the three rights" is 184.7 cfs. *Id.* at p. 13, ¶ 59.

9. The Order found that "the exercise of junior priority ground water rights have not reduced the quantity of water available for water rights no. 36-02356A and no. 36-07210. Therefore, there is no material injury to water rights no. 36-02356A and no. 36-07210." *Id.* at p. 26, ¶ 25.

10. However, the Order did find that junior ground water diversions were causing "delayed and long range" material injury to Blue Lakes' right to divert water under water right no. 36-07427. *Id.* at p. 27, ¶ 30.

11. The Order concluded that "unless a replacement water supply of suitable water quality for use by Blue Lakes Trout is provided by the holders of junior priority ground water rights causing material injury to water right no. 36-07427, or by the ground water district(s) or irrigation district through which mitigation can be provided, the Director should order the curtailment of such rights 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." *Id.* at p. 27, ¶ 31.

12. Moreover, the Order concluded that the "Director should order ongoing curtailment of junior priority ground water rights causing material injury to water right no. 36-07427 until there is no longer material injury. Material injury will cease when the total amount of water available for beneficial use by Blue Lakes Trout under rights no. 36-02356A, no. 36-7210, and no. 36-07427 at the average monthly seasonal maximum reaches 183 cfs, when Pristine Springs is diverting 25.3 cfs under water right no. 36-02603C, or up to 197.06 cfs when Pristine Springs is diverting less than 25.3 cfs. The rate amount of 183 cfs equals the maximum amount of water diverted by Blue Lakes Trout when Pristine Springs diverts 25.3 cfs . . . less the subordination to Blue Lakes Country Club for 1.7 cfs . . . ." *Id.*

13. In order to avoid curtailment, the Director provided alternatives to holders of junior priority ground water rights who consumptively use water in Water District No. 130 under rights later in time than December 28, 1973, excluding ground water rights used for de minimus purposes. First, the Director stated that "the irrigation district or ground water district(s) that hold or represent holders of ground water rights . . . must submit a plan or plans to the Director to provide mitigation by offsetting the entirety of the depletion to the ESPA under such rights or to provide Blue Lakes Trout with a replacement water supply of suitable water quality of 10 cfs (20 percent of 51 cfs), reduced by 20 percent of the average amount simulated to accrue to the Devil's Washbowl to Buhl Gage spring reach at steady state conditions resulting from approved mitigation plan(s), if any, or from suitably documented conversions from ground water irrigation to surface water irrigation, using the Department's ground water model for the ESPA." *Id.* at p. 28, ¶ (1).

14. To the extent a replacement water plan or mitigation plan is not timely submitted or approved by the Director, phased-in curtailment, over a period of five years, would be ordered. *Id.* at p. 28, ¶ (2).

15. As an alternative to a replacement water plan or mitigation plan, the Director stated that compliance with the Order could occur if "the irrigation district and ground water district(s) that hold or represent holders of ground water rights . . . forego (curtail) consumptive uses authorized under the affected water rights or other water rights beginning on June 7, 2005, over a period of not more than five years ('substitute curtailment') and continuing until further order of the Director so long as full beneficial use was made under the foregone rights in the prior year or use under the rights was foregone in the prior year for purposes of mitigation for which credits for mitigation to the Devil's Washbowl to Buhl Gage spring reach have not otherwise been granted." *Id.* at p. 29, ¶ (3).

16. On June 6, 2005, IGWA was granted intervention in this matter by order of the Director.

IGWA's Replacement Water Plan

17. On May 27, 2005, IGWA, on behalf of the Districts, submitted a replacement water plan to the Director for his review. *Ground Water Districts' Plan for Providing Replacement Water (Blue Lakes Delivery Call)* ("Replacement Water Plan").

18. IGWA states in its Replacement Water Plan that it represents holders of ground water rights in Water District No. 130 for "consumptive uses having priority dates later than December 28, 1973, that the Director deems to be causing material injury to water right no 36-07427 to provide mitigation by providing 'a replacement water supply from suitably documented conversions from ground water irrigation to surface water irrigation, using the Department's ground water model of the ESPA.'" *Replacement Water Plan* at 2.

19. IGWA states that the Replacement Water Plan is intended to comply with "the phased-in requirements intended to increase spring flows in the Devil's Washbowl to Buhl Gage spring reach ('Devil's Washbowl subreach') . . . ." *Id.* According to the Replacement Water Plan, replacement for depletions caused by diversion of ground water will be provided from four sources: (1) delivery of surface water for irrigation through the North Side Canal Company ("NSCC") system and continued deliveries of surface water through the NSCC system to the Sandy Pipeline Ponds; (2) voluntary curtailment of up to 10 percent of ground water irrigated acres by District members; (3) opportunistic ground water recharge; and (4) incremental substitution of curtailments of ground water irrigation through the Conservation Reserve Enhancement Program ("CREP") beginning in 2006. Attachment C of the Replacement Water Plan "describes the data analysis supporting ESPA Model runs" that compute steady state and transient gains to the Devil's Washbowl subreach resulting from these four proposed replacement activities. *Id.* at 4.

20. In order to satisfy "the phased-in requirements," the Order requires actions in 2005 that will increase reach gains in the Devil's Washbowl to Buhl Gage subreach by 10 cfs at steady state conditions. Therefore, assertions about transient state contributions contained in the Replacement Water Plan will not be discussed in this order. Furthermore, discussion and presentation of information in the Replacement Water Plan about past activities will also not be considered because these activities, most of which are ongoing, will be subsumed into the steady state analysis.

Surface Water Deliveries

21. The Replacement Water Plan proposes recognition of reach gains from surface water deliveries to conversions and Sandy Pipeline Ponds.

22. According to the Replacement Water Plan, and as documented in Attachment A, IGWA, on behalf of the Districts, "has obtained, or is obtaining surface water supplies in excess of 87,000 acre-feet ('AF') to be available in 2005 for direct delivery or by exchange to points of diversion above Milner Dam, including NSCC's point of diversion." *Id.* at 3. IGWA states that information concerning the supplies set forth in Attachment A was previously filed with the Department on April 29, 2005, and May 23, 2005.

23. Attachment A describes the surface water sources as follows:

2005 Replacement Water Sources

Source	Acre-Feet
FMC Lease	6,820
New Sweden Irr. Dist.	15,000
Peoples Canal Co.	3,000
Snake River Valley Irr. Dist.	2,000
Grindstone-Butte, et al. (High-lift exchange)	47,970*
United Water Idaho (High-lift exchange)	9,833**
Subtotal -- Surface water supplies	84,623
WD 120 Dry-Year Leasing	2,522***
Subtotal -- Above Milner water	87,145

* Based on total 2005 lease of 58,500 AF at 82% exchange credit from USBOR. Letter of Intent executed between Ground Water Districts and Lessors. Exchange Agreement with USBOR is pending.

** Based on total 2005 lease of 11,992 AF at 82% exchange credit from USBOR. Execution of lease agreement with Lessor and exchange agreement with USBOR are pending.

*** Eight separate dry-year lease agreements affecting 1,261 total acres in Bingham and Power Counties have been executed. Total associated consumptive use foregone in 2005 is 6,828 AF. First year reach gain increase in Blackfoot to Milner reach is 520 AF. Second year reach gain increase is 344 AF.

Replacement Water Plan, Attachment A.

24. In using the surface water supplies set forth in Attachment A, IGWA states it intends to divert "45,000 AF of surface water . . . through the NSCC system. This surface water will be used to irrigate those lands within the North Snake Ground Water District whose supply source has been converted from ground water to surface water. This surface water also will be used to provide a water supply to the Sandy Pipeline Project." *Id.* at 3.

25. IGWA proposes Department recognition of two components of replacement credits for delivery of surface water for irrigation: (1) seepage from delivery canals; and (2) reduction in ground water withdrawals because of conversion from ground water irrigation to surface water irrigation.

Canal Seepage

26. The Replacement Water Plan states that at steady state, as indicated by the Department's ground water model ("ESPA Model"), "7.1 cubic feet per second ('cfs') of reach gains will accrue to the Devil's Washbowl Subreach as a result of canal seepage from the deliveries in 2005 to Conversions and to the Sandy Pipeline Ponds." *Id.* at 4. Attachment C of the Replacement Plan "describes the data analysis supporting ESPA Model runs[]" computing reach gains seepage and other activities. *Id.*

27. Page 1 of Attachment C states: "Canal seepage of 30% was assumed, consistent with delivery accounting done by the North Side Canal Company. Seepage was subtracted from the total diversion and the remainder was treated as delivery to the conversion sites. . . . The canal seepage portion of the diversion was analyzed separately using the ESPA model as described later in this document."

28. Page 2 of Attachment C states: "Canal seepage was assumed to be 30% of the total amount of water diverted at Milner to serve existing conversions and to supply the Sandy Pipeline project. All seepage was assumed to occur in the North Side Canal. Seepage was distributed spatially among model cells intersected by the canal."

29. The overall seepage loss of 30 percent determined by the North Side Canal Company ("NSCC") delivery accounting is not the actual additional incremental loss from the NSCC canals and ditches resulting from additional deliveries of water for conversions and to the Sandy Pipeline. When the canals and ditches of NSCC are fully charged and water is already seeping into the ground, the addition of surface water on top of existing surface water flowing in the NSCC canals and ditches will not significantly increase the seepage from the canals and delivery ditches.

30. IGWA did not provide any information about the actual physical seepage of surface water from the North Side Canal to ground water resulting from delivery of surface water to the conversion acres and the Sandy Pipeline. The Department cannot determine the amount of replacement credit, if any, attributable to seepage.

Conversions from Ground Water Irrigation to Surface Water Irrigation

31. The North Snake Ground Water District ("NSGWD") conversions from ground water irrigation to surface water irrigation are described in Attachment B of the Replacement Water Plan. Attachment B summarizes conversions described as "online" in 2002, 2003, and 2004. For each conversion, the summary identifies the ground water right under which water will no longer be diverted, locates the well that by legal description presumably will not be used, and lists the number of acres that will be idled.

32. Department staff matched the well locations in Attachment B with power consumption data in Department records beginning in 1995. The annual power consumption data for each conversion well was averaged for the period from 1995 through the year prior to "online" conversion. If more than one year of electrical data was available after the conversion came online, the Department averaged the annual electrical consumption following conversion. The average electrical consumption prior to conversion was compared to the electrical consumption following the conversion. Some of the individual comparisons of pre-conversion and post-conversion reflect complete cessation of ground water pumping, creating a presumption of full conversion from ground water irrigation to surface water irrigation.

33. The electrical consumption comparison for most of the wells shows some reduction in power consumption. The electrical consumption comparison for a few wells reflects an increase in electrical consumption after conversion. The following is a summary of the comparisons:

Percent Reduction	Number of Wells	Percent of Wells
No Data	5	9.3
0 to 25%	10	18.5
25 to 50%	8	14.8
50 to 75%	7	13.0
75 to 100%	11	20.4
Over 100% (KWH Increase)	13	24.0
Total	**54**	**100.0**

34. The water master of Water District No. 130 visited some of the conversion sites and found that the diversion works at the visited sites were capable of delivering both surface water and ground water to the lands identified for conversion. Some of the lands identified for conversion have probably been irrigated with both ground water and surface water after the conversion was "online."

35. Some of the continuing or increased power consumption for the identified wells also might be the result of a number of additional unknown circumstances including additional pumping requirements added for surface water deliveries, mismatching of electrical records with

wells, or continued pumping of ground water for irrigation of lands not included in the conversion acreage.

36. In addition to comparison of the power consumption information, the Department also reviewed each water right identified to: (a) compare the acres IGWA asserts are now irrigated by surface water with the place of use identified in the water right; (b) identify potential overlaps in places of use or points of diversion; and (c) determine whether the identified ground water right is supplemental or primary.

37. When the Department investigated the water rights in Basin 36 for the SRBA, Department staff attempted to determine whether lands irrigated with ground water were also irrigated with surface water. When a dual source of ground water and surface water irrigation was identified, Department staff entered a remark in the recommendations to the SRBA District Court stating that NSCC surface water also irrigates the place of use.

38. Department records show that 26 of the 54 ground water rights identified by IGWA as describing places of use that were converted from ground water irrigation to surface water irrigation were ground water rights supplementing a surface water supply from the NSCC.

39. The ground water model divided the ESPA into grid cells. Numerical water use data within each cell were input into the model. The model uses the input data to determine ground water depletions within the individual cell. Data about mixed water use on lands irrigated by NSCC surface water and ground water were analyzed. The analysis determined that seven-tenths of the irrigation water is surface water and three-tenths of the irrigation water is ground water.

40. For the 26 ground water rights shown to supplement NSCC surface water, recognized acreage for conversion was reduced to three-tenths of the acreage that could be irrigated under the identified water right.

41. Some of the acreage identified exceeded the total number of acres that could be irrigated under the water right identified by the Replacement Water Plan. The conversion acres were limited to the water right acres.

42. The following are reductions in the conversion acres resulting from the identified discrepancies:

Water Right No.	Owner	IGWA Plan Acres	Water Right Acres	Supplemental	Adjusted Acreage for model
~~36-02067~~(incorrect)					
36-2087K	K & W Dairy	1010.0	126.2		126.2
36-02160A	Smith, Ronnie D.	96.0			96.0
36-02290	Dimond, Gary B. & Ruth P.	101.0		NSCC	30.3
36-02294	Bolich, Rodney E. & Stanley D.	640.0	320.0		320.0
36-02316	Standing Hat Ranch Inc.	120.0	120.0	NSCC	36.0
36-02316	Standing Hat Ranch Inc.	175.0	0.0	NSCC	0.0
36-02359	Henry Farms	200.0	287.0		200.0
36-02412C	Canyonside Dairy	550.0	322.0		322.0
36-02412C	Canyonside Dairy	0.0			0.0
36-02412C	Canyonside Dairy	0.0			0.0
36-02426	Connor, Keith A.	124.0	78.0		78.0
36-02444	Huettig Brothers	160.0	316.0		160.0
36-02474A	De Kruyf Dairy	163.0	146.3	NSCC	43.8
36-02493	Fleming, Bill C. & Pamela	0.0			0.0
36-02497	Strickland, Evelyn G.	41.0	41.0	NSCC	12.3
36-02503A	Rojas, Wilma L.	17.0	17.0	NSCC	5.1
36-02507	Hirai, Jack J. or Kunie	75.0	75.0	NSCC	22.5
36-02513	Henry Farms	286.0	191.0	NSCC	57.3
36-02539A	Roth, James	161.0	161.0	NSCC	48.3
36-02666	Bettencourt, Luis	168.0	168.0	NSCC	50.4
~~36-02858~~ (incorrect)					
36-2658	Dewit, Neil & Melinda	80.0	80.0		80.0
36-04117	Box Canyon Dairy	25.0	25.0	NSCC	7.5
36-04151A	Box Canyon Dairy	18.0	18.0		18.0
36-07145	Richard Trail Trust	160.0	130.0	NSCC	39.0
36-07156	Vader, Orval E.	190.0	190.0		190.0
36-07207A	Ruby, Kenneth E.	134.0	64.0		64.0
36-07214	Anderson, Kenneth C.	144.0	144.0		144.0
36-07260A	Verbree Jr., Jack	120.0	120.0	NSCC	36.0
36-07288A	McReits LLC (formerly Beukers)	229.0	229.0	NSCC	68.7
36-07291C	Hubbard, Edward & Geneva	52.0	51.8		51.8
36-07310	Wert, Wayne K.	144.0	144.0	NSCC	43.2
36-07341	Veenstra, Frank/Wellard, Larry	22.0	103.0		22.0
36-07342	Johnson, Jr., Elmer & Judy	231.0	151.0		151.0
36-07352	Jerome Cheese/Davis Family Idaho	151.0	151.0		151.0
36-07376	Veenstra, Frank	110.0	185.0		110.0
36-07499A	Bettencourt, Luis	113.0	113.0	NSCC	33.9
36-07569	Veenstra, Frank/V & L Dairy	302.0	302.0		302.0

36-07576	Brandsma Dairy	140.0	140.0	NSCC	42.0
36-07617	Jerome Cheese/Davis Family Idaho	214.0	619.0		214.0
36-07617	Jerome Cheese/Davis Family Idaho	405.0			405.0
36-07617	Jerome Cheese/Davis Family Idaho	0.0			0.0
36-07666A	Veenstra, Frank	60.0	82.0	NSCC	18.0
36-07714A	Dewit, Neil & Melinda	120.0	188.0	NSCC	36.0
36-07714B	Dewit, Neil & Melinda	144.0	144.0	NSCC	43.2
36-07782	Church of Jesus Christ Latter (5)	132.0	132.0	NSCC	39.6
36-07817	Harms, Boyd L.	22.0	55.0		22.0
36-08000	Wert, Loren	40.0	40.0	NSCC	12.0
36-08333	Smith, Ronnie D.	183.0	183.0		183.0
36-14649	Benedictine Monks of Idaho Inc.	425.0	399.0		399.0
36-15174A	Bettencourt, Luis	154.0	154.0		154.0
36-16187	Ted Miller Dairy	130.0	39.5	NSCC	11.8
37-07343	Ravenscroft, Bryan	90.0	90.0	NSCC	27.0
37-07805	Borchard, John	304.0	39.0	NSCC	11.7
37-08005B	Sawtooth Sheep Co. Inc.	494.0	111.0	NSCC	33.3

43. The conversion acreage identified by IGWA as irrigated by surface water instead of ground water was adjusted by reducing the acreage as described in the discrepancy summary above. The adjusted conversion acreage was input into the ESPA Model. Despite significant evidence from power consumption records that ground water continues to be delivered to the conversion acres, the Department was not able to quantify how much of the continued electrical consumption is attributable to continued ground water diversion. As a result, the Department did not reduce the conversion acreage because of the power consumption analysis. The input to the ESPA Model assumes full conversion from ground water irrigation to surface water irrigation.

44. Simulated conversions for water right nos. 36-2160A and 36-7156 were then trimmed from the adjusted conversion acreage and the effects of conversion were again simulated using the ESPA Model. The conversions for water right nos. 36-2160A and 36-7156 were trimmed because less than 10 percent of the depletion to the ESPA under these rights comprises a reduction in the reach gain in the Devil's Washbowl to Buhl Gage spring reach at steady state conditions. Ten percent is the uncertainty in the ESPA Model.

45. The model was run to determine steady state conditions resulting from full conversion from ground water irrigation to surface water irrigation. The ESPA Model calculated a steady state reach gain from full conversion of 5.3 cfs.

46. Replacement credit of 5.3 cfs for conversions is contingent upon full and complete cessation of ground water irrigation of the conversion acreage.

Opportunistic Recharge

47. Attachment B contains spreadsheets titled: (a) "Ground Water Users Running Water Through NSCC System" for "Deliveries & Recharge;" (b) "Flood Control Sites;" (c) "Water delivered October 19th through around 27th 2002;" and (d) other references to water having been delivered through the NSCC for recharge or other unidentified reasons. These

spreadsheets contain numbers that may be water volume delivered to various sites for what is discussed in the Replacement Water Plan as opportunistic recharge.

48. The spreadsheets do not state the volumetric units for each site or activity. The spreadsheets do not identify what water rights are being exercised for opportunistic recharge. Except for the Sugar Loaf site, the Department is unaware that any of the sites identified are authorized for use of water for managed recharge. Some of the activities identified are normal operating activities of surface water users or the NSCC.

49. Recharge must be conducted according to Idaho law. Recharge water must be consciously delivered for recharge purposes or put in place as a recharge activity and not as ordinary operations of NSCC. Delivered recharge water must be measured and monitored.

Voluntary Curtailment

50. The Replacement Water Plan states that the Districts have submitted written requests to their members to voluntarily reduce acres that were irrigated by ground water in 2004 by 10 percent, "and provide documentation to the Districts by July 1 of all reductions undertaken. The Districts will make this documentation available to the Water District 130 Watermaster and interested parties. Reach gains predicted to result from these voluntary reductions will be additive to the steady state and transient reach gains described above." *Id.* at 5.

51. The Replacement Water Plan describes steady state reach gains from additional voluntary curtailment of ground water irrigation pumping in 2005.

52. The Order required that alternative curtailment acres be identified by May 30, 2005. The discussion of a process to solicit voluntary curtailment and identify alternative curtailment acres by July 1, 2005, does not respond with sufficient certainty to the requirements of the Order. The Department cannot determine the reach gains resulting from non-irrigation of an unknown number of acres, the location of which has not been identified.

Conservation Reserve Enhanced Program (CREP)

53. The Replacement Water Plan describes steady state reach gains from additional curtailments of ground water irrigation pumping resulting from CREP implementation.

54. The Replacement Water Plan states that IGWA and the Districts intend to implement a CREP "with a potential for ESPA-wide participation of up to 100,000 acres. The Idaho Governor's Office, with IGWA's cooperation, has applied for federal approval of a 100,000 acre CREP program for southern Idaho." *Id.* at 6. According to the Replacement Water Plan, "CREP is proposed to be initiated in 2006, and is expected to achieve full enrollment by 2008." *Id.*

55. The Order required replacement water in 2005. The state of Idaho does not currently have a CREP program, and one cannot be implemented for 2005. In future years, a

CREP may be the source of additional replacement credits, but a CREP cannot be a source of mitigation credits in 2005.

Other Provisions

56. The Replacement Water Plan describes accounting, monitoring, and management practices that will be employed in the future. These are important activities of the Districts and the Department. The Districts, represented by IGWA, bear a responsibility for these activities, but the details of the activities will be determined by the Department and the Districts in the future.

Additional ESPA Model Run

57. Based on the above findings of fact, if 5.3 cfs of steady state credit is granted to the Districts and IGWA, another 4.7 cfs of steady state contribution to steady state reach gains must be identified and contributed to equal the 2005 steady state reach gain requirement of 10.0 cfs. The additional steady state reach gain of 4.7 cfs could be accomplished by curtailment.

CONCLUSIONS OF LAW

1. The Director of the Idaho Department of Water Resources recognizes the importance under Idaho law of protecting the interests of a senior priority water right holder against interference by a junior priority right holder from a tributary or interconnected water source. Art. XV, § 3, Idaho Const.; Idaho Code §§ 42-106, 42-237a(g), and 42-607.

2. Idaho Code § 42-602 states:

> 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 there from. 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 the water districts in accordance with the prior appropriation doctrine.

3. Idaho Code § 42-607 provides that the following shall apply during times of scarcity of water when it is necessary to distribute water between water rights in a water district created and operating pursuant to chapter 6, title 42, Idaho Code, in accordance with the priority of those rights:

> [A]ny person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a

> right subsequent to any adjudicated, decreed, permit, or licensed right in such steam or water supply . . . .

4. While there may be some additional seepage loss resulting from delivery of surface water though the NSCC system to replace ground water diversions or replace reduced spring flows through the Sandy Pipeline, IGWA did not present any technical analysis of the actual additional seepage losses in the NSCC delivery system resulting from the delivery of the additional surface water. The Department cannot credit IGWA with replacement gains, unless the gains are computed based on actual seepage data for the surface water added to the NSCC delivery system.

5. A change in the source of irrigation supply from ground water to surface water will reduce the depletions to the ESPA. Replacement credit for the conversions must be based on actual reduction in irrigation with ground water. Full replacement credit can only be granted if the lands were once fully irrigated with ground water and are now being fully irrigated with surface water.

6. When NSCC has primarily supplied the irrigation water historically, replacement water credits for reductions in ground water irrigation are limited to the simulated gains in the Devil's Washbowl to Buhl Gage spring reach resulting from elimination of the historical depletions to the ESPA from supplemental use of ground water. The best method of determining the portion of the water supply from ground water for these mixed use acres is the value used in the ESPA Model of three-tenths of the total water supply. Multiplying the acres irrigated with a mixed supply of surface water and ground water by seven-tenths and three-tenths, respectively, proportions the acres irrigated into equivalent acreages that would receive a full supply of water from surface water and those that would receive a full supply from ground water. Only the number of equivalent acres that would receive a full supply from ground water are eligible for replacement credits.

7. For the conversion acres, the Replacement Water Plan identified a water right, a point of diversion, and other components of the water rights. When inconsistencies in the information were found, the Department can only grant credit for the most limiting of the related pieces of information.

8. IGWA should receive credit for steady state reach gains of 5.3 cfs to the Devil's Washbowl to Buhl reach as a result of ground water to surface water conversions.

9. The Replacement Water Plan calls for future "opportunistic recharge," and may contain information related to past recharge activities. Replacement credit cannot be granted for recharge activities unless the recharge is conducted according to the law, is consciously delivered or put in place as recharge activity and not as ordinary operations of NSCC, and is measured and monitored.

10. An undocumented proposal to voluntarily curtail diversions in the future is too uncertain to grant replacement water credits for reach gains in the Devil's Washbowl to Buhl Gage spring reach.

11. To comply with the Order, IGWA and associated ground water users must: (a) undertake additional actions in 2005 to provide an additional 4.7 cfs in steady state reach gains to the Devil's Washbowl to Buhl spring reach; (b) curtail water rights in 2005 sufficient to supply the additional 4.7 cfs of steady state reach gains; or (c) supply a full 10.0 cfs of water of suitable quality to Blue Lakes during 2005. The full 10.0 cfs would include any transient reach gains to Alpheus Creek during 2005 resulting from past mitigation activities.

ORDER

The Director enters the following Order for the reasons stated in the foregoing Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED that the IGWA Replacement Water Plan is partially approved as follows:

(1) A credit for 5.3 cfs steady state replacement to the Devil's Washbowl to Buhl Gage spring reach is recognized for conversions from ground water irrigation to surface water irrigation.

(2) Wells that once provided ground water to the conversion acres must be disabled so water cannot be diverted from the wells or, alternatively, a means of accounting employed, as approved by the Watermaster of Water District No. 130 and the Department that will prevent diversion of the ground water replaced by surface water and to prevent delivery of ground water to the conversion acres.

(3) No replacement credit is recognized for seepage losses for deliveries of mitigation water to conversion locations and to the Sandy Pipeline.

(4) No replacement credit is recognized for *ad hoc* or ordinary NSCC operation activities that result in opportunistic recharge.

(5) No replacement credit is recognized for future, voluntary alternative curtailments that have not yet been identified.

(6) No credit is recognized for future Conservation Reserve Enhanced Program enrollments that will result in the future cessation of irrigation of additional lands.

IT IS FURTHER ORDERED that the 5.3 cfs of replacement credit granted for conversions is not sufficient replacement water to satisfy the 2005 requirement of 10.0 cfs flow in the Devil's Washbowl to Buhl Gage spring reach at steady state conditions.

IT IS FURTHER ORDERED that the Districts and IGWA are granted until June 14, 2005, to identify specific actions in 2005 in addition to the steady state replacement water

provided by the existing ground water to surface water conversions that will provide the full 10.0 cfs of replacement water in the Devil's Washbowl to Buhl Gage spring reach at steady state conditions based on simulations using the ESPA Model.

IT IS FURTHER ORDERED that alternatively the Districts and IGWA can provide replacement water of suitable quality of 10.0 cfs directly to Blue Lakes during 2005 as set forth in the Order of May 19, 2005.

IT IS FURTHER ORDERED that failure to provide (a) the full 10.0 cfs of steady state replacement water to the Devil's Washbowl to Buhl Gage spring reach required from actions in 2005, or (b) 10.0 cfs of replacement water directly to Blue Lakes, will result in curtailment of ground water rights bearing priority dates later than a date to be determined based on the amount of the short fall and simulations using the ESPA Model.

DATED this 7th day of June 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of June, 2005, the above and foregoing document was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Victoria Wigle

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