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 **(Blue Lakes Delivery Call)**	)	**OPINION CONSTITUTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION**
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 FARMS) **(Clear Springs Delivery Call)**	)	

Hearing was held commencing November 28, 2007, to resolve disputes arising from the Director's Orders entered May 19, 2005, concerning the delivery call made by Blue Lakes Trout Farm, Inc. and the Order entered July 8, 2005, concerning the delivery call made by Clear Springs Food, Inc. for Snake River Farm. When issues common to Blue Lakes and Clear Springs are considered they are referred to as the Spring Users, a term that is not inclusive of other users of spring water in the reaches of concern. The Spring Users are aquaculture businesses that use water flowing from springs in the Thousand Springs Reach to raise trout for sale. IGWA, Idaho Ground Water Appropriators, Inc., is a collective association of ground water users including the North Snake Ground Water District and the Magic Valley Ground Water District. Members of IGWA are subject to the Director's Orders which mandated curtailment of ground water usage to meet the Spring Users' delivery calls. The Idaho Dairymen's Association and Rangen, Inc. participated in the hearing with regard to issues of common concern with the Spring Users and IGWA, as did the cities of Wendell, Shoshone, Paul, Jerome, Heyburn and Hazelton. Prior to hearing the parties filed written testimony and exhibits of expert witnesses and some lay witnesses who were then subject to examination on their

testimony at hearing. The Idaho Department of Water Resources is not a party in this proceeding. The Department provided witnesses to explain the background of the Department's action and the administrative record relied upon by the Director in entering the Orders at issue to assist the parties and the Hearing Officer. Some issues were determined by summary judgment prior to trial. A copy of that opinion is attached for further explanation of those determinations.

Also at issue in this case are orders entered and actions taken by the Department subsequent to the May 19 and July 8, 2005, orders. These concern efforts by IGWA to avoid curtailment by alternate methods and the Director's responses to those efforts.

I.

HISTORICAL BACKGROUND

The current legal dispute arises from the dilemma of attempting to parse out the rights to water when there are more demands, and in fact more paper rights to water, than there is available water in times of shortage. The scientific and cultural history leading to this dispute is epic in the development of a significant portion of the State. It is important to understand to avoid simplifying the case by identifying villains to be the scapegoats and losers. Resolution would be easy if that were the case. This is a case, however, of industrious and often visionary people pursuing laudable goals dependent upon a water resource that for decades appeared infinite and is now known to be finite and in fact in short supply.

1. The Eastern Snake River Plain Aquifer. An aquifer is an underground source of water. The Eastern Snake River Plain Aquifer (ESPA) underlies the Eastern Snake River Plain that is approximately 170 miles long and 60 miles wide. The ESPA begins at the Teton Range near Ashton in the east and extends in a southwesterly direction following the Snake River downstream to King Hill. It comprises more than 10,800 square miles. There are estimates that it contains approximately one billion acre feet of water. The aquifer is made up primarily of fractured basalt, sometimes interspersed with river sediment or windblown material. It ranges in depth from thousands of feet to much more shallow levels. The significance of its structure is that it forms a conduit for the flow of water, but that flow is neither consistent in pace nor direction. Unlike a river channel that can be observed and which flows along clearly defined lines and identifiable speeds, water in the aquifer may move as little as 0.1 feet per day to as

much as 100,000 feet per day. The fractured basalt may form barriers that impede the flow of water and change its direction or may form conduits that channel the flow of water, allowing it to move quickly from one point to another. The movement is below ground. Consequently, particular water cannot be traced from one precise point under ground to another precise point where it emerges to the surface. This becomes significant in determining the cause and effect of junior ground water usage upon senior surface water rights. At any given point in its travels water may be either ground water or surface water as it enters or exits the aquifer.

2. The development of irrigation on the Eastern Snake River Plain. The initial development of irrigation in Idaho began in the second half of the 19th century when water was diverted from the Snake River and its tributaries and delivered to crops by channels on the ground – flood irrigation. From this practice developed what is called incidental recharge of the aquifer. That is, water that was not consumed by the crops or through evaporation entered the ground and joined the water that was in the aquifer. As a consequence, the level of water in the aquifer rose above what that level would be absent the irrigation practices. As the extent of flood irrigation increased, incidental recharge increased. This trend continued until the middle of the twentieth century at which time there were approximately 1.83 million acres under irrigation. At that time two developments occurred. In the 1950's Idaho Power had abundant inexpensive electrical power for which it needed a market in the summer. Idaho Power and the State of Idaho through its policy makers encouraged ground water development and the expansion of farming by pumping water from the aquifer. This was the science that made practical irrigation in areas that were impractical for flood irrigation from the river. It was, as the promotional literature of the day stated, the way to use this vast reservoir of untapped water and to make the desert bloom. That is what happened. Water in vast quantities began to be withdrawn from the aquifer for agricultural purposes.

3. The changes in irrigation practices. Coordinate with the development of ground water pumping was a change in irrigation practices by many surface water users who moved away from flooding the ground to the more efficient method of sprinkler irrigation. Flooding typically used more water than was necessary for crop growth. Additionally, it often meant crops at the beginning of the diversion received more water than crops further down the line and that it was impractical to deliver water to some property that would otherwise produce crops.

The use of sprinkler irrigation allowed the more efficient and uniform use of water. The collateral effect of this change was a reduction of the incidental recharge that had occurred with the less efficient flooding practices.

4. The need for conjunctive management of surface and ground water. Ground water pumping increased, incidental recharge diminished, and additional water rights were licensed. No doubt many people understood the connection between the water on the surface in the Snake River and its tributaries and the water below the ground in the aquifer. Nonetheless, for a significant period of time the connection was ignored as the administration of surface water and ground water progressed independent of one another. Ultimately the connection became obvious and the need for conjunctive management apparent. A drought of historic proportions that began in 2000 brought the problem to a head.

II.

THE SPRING USERS' WATER RIGHTS

1. **The Blue Lakes Trout Farm, Inc. rights at issue.** On March 22, 2005, Gregory Kaslo of Blue Lakes Trout Farm, Inc. provided a letter to the Director of the Department of Water Resources demanding that the Director "direct the watermaster for Water District 130 to administer water rights in the Water District as required by Idaho Code Section 42-607 in order to supply Blue Lakes prior rights." The letter asserted that Blue Lakes was then receiving 137.7 cfs and that at its low point in 2003 it received only 111 cfrs. The letter sought protection for Water Rights 36-02356A for 99.83 cfs with a priority date of May 29, 1958, 36-07210 for 45 cfs with a priority date of November 17, 1971, and 36-0747 for 52.23 with a priority date of December 28, 1973. Collectively the three water rights total 197.06. The water rights are for fish propagation and the period of use is January 1 through December 31.

2. The Blues Lakes facilities. The Blue Lakes Farm is located in the Thousand Springs in which there are numerous springs that emanate from the canyon walls. The Thousand Springs area is divided into six spring complexes or reaches: a) Devil's Washbowl to the USGS stream gage near Buhl, b) Buhl Gage to Thousand Springs, c) Thousand Springs, d) Thousand Springs to Malad Gorge, e) Malad Gorge, f) Malad Gorge to Bancroft. The Blue Lakes Trout Farm is in the Devil's Washbowl to Buhl spring reach which includes springs having moderately large rates

of discharge at intermittent locations. Blue Lakes diverts water from Alpheus Creek which is formed by spring water. The Blue Lakes facility consists of three ponds with 35 raceways each for a total of 105 raceways. Water passes from one set of raceways to a lower set by gravity flow with settling areas between the ponds. The youngest fish receive the water at the upper raceways to provide them with the purest water when they are most vulnerable to disease. The Blue Lakes facility is designed to use the 197.06 cfs. decreed.

3. Clear Springs Food, Inc. On May 2, 2005, Larry Cope of Clear Springs provided two letters to the Director requesting water rights administration in Water District No. 130 pursuant to Idaho Code Section 42-607 for the benefit of rights held by Clear Springs for use at the Snake River Farm and Crystal Springs Farm. The Snake River Farm facility which is at issue is located in the Buhl to Thousand Springs reach westerly of the Blue Lakes facility. The Snake River Farm facility is served by water rights 36-02703 for 40.00 cfs issued November 23, 1933, 36-02048 for 20.00 cfs issued April 11, 1938, 36-04013C for 14.00 cfs issued November 20, 1940, 36-04013A for 15.00 cfs issued September 15, 1955, 36-04013B for 27.00 cfs issued February 4, 1964, 36-07148 for 1.67 cfs issued January 31, 1971. The total of the water rights is 117.67 cfs year round and is a non-consumptive use. The water rights derive from spring flows that are collected and used in a manner similar to the Blue Lakes process.

4. The Spring Users' water rights are non-consumptive. The use of water by Blue Lakes and Clear Springs is non-consumptive. Unlike growing crops which take water into their structure which depletes the water supply, water used in the trout farms passes on and may be used again in lower elevations, similar to the non-consumptive use of hydroelectric power plants.

5. The quality of water is important for the propagation of trout. The use of spring water from the aquifer is important to the maintenance of the trout farms. The temperature, purity and oxygen content of the water from the springs makes it desirable for trout farming.

6. The use of water by the Spring Users is a beneficial use. The propagation of trout is a substantial business that competes in a global market. Blue Springs markets nationally. Clear Springs markets internationally. Water they receive pursuant to their water rights enables them to engage in an enterprise that benefits the owners and employees and the State of Idaho through tax revenues and employment. Each is capable of utilizing the total amount of water

decreed in their various rights to produce trout. The more water available under the rights the more fish they can produce.

7. The Spring Users need an adequate supply of water every day of the year. Trout propagation is a year round process. An adequate and predictable supply of water is necessary twenty-four hours a day. An interruption in the flow of water to the raceways would be devastating to the fish crop.

III.

THE DECLINES IN SPRING FLOWS AND THE CONSEQUENT RIGHT TO CURTAILMENT

1. There has been a decline in the spring flows in the Thousand Springs area from the time of and before the adjudication of the Spring Users water rights which has reduced the water available to their facilities well below the adjudicated amounts. The flow records of Blue Lakes show consistent declines in average daily flows from 1995 through 2004, ranging in the areas of 20cfs to 10cfs, depending on the months within the years. The former Director compared the November, 2004, average daily flow of Blue Lakes of 149.45 cfs to the USGS records for November 10, 1980, a time following Blue Lakes' last water right. The USGS record indicated that Blue Lakes would have received 184.7 cfs, accounting for that portion of the flow that would have been diverted to Pristine Springs senior right.

Analysis of records available for the Snake River Farm facility indicated spring flows from November 1, 1989, of 116 cfs, compared to 93.18 cfs October 20, 2004, which amounts to a decline of approximately 21%. There are variations in years and within years, but the long term trend has been a significant decline in the flow of water to the Spring Users' facilities.

2. Ground water pumping is a contributing factor to the decline in spring flows. Various factors contribute to the decline in spring flows, including reductions in incidental recharge as a consequence of improved irrigation practices, ground water pumping, and most recently, drought. Ground water pumping accounts for a withdrawal of nearly 2.0 million acre feet of water from the aquifer annually. Ground water pumping for agriculture is a consumptive

use and must have an effect upon the amount of water in the aquifer that will continue to the Thousand Springs area.

3. Agricultural ground water pumping accounts for 95% of the withdrawal from the aquifer. USGS records for the year 2000 indicate that 95% of ground water use is for agriculture. The remaining 5% is divided among public use (2.6%), domestic (1.2%), industrial (0.7%) and livestock (0.6%).

4. The relevant periods for consideration of aquifer levels are those beginning when the water rights were licensed or adjudicated. IGWA argues that analysis of the Spring Users' rights to water should look back to the time before incidental recharge from flood irrigation dramatically increased the amount of water in the aquifer. IGWA maintains that the spring flows were artificially inflated by decades of inefficient flood irrigation practices when vastly more water was placed on the ground than was necessary for crop growth. There is evidence that in the early part of the twentieth century some flood irrigators poured as much as thirty acre feet of water onto the land when only two acre feet was necessary, resulting in a mass of water going into the aquifer. Dr. Charles Brendecke testified that early ground water development was almost non-existent in the early 1900's and points to early measurement records that show significantly lower spring discharges in the Thousand Springs area than at the time the Spring Users' rights were licensed. He maintains that measurements in 1902 showed that Blue Lakes Spring, synonymous with Alpheus Creek, showed flows of 86.37 cfs in April and 80 cfs in August. Together with other information, he concludes that the natural flow of the springs in the Thousand Springs area was significantly lower than flows when the Spring Users rights were licensed and subsequently adjudicated. This was primarily the consequence of incidental recharge from surface irrigation practices. From this type of information IGWA maintains that there should not be curtailment when the Spring Users rights are dependent upon an inflated water level that was dependent upon incidental recharge that resulted from inefficient farming practices that cannot now be required.

There is a serious question as to the reliability of the 1902 measurements. Nonetheless, it is clear that the level in the aquifer increased when there were inefficient flood irrigation practices and has declined with the advent of more efficient practices. However, the extreme result pressed by IGWA is unacceptable.

5. To the extent that the level of the aquifer increased from irrigation practices, the ground water users began pumping from the same increased level. Were the calendar turned back to 1902 levels, the priorities would still be the same. The Spring User senior rights would come ahead of the ground water junior rights. The Spring Users cannot require the continuance of inefficient flood practices. To the extent spring flows decline as a consequence, the Spring Users lose water without recourse. But to the extent that water is in the aquifer subject to appropriation, senior rights come ahead of junior rights. Otherwise it would result in junior ground water users continuing to pump to the detriment of senior surface water users simply because they can reach water that would otherwise continue in the aquifer until it emerged at the Thousand Springs area. The Spring Users are entitled to curtailment to the extent that the junior ground water users interfere with the water the Spring Users would otherwise have under their water rights.

IV.

THE DIRECTOR'S ORDERS

The Director responded to the calls made by the Spring Users with Orders dated May 19, 2005, determining the Blue Lakes call, and July 8, 2005, concerning the Clear Springs call. There are common issues in dispute in the two orders, including the determination that the Spring Users are entitled to curtailment of some junior ground water users, the exclusion of some junior ground water users from curtailment, a limitation on the amount of water to which the Spring Users are entitled to under the calls, and the implementation of the orders which included alternatives available to the ground water users to avoid curtailment. There are issues concerning the use of pre-adjudication information and seasonal differences in spring flows in making the determination of the extent of the curtailment. There is an issue as to whether the model (ESPAM) developed for the use in conjunctive management of surface and ground water should be relied upon.

V.

THE EFFECT OF THE AMOUNT ADJUDICATED IN THE PARTIAL DECREES AND THE BURDENS OF PROOF

1. There is a presumption that a senior water user is entitled to the amount of water set forth in the partial decree. *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources,* 143 Idaho 862, 878, 154 P.3d 433, 449 (2007), addressed the threshold burden in a water adjudication:

> The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has. We note that in the Initial Order entered in this case, the Director requested extensive information from American Falls for the prior fifteen irrigation seasons, to which American Falls objected in part. While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on a senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication facts which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right.

2. The senior water right holder must allege material injury under oath setting forth the basis of that belief. *Id., 878:*

> The Rules require the petitioner, that is the senior water rights holder, to file a petition alleging that by reason of diversion of water by junior priority ground water rights holders, the petitioner is suffering material injury. That is consistent with the statutory provision which requires a surface priority water right holder claiming injury by junior water right holders pumping from an aquifer to file a "written statement under oath" setting forth "the facts upon which [he] founds his belief that the use of his right is being adversely affected" by the pumping. I.C. sec. 42-237b. The Rules further provide that the petitioner file a description of his water rights, including the decree, license, permit or claim for such right, the water diversion and delivery system he is using and the beneficial use being made. The Rules then provide three additional types of information which must be provided by the petition; however, the Rules are clear in saying that the additional information should be provided only *if available* to the petitioner.

In this case the Spring Users did not follow this process. They made calls for water by demands in letters. Nonetheless, the Director treated those letters as sufficient calls for water and initiated the investigation that led to the curtailments in this case. There is now considerable sworn

testimony as to the basis for the claims of material injury. The threshold showings necessary by the Spring Users have been made. They demonstrated their decreed rights and they have now alleged under oath material injury, i.e., they cannot utilize their fish propagation facilities fully from lack of their adjudicated rights.

3. "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *AFRD#2,* 879.

4. The decreed amount of a water right is a maximum amount to which the right holder is entitled. The right holder is presumed entitled to that amount, and the burden is upon a junior right holder to show a defense to a call for the amount of water in the partial decree. Id. 878, 879. The Director ordered curtailment of junior ground water rights holders but not to an extent that would ultimately meet the amounts set forth in the partial decrees. There are questions as to whether there was information produced that would overcome the presumption that the senior right holders are entitled to the full extent of their adjudicated rights.

5. The Director could consider information prior to the partial decrees in considering curtailment. It is clear that the Director could consider post-adjudication information in deciding whether to curtail junior rights holders. This case presents the question of whether it was proper to consider pre-adjudicative historical factors in determining issues of curtailment. The answer to the question of the use of pre-adjudicative information begins with the nature of the adjudicated right. If the adjudicated amount is the fixed amount of water to be provided at all times if it may be put to a beneficial use and absent waste, it would seem that pre-adjudication history is irrelevant. On the other hand if the adjudicated amount represents a maximum amount of water that may be used, historical information is relevant to determine what a water user could reasonably expect to be available at the time of licensing and subsequent adjudication short of optimal conditions when the full amount of water will appear without curtailment. The Spring Users maintain that such a process is a re-adjudication of the senior user's water right and impermissible. It is not. The right to the adjudicated amount continues. The question remains whether the information informs the Director as to any defenses that might be available to the calls.

The practice has been to license and subsequently adjudicate the water right as a maximum amount. The Director properly determined that he could examine historical information, together with post-adjudicative information, to utilize in determining the amount of curtailment, if any

VI.

THE REASONABLENESS OF ALTERNATIVE METHODS OF DIVERSION

1. The Spring Users are not required to pursue alternative methods of diversion. In the order resolving the motion for summary judgment and partial motion for summary judgment resolved prior to hearing the Hearing Officer ruled that the evidence established that the Spring Users' means of diversion were reasonable and that there was no evidence that the Spring Users had an obligation to "chase" water, a practice in ground water use. This concept was renewed at the hearing. The result does not change.

2. The current means of diversion are reasonable. The burden is on IGWA to show that there is a satisfactory alternative to curtailment that would satisfy the adjudicated rights of the Spring Users. There is speculation offered, but there is no scientific evidence that would lead to the conclusion that the Spring Users are neglecting a reasonable opportunity to satisfy their water rights in an alternative manner. Brian Patton, an engineer with IDWR examined the Spring Users' diversion facilities. He testified that horizontal wells into the canyon wall might be an option, but that such a proposal would need extensive study. IGWA offered no such evidence, and there appears to be none in the record. There is no evidence of cost or probable results.

3. The collateral effects of drilling for water in the Spring User reaches have not been established. The former Director determined in the Orders that the Spring Users were no obligated to pursue alternate means of diversion considering the nature of their water rights. At hearing he testified that he considered this proposed solution but rejected it because it would most likely lead to similar efforts along the spring reaches by others with rights dependent upon the springs pursuing the same water. The resulting actions might lead to additional problems of administration.

VII.

THE PROPOSAL FOR REUSE OF WATER BY THE SPRING USERS

1. The Spring Users are not obligated to pursue repumping of water beyond the current practices. IGWA maintains that the Spring Users should be required to institute systems for resuse of the water they receive before calling for the curtailment of junior rights. At the present time water is reused in the trout farms as it moves from one set of raceways in a pond to a lower set of raceways. The process works by gravity and utilizes a settling system between the ponds. IGWA maintains that this process can be replicated by repumping the water through the raceways. This is a theory. The burden of proof is upon IGWA to show that it is a realistic method.

Several problems prevent acceptance of this alternative: a) There is no showing that it is financially feasible to run pumps twenty-four hours a day, three hundred sixty-five days a year. b) There is evidence that there would be risks that make this process unacceptable. Any breakdown for even a brief time could be catastrophic to fish deprived of water containing adequate oxygen. c) While water is presently reused in a process of settling waste that works, there is no evidence that a similar quality of water could be maintained with repumping.

VIII.

THE ESPA MODEL AND ITS APPLICATION

1. The implementation of conjunctive management of surface and ground water required the development of a model to understand the interaction of the two. Conjunctive management of surface and ground water rights depends upon an understanding of the hydrology of surface and ground water and the relationship between the two. Unlike the history of surface water administration in which a watermaster could monitor water he or she could see and understand the immediate effect of curtailment, the relationship between surface water and ground water rights is much more complex. In its travels the same water may be surface water at one point and ground water at another. When it is surface water it may be tracked with some certainty as to amount, direction and speed or flow. When it is ground water its course is hidden. Water that enters the aquifer at the eastern end may take a century to exit at the western end.

There have been numerous studies of the geology of the aquifer and ground water resources of the eastern Snake River Plain (ESP) dating from 1902 (Russell), 1938 (Stearns, et al.), 1964 (Mundorff, et al.) 1962, (Shibitzke and da Costa), 1969 (Norwich), 1974 (Maintei), 1974 (de Sonneville), 1978 (Newton), 1980 (Wytzes), 1984 (Johnson, et al.), 1974, 1977 (Robertson), 1982 (Lewis and Goldstein). See S. P. Garabedian, *Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho.* Pp. 10, 11. None of these studies provided an adequate basis for actual administration of water rights between ground and surface water. Consequently, IDWR contracted with the University of Idaho Water Resources Research Institute to develop a new and enhanced model. The model was developed with broad based representation, including a substantial number of the witnesses who testified for competing interests in this litigation. The model was calibrated to a 22 year data set from 1980 through 2002. The model divides the Eastern Snake River Plain into square mile cells which are assumed to be homogenous in their composition. It is described as "a numerical ground-water model of the eastern Snake River Plain which is calibrated to a sufficient time period to represent a wide range of aquifer stresses." *Abstract,* p. 113. The ESPAM was utilized by the Director in deciding the dispute between the Spring Users and IGWA.

2. There are limitations in the use of the model. a) The aquifer is not uniform in its geology. It is composed of fractured basalt that may lie in random patterns, sometimes interspersed with soil of a different composition. There may be variations within the model cells, contrary to the assumption of homogeneity. Hydrologists describe a cone that is created when water is pumped. Water from connected areas then flows to the cone. The assumption for model purposes is that the cone is uniform, but it may not be, since the aquifer is not uniform in its structure. The scientists know these things and developed the model to account for them. b) The model cannot predict the effect of a particular well on a particular spring. Conclusions must be drawn on a regional basis. That is, withdrawal of water from wells in certain cells will have an effect on spring flows within a particular reach, not that a particular well will have a certain effect upon a particular spring. The closer the well is to a spring source the more likely there is to be an immediate effect. c) Development of the model has not proceeded to the point of establishing a margin of error. Those involved in the development of the model agree that it is not 100% accurate and that it is desirable to determine an error factor. However, the shortages in water precipitated calls that necessitated decisions before the next stage in model development

could occur. The former Director recognized that there had to be a margin of error in the application of the model and assigned a 10% error factor. This conclusion was based on the fact that the gauges used in water measurement have a plus or minus error factor of 10%. Some will be high; some will be low. The Director concluded that the model could be no better than the measuring gauges and used the 10% margin absent a better figure developed through further testing of the model.

3. It was and is appropriate to use the ESPAM in making the conjunctive management decisions in these cases. There is no better science available. Decisions had to be made and will have to be made. The limitations of the model are identifiable and important but they do not preclude reliance upon it. It has an acceptable level of reliability based on peer reviewed science. There is evidence By Eric J. Harmon, a professor of hydrogeology, that water table contours can be utilized to estimate contributing areas to the springs that supply the Spring Users facilities. This approach would supplement and might improve model results, but the evidence does not tell us what that would mean in the outcome of this case. It appears to be a method to add to, not replace the ESPAM. Stated redundantly, the Director had no better tool than the model available in 2005, and there is no showing of any better tool today than the ESPAM. It is the product of an intense effort by scientists with adequate opportunities to present any competing views.

4. It was proper for the Director to determine a margin of error which resulted in the so called "trim line." The 10% margin of error factor assigned by the former Director was not the result of a perfect protocol that might render a different figure or range of figures. No such protocol was in place and there was none forthcoming in a reasonable time when the decisions on the Spring Users' calls had to be made. There is common sense to the 10% error factor assigned by the former Director, based on the assumption that the model cannot be better than the input of a key component. The evidence is clear that the model is not perfect and should have an error factor developed to utilize. It may be simple but true – a 10% factor is closer to accurate than no error factor, once the scientists agree, as they do, that an error factor is desirable. Until a better factor is established, the Director in his best judgment may use 10%. The development of a more scientifically based error factor should be a priority in improvement

of the model. The question of whether this is an appropriate basis for a "trim line" is addressed separately. That intersects State policy which must be considered.

IX.

THE ROLE OF PUBLIC INTEREST IN CONSIDERING CURTAILMENT

1. The public interest is a proper interest to be considered when a call is made that requires curtailment. The concept of "first in time, first in right" is a deeply held principle in Idaho water law. Idaho Code section 42-106 provides, "As between appropriators, the first in time is first in right." Case law has enforced this rule for generations. However, this principle of law is not without limitation. In *AFRD#2, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007),* the Supreme Court cited *Schodde v. Twin Falls Land and Water Co.,* 224 U.S 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912), noting that "evaluation of whether a diversion is reasonable in the administrative context should not be deemed a re-adjudication." In *Schodde* the U.S. Supreme Court was interpreting Idaho law. The Idaho Supreme Court would not be bound by the interpretation, but two factors make it persuasive authority. First, the Idaho Supreme Court has cited it favorably. Second, the Legislature has had nearly one hundred years to address issues presented by *Schodde* and act otherwise. It has not done so.

Schodde presented the issue of weighing public interest against the exercise of an established water right. Construction of a dam downstream from Schodde's point of diversion eliminated his means of diversion. Those means of diversion were reasonable when constructed, but construction of the dam would foreclose their usage and render his water right unusable by the means then available. He retained the water right and its priority but could not use it with the then existing technology. His water right could not trump the public welfare. The result was that junior water right holders would be able to use water as a consequence of the dam construction but Schodde could not utilize his senior right because of the construction. The public good was considered and outweighed the private right.

Article XV, Section 5 of the Idaho Constitution acknowledges the priority in time of water rights but passed to the Legislature the authority to subject that priority to "such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or

improvement, may by law prescribe." The Legislature responded in Idaho Code section 42-106: "As between appropriators, the first in time is first in right." This provision must be read in the context of Idaho Code section 42-101:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for delivery of such water."

Idaho Code section 42-602 vests supervision of the distribution and control of water in the Director of the Department of Water Resources, this authority to be accomplished by watermasters. Section 42-602 provides that, "The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine." This provision raises the question of whether the Director may consider the public interest in making a determination that there should or should not be curtailment or is to look solely at the timing of the water right and the amount stated in the partial decree. It is clear that the Legislature did not intend to grant the Director broad powers to do whatever the Director might think right. However, it is clear also that the Legislature did not intend to sum up water law in this single statement. The appropriation must be for "some useful or beneficial purpose." *Idaho Code section 42-104.* A water user cannot waste water. These principles remain. Similarly, the constrictions of Idaho Code section 42-101 that water is the property of the state "which, in providing for its use shall equally guard all the various interests involved." See *Schodde.*

As noted in *American Falls,* there is a presumption that the senior water right holder is entitled to the decreed water right. However, "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call

would be futile or to challenge in some constitutionally permissible way, the seniors call." The Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules), Rule 020.01, acknowledge the prior appropriation doctrine: "These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law." However, Rule 020.03 acknowledges other elements:

> **Reasonable Use of Surface and Ground Water.** These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water reasources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

In *American Falls* the Supreme Court determined that the Conjunctive Management Rules are not facially unconstitutional. Rule 020.03 is at the heart of the rules and how they will be applied. Had any Rule been subject to a facial challenge, 020.03 was one. It was adopted October 7, 1994, and has remained untouched by the Legislature or the Supreme Court. It incorporates the law as it has developed. "First in time, first in right" is fundamental to water administration but is subject to consideration of the public interest. The Director is not limited to counting the number of cubic feet per second in the decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of the consequences to the State, its communities and citizens. These conclusions have significance in several issues in this case. They affect the Director's use of the so-called "trim line," a point of departure beyond which curtailment was not ordered. The public interest affects the timing of curtailment. Consideration of the public interest gives relevance to the economic evidence that was presented.

X.

THE INTRA-YEAR AND INTER-YEAR VARIATIONS IN WATER FROM THE SPRINGS

1. It is proper to consider intra-year and inter-year variations in the spring flows in determining curtailment. The Director found that springs discharging in the Thousand Springs area do not discharge at a constant rate. There are significant variations in discharge in a single year and variations from year to year. Among factors influencing these variations are differences in the amount of water available for surface water irrigation and the collateral effect of incidental recharge, changes in the amounts and timing of tributary underflow to the ESPA, and differences in precipitation and temperature. Additionally, the variations can result from ground water withdrawals and managed recharge to the aquifer. The Director found that for the water rights in issue for the Snake River Farm and Blue Lakes the factors contributing to variations would have been present when the rights were licensed. Finding 54 Clear Springs; finding 49 Blue Lakes. The Director found that the Spring Users "are not entitled to water supplies...that are enhanced beyond the conditions that existed at the time such rights were established..." And the Spring Users "cannot call for the curtailment of junior priority ground water rights simply because seasonally the discharge from springs is less than the authorized rates of diversion...unless seasonal variations are caused by depletions resulting from diversions and use of water under such junior priority rights." Finding 55, Clear Springs; finding 50 Blue Lakes.

The concept that curtailment of junior water rights can enhance a senior's rights beyond the amount available at the time the senior's rights were established is not sound. Curtailment of juniors would not put more water in the system than existed prior to the junior's appropriation. In ruling on the motion for summary judgment the Hearing Officer was concerned from language in the Orders that the former Director was imposing conditions on the amount of the water rights in issue, limiting the adjudicated amounts. Following testimony by the former Director it is clear that was not the intent and cannot be the case. The Spring Users retain the full amount of the adjudicated rights which they can use when water is available. But as a matter of fact the flows fluctuate annually and within the year. That is a matter of science, not a legal conclusion. It is a relevant fact in considering the extent of curtailment. If curtailment were ordered and could provide the full amount of the water rights at the lowest point of the year it seems almost certain

that significantly more water would be delivered in the high points of the year than the Spring Users are entitled to receive.

According to Dr. Brockway, the Snake River Farm rights of 117 cfs have not been met since 1988, and then not for the entire year. Apparently it is necessary to go back to 1972 to find a time the full rights were previously met, and that would not have been year round. The variations in spring flows from year to year and within years are facts, influenced in part by ground water pumping but also attributable to such factors as changes in incidental recharge, stream underflow, and weather.

In context the sense of the Director's finding is that the Spring Users cannot be guaranteed the full amount of the water rights adjudicated every day of the year or every year when that condition has not existed during any relevant time. Consequently, seasonal variations must be considered to determine what the Spring Users would have received throughout the year absent junior water users' appropriations.

XI.

THE FUTILE CALL RULE

1. **The Spring Users' Calls Are Not Futile.** The Director determined that the Spring Users can only call for the distribution of water to their rights through the curtailment of junior priority ground water rights when such curtailment would result in a usable amount of water reaching the Spring Users "in time of need." Clear Springs Finding 56. Blue Lakes Finding 51. Rule 10.08 of the *Conjunctive Management Rules* defines a futile call:

> A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.

The relationship of water in the aquifer to surface water differs from that of surface water to surface water in ways that affect interpretation of the futile call rule. In managing surface water to surface water for irrigating crops a reasonable time for the delivery of water has been considered to be the time to get water in a surface channel to a crop before it perishes. Two different factors intersect in the Spring User cases. First, curtailing ground water pumping does

not provide the immediacy of delivery to the senior user that would be present in the curtailment of surface water. Surface water travels in a channel from one source that may be seen to a destination that can be seen. It can be routed to a particular point. Ground water does not fall into this model. Its route is determined by the contours of fractured basalt interspersed at times with soil of a different composition. Part of the water curtailed may travel one direction, part another. The effects of curtailment may be years to be realized. The parameters of a futile call in surface to surface delivery do not fit in the administration of ground water. If the time for the delivery of water to avoid a futile call defense that is applicable in surface to surface water delivery were applied in calls for the curtailment of ground water, most calls would be futile. In effect ground water pumping could continue uncurtailed despite deleterious effects upon surface water use because curtailment would not have the immediate effect traditionally anticipated.

A second complexity exists in this case. Fish propagation is a year round enterprise. It is not limited by a growing season, so water in some amount is necessary every day of the year. Unlike plant crops which may survive for a period of days without water, common knowledge, tells us that it is minutes, not days, for fish to survive without water. Further, water cannot simply be held in raceways. Trout need flowing water or the effects will be adverse in a short time. According to the testimony of Gregory Kaslo, Vice President in charge of operations for Blue Lakes, it is necessary to anticipate low cycles to determine the stocking of fish. Consequently predictability is necessary to avoid overstocking or understocking of fish. A curtailment system that depended upon an immediate response when a shortage appeared would not work either for the health of the fish or the businesses.

What these facts establish is that in the administration of ground water to spring flows the fact that curtailment will not produce sufficient water immediately to satisfy the senior rights does not render the calls futile. A reasonable time for the results of curtailment to be fully realized may require years, not days or weeks. This is the reverse process of the depletion of the water flowing to the springs from the aquifer over a substantial number of years. The Director's orders of curtailment recognized that the Spring Users' calls were not futile, though remediation would take considerable time. The evidence supports that determination.

XII.

USABLE QUANTITY

1. The percentages of curtailed water used by the former Director that will go to the Spring Users facilities should be utilized, with a small adjustment for the Snake River Farm facility. The Director determined that curtailment of ground water users would only be appropriate if the curtailment would result in a usable amount of water reaching the Spring Users. The usable quantity issue presents a continuing problem peculiar to ground water administration since the majority of the water curtailed will not go to the two Spring Users. Use of the ESPAM renders an amount that will go to the Thousand Springs area and the reaches within that area. However, it does not establish an amount that will go to the particular springs supplying the Spring Users' facilities. The result determined by the Director must come from calculating the percentage of the water in the area of concern that will go to the Blue Lakes and Snake River Farm raceways. That percentage applied to the Blue Lakes facility is supported by the evidence and was proper to be applied. However, the Director determined that 7% of the spring flows go to the Snake River Farm facility in the Buhl Gage to Thousand Springs reach. There is some confusion concerning this finding. The former Director testified that he thought the figure came from Dr. Allan Wylie, an expert with IDWR. However, Dr. Wylie's memorandum to the former Director set the percentage applicable to the Snake River Farm at 4.2%: "As best I can figure (after talking with Tim Luke) Snake River Trout gets 4.2% of the Buhl to Thousand Springs reach." Dr. Wylie did not defend the 4.2% figure. Tim Luke indicated that 6.9% is the figure supplied. It does not appear that the Director made an independent determination apart from the information he received from staff. The most likely state of the evidence is that he rounded the figure up from the 6.9%. The 6.9% figure should be used as the only one supported by evidence.

3. The amount of water that would be delivered to the Spring Users' facilities is a usable quantity. Using the ESPAM establishes the increased amount of water that will go to the reaches. The percentage of that water that will go to the particular Spring Users is a usable quantity.

XIII.

THE QUALITY OF WATER THAT MUST BE PROVIDED

1. The quality of water is not an element of a water right but may be considered. IGWA maintains correctly that quality of water is not one of the elements of a water right. However, the quality of water may be considered in alternative proposals to curtailment. The Spring Users businesses are dependent upon a certain quality of water in order to operate their business. The purpose of the water rights enumerated in their partial decrees is fish propagation. If something happens in nature that prevents the quality of water necessary for fish propagation from coming to them from the springs they are out of luck and most likely out of business. There are no guarantees against natural processes that might alter either the quantity or quality of the water they receive. However, in considering alternate proposals to provide water in a manner different from the practices in place when the rights were licensed and ultimately decreed, the quality of the water may be considered. They are adjudicated to have water rights for the purpose of fish propagation. If their rights are met through curtailment they will receive the quality of water that nature provides and that will most likely be suitable for fish propagation. Any alternative to curtailment must accomplish the same result as curtailment. Otherwise the purpose of the water right is defeated.

XIV.

THE USE OF THE "TRIM LINE"

1. The Director's use of the "trim line" to limit curtailment was proper. One of the most startling facts in these cases is the amount of acreage that must be curtailed in order to deliver water to the Spring Users facilities. It is not a one cfs curtailed to one cfs increase to the Spring Users ratio. The vast majority of the water that will be produced from curtailment does not go to the Blue Lakes and Snake River Farm facilities. Perhaps it will go to beneficial use in Idaho, perhaps not. According to Dr. Allan Wylie, absent the application of the trim line or clip, as he termed it, the curtailment required for Blue Lakes would go from 57,220 acres to 300,000 acres. The acres curtailed to be applied to Snake River Farm would rise from 52,740 to 600,000 acres, producing a 38 cfs gain to the reach and 2.7 cfs to Snake River Farm. Dr. Wylie indicated that in 2005 the Spring Users' rights would not be satisfied year round even if there were

curtailment in the entire Snake River Plain. It is within this context that the Director's decision to use a "trim line" excluding certain pumpers from curtailment must be viewed. Conjunctive Management Rule 020.03 provides the following:

> **Reasonable Use of Surface and Ground Water.** These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, and full economic development as defined by Idaho law. **An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.** (emphasis added).

The development of ground water pumping has not been an act of piracy. State policy has sanctioned it. Making the "desert bloom" as the promotional literature of Idaho Power proclaimed was a reality. The cities of Wendell, Shoshone, Paul, Jerome, Heyburn and Hazelton have offered testimony as to the damage that would occur from curtailment. Vast areas of land were brought into production, jobs created, businesses in communities serving farm needs have benefited and become dependent on the agricultural economy. Tax revenue increased to the State and local communities. In this context to say that land will not be dried up when there is a substantial possibility that there will be no significant contribution to the Spring Users water rights is consistent with the policies set forth in the Conjunctive Management Rules, which are consistent with the Idaho Constitution and the legislative policy towards ground water development. The Spring Users retain the full extent of their water rights to be used when water is available, but parallel to *Schodde* they do not trump the interests of the State by commanding "*the entirety of large volumes of water in a surface or ground water source to support* [their] appropriation[s] contrary to the public policy of reasonable use of water…" CM Rule 020.03. The Spring Users are entitled to curtailment, or alternative redress, but not to the extent of drying up hundreds of thousands of acres when that action may contribute little or nothing in any reasonable time to their shortage. The same logic applies to the exclusion from curtailment of water users whose consumption is so small that it is unlikely any benefit to the Spring Users could be traced but the effect on the individual user potentially devastating.

2. The financial impact of curtailment has limited relevance. There was expert evidence concerning the financial impact of curtailment. John Church, an expert in financial forecasting, testified that widespread curtailment of ground water users would have dramatic negative impacts, including the loss of thousands of jobs, millions of dollars in lost personal income, and losses to the State and local governments in tax revenues. In his opinion, which is persuasive, the losses would not be offset by comparable gains through improved aquaculture. These conclusions are consistent with the January 31, 2005, "*Assessment of Relative Economic Consequences of Curtailment of Eastern Snake Plain Aquifer Ground Water Irrigation Rights*," which was prepared by Donald L. Snyder, Utah State University, and Roger H. Coupal, University of Wyoming, for the Natural Resources Interim Committee. Such information is very relevant to legislative considerations but has limited relevance in an adjudication. Were such information prominent in an adjudication, the Director and the courts would be drawn into comparing the merits of one water user against another and passing out water to the one perceived to be better. That is not the Director's or a court's role. The hallmark of water adjudication is first in time, first in right when the water is applied to a beneficial use without waste. However, this is the extreme case in which the requested curtailment would dry up as many as 600,000 acres, or more if an effort were made to supply the full amount of adjudicated rights every day of the year for a speculative benefit. At that point the Director has a responsibility to the State to consider the impact of the requested curtailment.

The curtailment ordered by the former Director would improve the position of the Spring Users to the level they could reasonably expect when their rights were adjudicated. From that there is harm to ground water users who are curtailed, but it is reasonable considering priorities and the effects of their pumping. The same would not be the case if the trim line were left out of consideration. This is not a case of saying crop farmers are more important than fish farmers. It is the case where two businesses cannot "command the entirety of large volumes of water in a surface or ground water source to support [their] appropriation[s] contrary to the public policy of reasonable use of water as described in this rule." *Conjunctive Management Rule* 020.03.

XV.

BLUE LAKES COUNTRY CLUB, INC. WATER RIGHT NO. 36-08593

1. The amount of water Blue Lakes Country Club, Inc. receives under right no. 36-08593 which is junior to all Blue Lakes water rights should be deducted from the amount Blue lakes is entitled to receive by curtailment of other junior water users. Blue Lakes Country Club has a water right, no. 36-08593 for 0.7 cfs, which is junior to all Blue Lakes water rights. This is water that it uses during the irrigation season, together with other water it receives, to water its golf course. Pursuant to an agreement, Blue Lakes Trout Farm does not assert its priority rights and object to this use. The Director reduced the amount to which Blue Lakes Trout Farm is entitled by the amount that goes to Blue Lakes Country Club pursuant to the agreement. This decision is proper. It is water to which Blue Lakes Trout Farm has a priority right. Unlike the calculation of water that must be determined by the use of the ESPAM, this is water from the source used by the Trout Farm. Rather than curtail to provide this water, it should be counted as water already available to Blue Lakes Trout Farm.

XVI.

THE CURTAILMENT ORDERS

1. The information available to the Director and presented at hearing in this matter justify curtailment of junior ground water users. IGWA objects on various grounds to any curtailment. In the mass of expert opinions and evidence offered a number of conclusions could be reached on different issues in this case. It is, however, inescapable that spring flows have declined over time and that a portion of that decline is attributable to ground water pumping. The ground water pumpers are upstream from the springs that supply water to the Spring User facilities. The ground water users draw water from the body of water that ultimately spills water into the canyon reaches from a variety of springs. The ground water users that have been curtailed are junior to all Spring User adjudicated rights. The Spring Users have been prevented from applying water that would otherwise be available to them for a beneficial use, causing them material injury. Curtailment is proper.

2. The target amounts set by the Director in the Orders of curtailment are reasonable. The Spring Users object to the curtailment orders because they do not focus on providing the amount of their adjudicated rights. However, the Orders seek to provide improvement of their rights to the levels that could reasonably be expected when they were adjudicated, curtailing the amounts attributable to the junior ground water rights users' depletions that reduce spring flows, and excluding from curtailment a marginal group that might or might not provide water to the springs in any reasonable time and any measurable amount. There was information available to the Director and evidence presented at hearing that supports these amounts. An Order should be entered confirming the amounts.

3. Implementing the curtailment orders, or alternative methods of remediation, over time is consistent with State policy and justified in the public interest. The Conjunctive Management Rules have not been altered by the Legislature since their promulgation in 1994 and do, consequently reflect State policy. Rule 040.01.a. of the Conjunctive Management Rules provides that the Director, acting through the watermaster may:

> Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included with the district, provided that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment.

This process of phased in curtailment would extend to a mitigation plan approved by the Director pursuant to CM Rule 040.01.b. The failure to meet the targets in a mitigation plan approved by the Director is addressed separately.

XVII.

THE ALTERNATIVE METHODS OF ADDRESSING CURTAILMENT

1. A replacement water plan is an acceptable alternative to curtailment if it meets the target goals of curtailment. The Director's Orders afforded the ground water users the alternative of providing replacement water in lieu of curtailment. IGWA has attempted to provide adequate replacement water through various methods, including drying up of acres and running water through the North Side Canal system in the hopes that an adequate amount of

water would seep into the aquifer to improve spring flows. These are legitimate methods in the attempt to avoid full curtailment.

2. Replacement plans must meet the targeted goals of curtailment. Replacement plans are an alternative to curtailment. To be valid they must meet the goals of curtailment within the time frames of curtailment. A failure in one year to meet the goals of curtailment requires carrying over that shortage to be made up in the following years. The cap on phased in curtailment is five years. That period of time should apply also to any approved mitigation plan, unless an agreement is reached with the Spring Users that extends the period or provides a different alternative. That appears unlikely. Consequently, if the targeted goals are not met in the five year phase in period, curtailment to meet the initial goals is required.

3. The Director's approval of a mitigation plan does not eliminate the need to meet the goals to be achieved by curtailment. The fact that the Director approves a replacement water plan for a particular year does not eliminate the ultimate goal of providing the amount of water to the Spring Users set forth in the Orders. The value of the approval is that the rights of IGWA and the Spring Users are settled for that year and they may plan accordingly. But the ultimate obligation that would be met by curtailment remains and is carried over. This is relevant in this case, since it appears that the last approved mitigation plan falls short of the targeted goal.

XVIII.

DUE PROCESS CONCERNS

1. Rules outlining an immediate process for hearing are necessary. The Director's Orders for curtailment were entered in the spring and summer of 2005. This hearing occurred in December, 2007. There are reasons. When the Conjunctive Management Rules were challenged, the authority of the Director and the policies of the State were in doubt. There is no remediation for what has occurred. The Director's Orders are supportable and should be enforced. Actions that were taken pursuant to them have been actions that would have been necessary had there been a hearing in a short time from their issuance. Nonetheless, it is critical that procedures be adopted which define the immediate rights of parties subject to emergency conjunctive management orders of curtailment, or denial of curtailment.

XIX.

THE DAIRYMEN

The Hearing Officer has been informed that the Dairymen have reached an agreement with the Department which should be addressed. However, that agreement has not yet been formalized and presented, and apparently not all parties have stipulated to it. Further action awaits the presentation of the agreement and the impact that it may have on these proceedings.

XX.

CONCLUSION

This opinion constitutes the findings of fact and the conclusions of law of the Hearing Officer for consideration by the Director.

Dated January 11, 2008.

GERALD F. SCHROEDER, Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2008, the above and foregoing, was served by the method indicated below, and addressed to the following:

RANDY BUDGE CANDICE M. MCHUGH RACINE OLSON PO BOX 1391 POCATELLO ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
JOHN SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 (208) 344-6034 jks@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
DANIEL V. STEENSON CHARLES L. HONSINGER RINGERT CLARK PO BOX 2773 BOISE ID 83701-2773 (208) 342-4657 dvs@ringertclark.com clh@ringertclark.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
MIKE CREAMER JEFF FEREDAY GIVENS PURSLEY PO BOX 2720 BOISE ID 83701-2720 (208) 388-1300 mcc@givenspursley.com jeffferedayy@givenspursley.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
MICHAEL S. GILMORE ATTORNEY GENERAL'S OFFICE PO BOX 83720 BOISE ID 83720-0010 (208) 334-2830 mike.gilmore@ag.idaho.gov	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail

J. JUSTIN MAY
MAY SUDWEEKS & BROWNING
1419 W. WASHINGTON
BOISE ID 83702
(208) 429-0905
jmay@may-law.com

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

ROBERT E. WILLIAMS
FREDERICKSEN WILLIAMS MESERVY
PO BOX 168
JEROME ID 83338-0168
rewilliams@cableone.net

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

ALLEN MERRITT
CINDY YENTER
WATERMASTER - WD 130
IDWR – SOUTHERN REGION
1341 FILLMORE STREET SUITE 200
TWIN FALLS ID 83301-3380
(208) 736-3037
allen.merritt@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources