

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHTS NOS. 36-02659,)
36-02680, 36-04032A, 36-04032B, 36-04032C,) **ORDER**
36-04032D, 36-07004, 36-07080, 36-07167,)
36-07176, 36-07725, 36-07731, AND 36-08089)
_____)

This matter comes before the Director of the Department of Water Resources (“Director” or “Department”) as a result of four letters dated May 14 and May 15, 2003. The first letter, dated May 14, was from Kay Hardy, President of Clear Lakes Trout Company. The second letter, dated May 15, was from Kay Hardy, President of Fisheries Development Company. The third letter dated, May 15, was from Kay Hardy, President of Rim View Trout Company. The fourth letter, dated May 15, was from Kay Hardy, General Partner of Hardy Properties, LP and Personal Representative for the Estate of Earl M. Hardy (collectively referred to as “Hardy”). All four letters demand that the Director direct the watermaster for Water District No. 130, and the watermaster for Water District No. 36A in the letter from Fisheries Development Company, “to administer water rights in the Water District(s) ... as required by Idaho Code § 42-607” in order to supply the prior rights of Clear Lakes, Fisheries Development, Rim View, and Hardy. The Director enters the following Findings of Fact, Conclusions of Law, and Order in response to these four letters.

FINDINGS OF FACT

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

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

2. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA east and southeast of Hagerman, Idaho.

3. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from certain portions of the ESPA for irrigation and other consumptive purposes cause reductions in spring flows tributary to the Kimberly to King Hill (or Thousand Springs) reach of the Snake River, although the reductions in flows from individual springs caused by ground water withdrawals from individual wells or groups of wells cannot be determined using the Department's existing ground water model for the ESPA.

4. Surface and ground water studies for the Eastern Snake River Plain, funded in part by the Idaho Legislature, are presently being completed by or on behalf of the Department, with the participation of other public and private entities. These studies will provide additional data that will be used to reformulate and recalibrate the ground water model used by the Department to calculate the amount, location, and timing of surface water depletions caused by the withdrawal and use of ground water throughout the plain overlying the ESPA. The purpose for the additional data collection and model reformulation/calibration is to reduce uncertainty in modeled results and increase acceptance of the Department's use of the reformulated/recalibrated ground water model. Although these efforts are nearing completion, the reformulated and recalibrated ground water model will not be ready for use in making water management determinations until the mid to latter part of 2004. In the meantime, the results from simulations using the Department's existing ground water model provide the best available technical basis for making some water management decisions when the uncertainties of the existing model are appropriately addressed.

5. The Department is implementing full conjunctive administration of rights to the use of interconnected surface and ground waters within the Eastern Snake River Plain consistent with available information and technical resources. The results of simulations from the Department's existing ground water model are suitable for determining the area containing those ground water diversions for which the depletion of water from the ESPA results in the most direct and significant reduction in the flow of water from springs tributary to the Snake River in the Thousand Springs reach.

The Thousand Springs Ground Water Management Area and Interim Stipulated Agreement

6. Discharges from springs in the Thousand Springs area have diminished and are expected to be further diminished because of changes in irrigation practices using surface water and the last four consecutive years of drought. Absent mitigation for the effects of depletions caused by ground water use, spring discharges would also be reduced as a result of ground water withdrawals from the ESPA for irrigation and other consumptive purposes that are diverted in close proximity to the area of the springs.

7. On August 3, 2001, the Director issued an order designating the Thousand Springs Ground Water Management Area in exercise of his statutory authorities to administer rights to the use of ground water, subject to the confines of existing knowledge and technology, in a manner that recognizes and protects senior priority surface water rights in accordance with the directives of Idaho law. In issuing this order, the Director also announced his intent to issue additional orders prior to September 1, 2001, directing that holders of certain water rights for the

use of ground water cease ground water withdrawals beginning March 15, 2002, pursuant to Idaho Code § 42-233b.

8. On August 31, 2001, the Director was advised by representatives of certain holders of senior priority surface water rights and certain holders of junior priority ground water rights that an agreement in principle had been reached under which the holders of junior priority ground water rights agreed to provide replacement surface water for the next two irrigation seasons in an amount equal to what the information then available to the Director indicated would have resulted from the curtailment of ground water diversions intended by the Director within the Thousand Springs Ground Water Management Area, or an appropriate reduction in ground water diversions to the extent that replacement water was not provided.

9. Based upon the representations that an agreement in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the Thousand Springs Ground Water Management Area.

10. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into a detailed, written, stipulated agreement with representatives of certain holders of senior priority surface water rights titled: "Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36" (the "Stipulated Agreement"). Clear Lakes Trout Company is a signatory to the Stipulated Agreement. The Director conditionally approved the Stipulated Agreement by interlocutory order on January 18, 2002.

11. Under the Stipulated Agreement, the represented holders of senior priority surface water rights agreed not to exercise their senior priorities against the represented holders of junior priority ground water rights in exchange for commitments by the ground water right holders to provide 40,000 acre feet of replacement water during each year of the two-year term of the Stipulated Agreement as replacement for water that would have resulted from curtailment of ground water diversions intended by the Director, based on the Department's simulations of curtailment using the existing ground water model for the ESPA. The replacement water was to be used to enhance spring flows in the Thousand Springs reach. In the event the full amount of replacement water could not be provided, the Stipulated Agreement provided that the holders of ground water rights would reduce their diversion and use of ground water for irrigation in proportion to the lack of replacement water provided up to a maximum reduction of 10 percent.

12. Under the Stipulated Agreement, the parties also agreed not to oppose the State of Idaho's motion to the District Court for the Snake River Basin Adjudication ("SRBA District Court") requesting authority for the Director to implement interim administration of water rights in Basin 36. Basin 36 is the administrative basin defined by the Department primarily for the purpose of managing surface water and for administering water rights for the use of surface water decreed in proceedings preceding the Snake River Basin Adjudication. Basin 36 includes most of the area in the Thousand Springs Ground Water Management Area. The remaining portion of

the Thousand Springs Ground Water Management Area is within the Department's Administrative Basins 37 and 43.

13. Pursuant to the Stipulated Agreement, in 2002 the parties representing the holders of ground water rights provided a total of 12,963 acre feet of replacement water, which was 32.4 percent of the 40,000 acre feet required to avoid reductions in ground water diversions. Consequently, the holders of ground water rights were required to reduce their diversion and use of ground water by an aggregate amount of 6.76 percent (10 percent maximum reduction multiplied by the factor of $1 - 0.324$). The actual reduction in diversion and use of ground water achieved in 2002 was an aggregate amount of 10.37 percent based on comparing power consumption for pumping ground water for irrigation in 2002 against the power consumption for pumping ground water for irrigation averaged for the years 1999 and 2000. This reduction in the diversion and use of ground water, as measured by power consumption, was substantially more than required pursuant to the Stipulated Agreement, and the holders of ground water rights party to the Stipulated Agreement fully met their obligations under the Stipulated Agreement in 2002.

14. At a meeting held in Hagerman, Idaho on April 2, 2002, involving representatives of all of the signatories to the Stipulated Agreement on file with the Department, it was verbally agreed that in the event reductions in diversion and use of ground water either exceeded or did not meet the reductions required pursuant to the Stipulated Agreement, any surplus or deficit in reductions could be carried over to the 2003 irrigation season. The Department has determined that the carry over credit for reductions in diversion and use of ground water that exceeded reductions required in 2002 is equivalent to at least 8,894 acre feet of replacement water.

15. Pursuant to the Stipulated Agreement, in 2003 the parties representing the holders of ground water rights are providing a total of 36,000 acre feet of replacement water, relying on at least the equivalent of 4,000 acre feet of carry over credit from 2002. The Department has confirmed that all of the 36,000 acre feet of replacement water will be delivered through the North Side Canal Company facilities in 2003, and since the actual carry over credit from 2002 was substantially greater than 4,000 acre-feet, the holders of ground water rights party to the Stipulated Agreement will fully meet their obligations under the Stipulated Agreement in 2003.

Creation and Operation of Water District No. 130 and Status of Thousand Springs Ground Water Management Area

16. Consistent with the Stipulated Agreement, the State of Idaho filed a motion with the SRBA District Court on November 19, 2001, requesting an order authorizing the interim administration of water rights by the Director in all, or parts, of the Department's Administrative Basins 36 and 43 overlying the ESPA in the Thousand Springs Area. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on February 19, 2002, creating Water District No. 130 pursuant to the provisions of Idaho Code § 42-604.

17. On August 30, 2002, the State of Idaho filed a second motion with the SRBA District Court requesting an order authorizing the interim administration of water rights by the Director in the portion of the Department's Administrative Basin 37 overlying the ESPA in the Thousand Springs Area. On November 19, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on January 8, 2003, revising the boundaries of Water District No. 130 to include the portion of Administrative Basin 37 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604.

18. Water District No. 130 was created, and its boundaries revised, to provide for the administration of water rights, pursuant to chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights. As a result, the watermaster for Water District No. 130 was given the following duties to be performed in accordance with guidelines, direction, and supervision provided by the Director:

- a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);
- b. Measure and report the diversions under water rights;
- c. Enforce the provisions of the Stipulated Agreement; and
- d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

19. During 2002, in the course of carrying out the duties set forth in Finding 18, the watermaster for Water District No. 130 identified five unauthorized diversions of ground water for uses that were in excess of the beneficial use authorized under a water right or for uses at unauthorized places of use. Pursuant to instructions from the Director, Notices of Violation were issued, Consent Orders entered, and penalties were assessed for each of these five illegal uses of ground water.

20. To date during 2003, in the course of carrying out the duties set forth in Finding 18, the watermaster for Water District No. 130 identified two additional unauthorized diversions of ground water; one for violation of a Consent Order entered in 2002, and another for a large expansion in use beyond the beneficial use authorized under a water right. Notices of Violation are pending for both.

21. Because Water District No. 130 had been formed and was functioning, the Director issued a final order on August 29, 2003, dissolving the Thousand Springs Ground Water Management Area. Even though ground water levels and spring discharges in the Thousand Springs area have generally not improved since 2001 when the Thousand Springs Ground Water Management Area was designated, the Director determined that the Thousand Springs Ground Water Management area was no longer necessary to administer water rights for the protection of senior surface and ground water rights because administration of such rights is now

accomplished through the operation of Water District No. 130.

22. The final order described in Finding 21 has been contested by Clear Lakes Trout Company and Clear Springs Foods, both seeking a hearing on the final order and rescission of the final order through timely filed petitions. Action on these petitions is pending.

The Conjunctive Management Rules

23. Idaho Code § 42-603 authorizes the Director “to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.” Promulgation of such rules and regulations must be in accordance with the procedures of chapter 52, title 67, Idaho Code.

24. On October 7, 1994, the Director issued *Order Adopting Final Rules; the Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) (“Conjunctive Management Rules”), promulgated pursuant to chapter 52, title 67, Idaho Code, and Idaho Code § 42-603.

25. The Conjunctive Management Rules “apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply.” IDAPA 37.03.11.020.01.

26. The Conjunctive Management Rules “acknowledge all elements of the prior appropriation doctrine as established by Idaho law.” IDAPA 37.03.11.020.02.

27. The Conjunctive Management Rules “may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right” IDAPA 37.03.11.020.04.

28. Pursuant to Idaho Code § 67-5291, the 1st Regular Session of the 53rd Idaho Legislature (1995 session), and subsequent legislative sessions, had the opportunity to determine that the Conjunctive Management Rules were “violative of the legislative intent of the statute under which such rule[s] [were] made . . .” and to adopt “a concurrent resolution . . . rejecting, amending or modifying the same.” During no legislative session, beginning with the 1st Regular Session of the 53rd Idaho Legislature, have the Conjunctive Management Rules been rejected, amended, or modified by the Idaho Legislature.

The Letters from Kay Hardy Demanding Delivery of Water to Various Water Rights

29. On May 14, 2003, the Director received a letter from Kay Hardy, President of

Clear Lakes Trout Company 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 Clear Lakes’ prior rights. This demand includes adjustment of the weir in the Western Diversion Pool to deliver to Clear Lakes the portion of Water Right No. 36-02659 (a minimum of 66 cfs) that it is entitled to divert from the springs through the Western Diversion Pool, and adjustment of all other water diversions within the Water District as necessary to supply water right nos. 36-02659 and 36-07004.”

30. On May 16, 2003, the Director received a letter from Kay Hardy, President of Fisheries Development Company (“FDC”) demanding that the Director “direct the Watermasters for Water District 130 and Water District 36-A to administer water rights in the Water Districts as required by Idaho Code § 42-607 in order to supply FDC’s prior rights [water rights nos. 36-07080, 36-07725, 36-07731, and 36-08089].”

31. On May 16, 2003, the Director also received a letter from Kay Hardy, President of Rim View Trout Company, demanding that the Director “direct the Watermaster for Water District 130 to administer water rights in the Water District that deplete the supply of water to Niagara Springs as required by Idaho Code § 42-607 in order to supply Rim View’s prior rights [water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and 36-07167].”

32. On May 16, 2003, the Director also received a letter from Kay Hardy, General Partner in Hardy Properties LP and Personal Representative for the Estate of Earl M. Hardy, 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 this prior right [water right no. 36-07176].”

33. Rule 10.04 of the Conjunctive Management Rules defines a “delivery call” as: “A request from the holder of a water right for administration of water rights under the prior appropriation doctrine.” The four letters from Kay Hardy demanding delivery of water to various water rights described in Findings 29 through 32 come within the definition of a delivery call.

34. Rule 40 of the Conjunctive Management Rules is titled “Responses to Calls for Water Delivery Made by the Holders of Senior-Priority Surface or Ground Water Rights Against the Holders of Junior-Priority Ground Water Rights from Areas Having a Common Ground Water Supply in an Organized Water District.” Rule 40 applies to delivery calls by the holder of senior priority water rights against the holders of junior priority ground water rights when such junior priority ground water rights are included in an organized water district created pursuant to Idaho Code § 42-604.

35. Water Districts No. 36A and No. 130 were created pursuant to Idaho Code § 42-604, and Rule 40 of the Conjunctive Management Rules applies to delivery calls by the holder of

senior priority water rights against the holders of junior priority ground water rights in Water Districts No. 36A and No. 130.

36. Neither Rule 40 nor any other provisions of the Conjunctive Management Rules are applicable to delivery calls or demands for water distribution by the holder of a senior priority water right against the holder of a junior priority surface water right.

37. On May 19, 2003, the Director provided an initial response by letter to Kay Hardy to the four letters described in Findings 29 through 32 making delivery calls for the distribution of water to the various listed water rights. In his May 19 letter, the Director advised that determinations regarding “material injury” and “reasonableness of water diversions” would be made pursuant to Rule 40 and Rule 42 of the Conjunctive Management Rules in responding to the delivery calls against junior priority ground water rights in Water District No. 130.

38. On May 23, 2003, the Director sent a second letter to Kay Hardy in which he advised that the determinations regarding “material injury” and “reasonableness of water diversions” would be made without initiating a contested case, unless a petition to initiate a contested case was filed with the Department. In his May 23 letter, the Director also requested that he be provided copies of “all historical records of the amounts of water diverted under the listed rights as soon as practicable [sic].”

Initial Response to Delivery Calls for Distribution to Water Rights Nos. 36-02659 and 36-07004 (Clear Lakes Trout Company)

39. Water rights nos. 36-02659 and 36-07004 are held by Clear Lakes Trout Company, which is a signatory to the Stipulated Agreement described in Findings 10, 11, and 12.

40. As described in Findings 13, 14, and 15, the mitigation required pursuant to the Stipulated Agreement has either been provided (during 2002) or is being provided (during 2003). Consequently, Clear Lakes Trout Company is not entitled to make delivery calls for distribution of water against the holders of junior priority ground water rights in Water District No. 130 that are providing the required mitigation until after the Stipulated Agreement expires on December 31, 2003. Kay Hardy was advised of this determination in the Director’s letter of May 19, 2003.

41. Regarding the demand from Clear Lakes Trout Company that the “weir in the Western Diversion Pool [be adjusted] to deliver to Clear Lakes the portion of Water Right No. 36-02659 (a minimum of 66 cfs) that it is entitled to divert from the springs through the Western Diversion Pool,” the adjustment of the weir is governed by *Amended Water District 130 Watermaster Instructions No. 02-01 – Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-07201, and 36-07218*. Although the subject of pending litigation, these watermaster instructions remain in effect and govern the adjustment of the weir, unless subsequently modified or set aside.

Initial Response to Delivery Calls for Distribution to Water Rights Nos. 36-07080, 36-07725,

36-07731, and 36-08089 (Fisheries Development Company)

42. Water rights nos. 36-07080, 36-07725, and 36-07731 are held by Clear Lakes Trout Company for use by Fisheries Development Company. Clear Lakes Trout Company is a signatory to the Stipulated Agreement described in Findings 10, 11, and 12.

43. As described in Findings 13, 14, and 15, the mitigation required pursuant to the Stipulated Agreement has either been provided (during 2002) or is being provided (during 2003). Consequently, Clear Lakes Trout Company is not entitled to make delivery calls for distribution of water against the holders of junior priority ground water rights in Water District No. 130 that are providing the required mitigation until after the Stipulated Agreement expires on December 31, 2003. Kay Hardy was advised of this determination in the Director's letter of May 19, 2003.

44. Notwithstanding Finding 43, Clear Lakes Trout Company is entitled to make delivery calls for distribution of water against the holders of junior priority surface water rights.

45. Based on review of the Department's water right records, field investigations, and consultation with the watermasters for Water Districts Nos. 36A and 130, there currently are no surface water rights in Water Districts Nos. 36A and 130 that are junior in priority to water rights nos. 36-07080, 36-07725, and 36-07731, and that if curtailed would provide water to the prior rights held by Clear Lakes Trout Company for use by Fisheries Development Company. Counsel for Kay Hardy was advised of this determination in a letter from the Director dated July 2, 2003.

46. Water right no. 36-08089 is held by Fisheries Development Company for power generation purposes. Consistent with other water rights held for power generation, water right no. 36-08089 is subordinate to all rights for the use of water that are later in priority, other than water rights for hydropower production. Kay Hardy was advised of this determination in the Director's letter of May 19, 2003.

Initial Response to Delivery Calls for Distribution to Water Rights Nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and 36-07167 (Rim View Trout Company)

47. Water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and 36-07167 are held by Rim View Trout Company, which is not a signatory to the Stipulated Agreement.

48. Rim View Trout Company has not provided all historical records of the amounts of water diverted under its water rights as requested by the Director in his letter of May 23, 2003.

49. Based on the measured discharge through its facilities reported annually to the Department by Rim View Trout Company, the discharge has generally been 100 cfs or more from March of 1995 through December of 2002.

50. None of the intermittent measurements of the discharge through the Rim View

Trout Company facilities made by the watermaster for Water District No. 130 during 2003 have shown a discharge of less than 100 cfs through the Rim View facilities.

51. Based on the discharge measurements through the Rim View Trout Company facilities available to the Department, there has been a sufficient amount of water to satisfy water rights nos. 36-02680 for 60 cfs, 36-04032A for 10 cfs, 36-04032B for 10 cfs, 36-04032C for 5 cfs, and 36-04032D for 15 cfs, which total 100 cfs in order of priority.

52. Water right no. 36-07167 has a priority date of March 18, 1971, and authorizes a maximum diversion rate of 50 cfs for fish propagation. At times, there has not been a sufficient amount of water to satisfy water right no. 36-07167, for which a delivery call can be considered pursuant to the Conjunctive Management Rules.

**Initial Response to Delivery Call for Distribution to Water Right No. 36-07176
(White Springs Hatchery)**

53. Water right no. 36-07176 is held by the Estate of Earl M. Hardy (“Hardy Estate”), which is not a signatory to the Stipulated Agreement.

54. Water right no. 36-07176 has a priority date of May 18, 1971, and authorizes a maximum diversion rate of 38.8 cfs for fish propagation at the White Springs Hatchery.

55. The Hardy Estate has not provided all historical records of the amounts of water diverted under its water right as requested by the Director in his letter of May 23, 2003.

56. Based on the measured discharge through its facilities reported annually to the Department by the White Springs Hatchery, the discharge has continuously been less than 38.8 cfs from March of 1995 through December of 2002.

57. The intermittent measurements of the discharge through the White Springs Hatchery facilities made by the watermaster for Water District No. 130 during 2003 have all shown a discharge of less than 38.8 cfs through the facilities.

58. Based on the discharge measurements through the White Springs Hatchery facilities available to the Department, there has not been a sufficient amount of water to satisfy water right no. 36-07176 since at least March of 1995, and a delivery call can be considered pursuant to the Conjunctive Management Rules.

Authorized Diversion Rate for Water Rights Nos. 36-07167 and 36-07176

59. 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.

60. Overall variations in the discharge from individual springs between years result from factors that include but are not necessarily limited to: variations in surface water supplies available for irrigation above the ESPA, which affect cropping decisions and the amount of incidental recharge to the ESPA; changes in the amounts and timing of tributary underflow to the ESPA, which also reflect numerous variations upgradient from where tributary underflow contributes to the ESPA; inter-year variations in precipitation and temperature, which not only affect the amount of surface water used above the ESPA and associated incidental recharge to the ESPA, but also affect the quantity of ground water withdrawals and depletions from the ESPA; and differences between years in the quantity of intentional recharge to the ESPA.

61. Intra-year variations in the discharge from individual springs result from the factors described in Finding 60 but also from other factors including: variations in surface water application above the ESPA and associated incidental recharge in response to seasonal changes in precipitation and temperature; variations in timing of ground water withdrawals and depletions from the ESPA in close proximity to individual springs; and the timing of intentional recharge to the ESPA in close proximity to individual springs.

62. While both the regional and local factors affecting inter-year and intra-year variations in spring discharge are generally understood, the interactions between these factors are complex and the specific effects of individual factors and various combinations of factors on the discharge from individual springs have not been quantified.

63. Inter-year and intra-year variations in the discharge from the springs that are the source for water rights nos. 36-07167 and 36-07176 existed when appropriations for these rights were initiated (March 18 and May 18, 1971, respectively). The Department has no records that show that the quantities of water diverted pursuant to water rights nos. 36-07167 and 36-07176 were consistently available at the authorized diversion rates during the years following the initial appropriations. Neither Rim View Trout Company nor the Hardy Estate have submitted historical records of the amounts of water diverted under their respective water rights that show water was historically available from the sources for these water rights to consistently fill the rights at the authorized rates of diversion.

64. The rates of diversion authorized pursuant to water rights nos. 36-07167 and 36-07176 (50 cfs and 38.8 cfs, respectively) are not quantity entitlements that are guaranteed to be available to the right holders. 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 available and the rights are in priority. Neither Rim View Trout Company nor the Hardy Estate can call for the curtailment of junior priority water rights simply because insufficient water is

available to fill the Rim View right (no. 36-0167) or the Hardy Estate right (no. 36-0176) at the authorized rate of diversion. Rim View Trout Company and the Hardy Estate can only call for the distribution of water to their rights through the curtailment of junior priority rights when such curtailment would result in a usable amount of water reaching their respective point of diversion in time of need, and the depletions caused by diversion and use of ground water under such junior priority rights have not been adequately mitigated.

Factors Considered in Determining Material Injury To and Reasonableness of Water Diversions Under Water Right No. 36-07167 (Rim View Trout Company)

65. Because Rim View Trout Company has not provided historical records of the amounts of water diverted (see Findings 38 and 48) under water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, and 36-04032D, for which the cumulative authorized diversion rate is 100 cfs, and 36-07167, for which the authorized diversion rate is 50 cfs, the only records of the amounts of water diverted through the Rim View facilities possessed by the Department are the annual reports submitted by Rim View for the time period beginning in March of 1995 through December of 2002 and the intermittent measurements made by the watermaster for Water District No. 130 in 2003.

66. Based on the annual reports submitted by Rim View Trout Company for the years 1995 through 2002, the following table summarizes the minimum daily flow and average daily flow by month through the Rim View facilities at the beginning and end of this time period:

| Month | Year | Minimum Daily Flow | Average Daily Flow |
|-----------|------|--------------------|--------------------|
| January | 1996 | 133.1 cfs | 134.6 cfs |
| | 2002 | 128.0 | 141.5 |
| February | 1996 | 119.8 | 121.2 |
| | 2002 | 146.0 | 151.1 |
| March | 1995 | 97.5 | 101.1 |
| | 2002 | 131.1 | 153.2 |
| April | 1995 | 103.1 | 116.2 |
| | 2002 | 158.9 | 160.8 |
| May | 1995 | 136.0 | 139.4 |
| | 2002 | 154.1 | 154.6 |
| June | 1995 | 140.5 | 142.6 |
| | 2002 | 150.9 | 152.4 |
| July | 1995 | 142.0 | 142.4 |
| | 2002 | 150.9 | 153.9 |
| August | 1995 | 142.0 | 143.2 |
| | 2002 | 153.0 | 153.7 |
| September | 1995 | 142.9 | 143.4 |
| | 2002 | 151.9 | 154.3 |
| October | 1995 | 144.1 | 144.7 |
| | 2002 | 149.8 | 151.5 |
| November | 1995 | 145.3 | 146.5 |
| | 2002 | 150.9 | 153.8 |
| December | 1995 | 144.2 | 145.1 |
| | 2002 | 152.0 | 153.8 |

67. Comparing same-month minimum daily and average daily flows through the Rim View Trout Company facilities between years for the years shown above as well as for the other years between 1995 and 2002 not shown above, demonstrates that flows through the Rim View facilities have generally increased since 1995, particularly from 2001 to 2002.

68. Thus far during 2003, the watermaster for Water District No. 130 has recorded the following measurements of flow through the Rim View Trout Company facilities:

| Date | Measured Flow |
|------------|---------------|
| 03/04/2003 | 151.0 cfs |
| 05/30/2003 | 151.9 |
| 06/06/2003 | 153.0 |
| 06/17/2003 | 154.1 |
| 07/09/2003 | 153.0 |
| 08/04/2003 | 153.0 |
| 08/06/2003 | 143.4 |

69. The watermaster for Water District No. 130 reported to the Director that water was available to fully satisfy water right no. 36-07167 sometime during the first part of September 2003.

70. The flows through the Rim View Trout Company facilities measured by the watermaster in 2003 are similar to the measured flow rates in 2002, except for the time period after August 4 until the early part of September.

71. Based on the historical flow measurements available to the Department and taking into account the variations in spring flows between months that have existed since the date of appropriation for water right no. 36-07167, the quantity of water available at the source for water right no. 36-07167 is currently adequate to satisfy this right. (See IDAPA 37.03.11.042.01.a).

72. Based on documentation in the Department's files for water right no. 36-07167 and the results from a field inspection conducted on May 30, 2003, by the watermaster for Water District No. 130 and Brian Patton, a registered professional civil engineer, Rim View Trout Company has expended reasonable efforts to divert water right no. 36-07167 from its source. (See IDAPA 37.03.11.042.01.b).

73. Based on simulations using the Department's existing ground water model for the ESPA, the diversion and use of ground water under certain water rights having priority dates later than the priority date for water right no. 36-07167 (March 18, 1971) do affect the quantity and timing of when water is available from springs discharging in the Thousand Springs area. However, the Department's existing ground water model for the ESPA cannot accurately simulate the effects on individual spring sources caused by the diversion and use of ground water from individual wells or groups of wells. (See IDAPA 37.03.11.042.01.c).

74. Findings 66 and 68 demonstrate that Rim View Trout Company diverts and uses surface water within the authorized cumulative diversion rate for water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, and 36-04032D (100 cfs), and generally within the authorized diversion rate for water right no. 36-07167 (50 cfs). However, there are times when the amount of water diverted by Rim View under water right no. 36-07167 exceeds the authorized diversion rate. (See IDAPA 37.03.11.042.01.e).

75. Based on documentation in the Department's files for water right no. 36-07167 and the results from the field inspection on May 30, 2003, described in Finding 72, Rim View Trout Company has adequate water measuring and recording devices. (See IDAPA 37.03.11.042.01.f).

76. Based on the results from the field inspection on May 30, 2003, described in Finding 72, no modifications to the existing facilities of Rim View Trout Company were identified that could increase the supply of water to Rim View during times that water right no. 36-07167 is not satisfied. (See IDAPA 37.03.11.042.01.g).

77. Based on the results from the field inspection on May 30, 2003, described in Finding 72, there are potentially feasible actions that could provide alternate reasonable means of diversion or alternate points of diversion to increase the supply of water to Rim View during times that water right no. 36-07167 is not satisfied. However, based on subsequent findings in this order it is not necessary to determine whether such alternatives should be pursued. (See IDAPA 37.03.11.042.01.h).

Factors Considered in Determining Material Injury To and Reasonableness of Water Diversions Under Water Right No. 36-07176 (White Springs Hatchery)

78. Because the Hardy Estate has not provided historical records of the amounts of water diverted under water right no. 36-07176 (see Findings 38 and 55), for which the authorized diversion rate is 38.8 cfs, the only records of the amounts of water diverted through the White Springs Hatchery facilities possessed by the Department are the annual reports submitted by the White Springs Hatchery for the time period beginning in March of 1995 through December of 2002 and the intermittent measurements made by the watermaster for Water District No. 130 in 2003.

79. Based on the annual reports submitted by the White Springs Hatchery for the years 1995 through 2002, the following table summarizes the minimum daily flow and average daily flow by month through the White Springs Hatchery facilities at the beginning and end of this time period:

| Month | Year | Minimum Daily Flow | Average Daily Flow |
|-----------|------|--------------------|--------------------|
| January | 1996 | 28.3 cfs | 28.9 cfs |
| | 2002 | 28.0 | 28.8 |
| February | 1996 | 28.3 | 28.8 |
| | 2002 | 27.3 | 27.6 |
| March | 1995 | 27.3 | 27.8 |
| | 2002 | 26.4 | 27.2 |
| April | 1995 | 27.3 | 28.0 |
| | 2002 | 26.4 | 27.1 |
| May | 1995 | 29.6 | 30.4 |
| | 2002 | 27.0 | 28.7 |
| June | 1995 | 30.2 | 31.0 |
| | 2002 | 29.9 | 31.1 |
| July | 1995 | 31.6 | 32.0 |
| | 2002 | 31.2 | 31.7 |
| August | 1995 | 32.2 | 32.8 |
| | 2002 | 31.2 | 31.8 |
| September | 1995 | 33.2 | 33.7 |
| | 2002 | 30.9 | 31.0 |
| October | 1995 | 31.9 | 32.5 |
| | 2002 | 30.6 | 31.1 |
| November | 1995 | 29.9 | 31.3 |
| | 2002 | 29.6 | 30.2 |
| December | 1995 | 29.3 | 29.5 |
| | 2002 | 28.3 | 28.9 |

80. Comparing same-month minimum daily and average daily flows through the White Springs Hatchery facilities between years for the years shown above demonstrates that there has been some decrease in flows through the White Springs Hatchery facilities between 1995 and 2002. However, flow measurements for the other years between 1995 and 2002 not shown above demonstrates that flows through the White Springs Hatchery facilities generally increased after 1995 through 1997 but have generally decreased since, although there was generally some recovery in 2000 and 2001 in most months.

81. Thus far during 2003, the watermaster for Water District No. 130 has recorded the following measurements of flow through the White Springs Hatchery facilities:

| Date | Measured Flow |
|------------|---------------|
| 05/30/2003 | 29.9* cfs |
| 10/07/2003 | 29.9* |

*Excludes \leq 0.1 cfs diverted to settling ponds

82. The flows through the White Springs Hatchery facilities measured by the watermaster in 2003 are similar to the measured flow rates in 2002.

83. Based on the historical flow measurements available to the Department and taking into account the variations in spring flows between months that have existed since the date of appropriation for water right no. 36-07176, the quantity of water available at the source for water right no. 36-07176 is currently insufficient to fill this right, even during months when the springs providing the source for this right are discharging at the highest flows during the year, generally August through October. (See IDAPA 37.03.11.042.01.a).

84. Based on documentation in the Department's files for water right no. 36-07176 and the results from a field inspection conducted on May 30, 2003, by the watermaster for Water District No. 130 and Brian Patton, a registered professional civil engineer, the Hardy Estate has expended reasonable efforts to divert water right no. 36-07176 from its source for use at the White Springs Hatchery. (See IDAPA 37.03.11.042.01.b).

85. Based on simulations using the Department's existing ground water model for the ESPA, the diversion and use of ground water under certain water rights having priority dates later than the priority date for water right no. 36-07176 (May 18, 1971) do affect the quantity and timing of when water is available from springs discharging in the Thousand Springs area. However, the Department's existing ground water model for the ESPA cannot accurately simulate the effects on individual spring sources caused by the diversion and use of ground water from individual wells or groups of wells. (See IDAPA 37.03.11.042.01.c).

86. Findings 79 and 81 demonstrate that the Hardy Estate is currently diverting and using surface water within the authorized diversion rate for water right no. 36-07176 (38.8 cfs). (See IDAPA 37.03.11.042.01.e)

87. Based on documentation in the Department's files for water right no. 36-07176 and the results from the field inspection on May 30, 2003, described in Finding 84, the White Springs Hatchery has adequate water measuring and recording devices. (See IDAPA 37.03.11.042.01.f).

88. Based on the results from the field inspection on May 30, 2003, described in Finding 84, no modifications to the existing White Springs Hatchery facilities were identified that could increase the supply of water to the White Springs Hatchery during times that water right no. 36-07176 is not satisfied. (See IDAPA 37.03.11.042.01.g).

89. Based on the results from the field inspection on May 30, 2003, described in Finding 84, there are potentially feasible actions that could provide alternate reasonable means of diversion or alternate points of diversion to increase the supply of water to the White Springs Hatchery during times that water right no. 36-07176 is not satisfied. However, based on subsequent findings in this order it is not necessary to determine whether such alternatives should be pursued. (See IDAPA 37.03.11.042.01.h).

Adequacy of Mitigation Provided Pursuant to Stipulated Agreement

90. The 40,000 acre feet of replacement water to be provided each year by the holders of ground water rights party to the Stipulated Agreement referred to in Finding 11 was calculated using the Department's existing ground water model to simulate the effects of curtailing all diversions and use of ground water for irrigation that met criteria specified by the Director regarding quantity and time impacts on reach gains (spring discharges) in the Thousand Springs area. The quantity criteria specified by the Director was 50 percent and the time criteria specified by the Director was within 6 months; meaning that curtailment of a ground water right was included in the modeled simulations if at least 50 percent of the depletion to the ESPA that would have resulted from continued diversion and use of ground water under that right was determined from the ground water model to be included in the reach gains in the Thousand Springs area within six months of curtailment.

91. The 50 percent quantity and within 6 months time criteria specified by the Director addressed uncertainties in the modeled results to ensure that ground water rights were not identified to be curtailed unless curtailment would result in a usable amount of water reaching the points of diversion for senior priority rights in time of need. The Director determined that eliminating at least 50 percent of the ground water depletion causing reduced spring discharges within 6 months of curtailment would result in a usable amount of water reaching springs in the Thousand Springs area in time of need.

92. Only ground water diverted and used for irrigation purposes was included in the modeled curtailment simulation, because irrigation uses (including irrigation under municipal water rights and domestic uses) cause essentially all of the depletions to the ESPA. All irrigation uses of ground water, other than domestic and small residential lots, that met the 50 percent and 6 month criteria were included in the curtailment simulation, regardless of priority date, because all such water rights are junior in priority to one or both of the most senior priority water rights that were not satisfied during the 2001 irrigation season, water right no. 36-00018 with the priority date of September 10, 1884, and water right no. 36-00004 with the priority date of April 1, 1917.

93. The simulated 40,000 acre feet of increased reach gain that would result from curtailment of all ground water diversion and use under water rights for irrigation was modeled to accrue to the reach of the Thousand Springs area as a whole. The Department's existing ground water model for the ESPA cannot provide accurate simulations of the effects on individual springs in the Thousand Springs area from curtailing individual ground water rights or groups of ground water rights.

94. The Department's existing ground water model for the ESPA provides the best and most technically sound information that is currently available concerning the effects of ground water depletions on spring discharges in the Thousand Springs area. The new ground water model resulting from the reformulation and recalibration described in Finding 4 is expected to provide more detailed and reliable information concerning the effects of ground water depletions on spring discharges in the Thousand Springs area. The reformulation and recalibration for the new ground water model will not be completed until the end of 2003, and the new model is not expected to be ready for use in making water management decisions until at

least the mid to latter part of 2004.

95. There currently is no other technical basis as accurate as the simulations from the Department's existing ground water model for the ESPA to determine the amount of replacement water required to offset the depletions causing reductions in spring discharges in the Thousand Springs area from the diversion and use of ground water that result in material injury to the rights to use water from sources provided by such spring discharges. There also is not currently a sufficient basis to determine that the amount of replacement water or mitigation required to offset such depletions is different than 40,000 acre feet each year.

96. Through the Director's approval of the Stipulated Agreement, the Director approved the amount of replacement water as being adequate mitigation to the Thousand Springs reach for the depletionary effects of ground water withdrawals for the two-year term of the agreement. By offsetting the depletionary effects, any material injury potentially caused by out-of-priority diversion of ground water is adequately mitigated during the term of the Stipulated Agreement. The amount of replacement water or other mitigation required for continued out-of-priority diversion and use of ground water is subject to change after 2003, depending on hydrologic conditions and other additional information that will be available, and has not been determined.

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

4. The Department adopted Conjunctive Management Rules, effective October 7, 1994. IDAPA 37.03.11. The Conjunctive Management Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. IDAPA 37.03.11.001.

5. Rule 10 of the Conjunctive Management Rules contains the following pertinent definitions:

01. Area Having a Common Ground Water Supply. A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. IDAPA 37.03.11.010.01.

03. Conjunctive Management. Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply. IDAPA 37.03.11.010.03.

04. Delivery Call. A request from the holder of a water right for administration of water rights under the prior appropriation doctrine. IDAPA 37.03.11.010.04.

6. Rule 20 of the Conjunctive Management Rules contains the following pertinent statements of purpose and policies for conjunctive management of surface and ground water resources:

01. Distribution of Water Among the Holders of Senior and Junior-Priority Rights. The rules apply to all situations in the State where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water

from ground water sources and areas having a common ground water supply. IDAPA 37.03.11.020.01.

02. Prior Appropriation Doctrine. These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law. IDAPA 37.03.11.020.02.

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued. IDAPA 37.03.11.020.04.

7. Rule 40 of the Conjunctive Management Rules sets forth the following procedures to be followed for responses to calls for water delivery made by the holders of senior priority surface or ground water rights against the holders of junior priority ground water rights from areas having a common ground water supply in an organized water district. IDAPA 37.03.11.040.

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. 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 within 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 period to lessen the economic impact of immediate and complete curtailment; or

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

02. Regulation of Uses of Water by Watermaster. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in section 42-604, Idaho Code, and under the following procedures:

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source.

b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director.

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority.

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by section 42-606, Idaho Code.

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated.

03. Reasonable Exercise of Rights. In determining whether diversion and use of water under rights will be regulated under Rules 40.01.a., or 40.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

04. Actions of the Watermaster under a Mitigation Plan. Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan.

.....

8. Rule 42 of the Conjunctive Management Rules sets forth the factors the Director may consider in determining material injury and the reasonableness of water diversions:

01. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

a. The amount of water available in the source from which the water right is diverted.

b. The effort or expense of the holder of the water right to divert water from the source.

c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.

e. The amount of water being diverted and used compared to the water rights.

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

02. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

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

10. The Director has appointed a watermaster for Water District No. 130 to perform the statutory duties of a watermaster in accordance with guidelines, direction, and supervision provided by the Director. The Director has given specific directions to the watermaster for Water District No. 130 to curtail illegal diversions, measure and report diversions, enforce the provisions of the Stipulated Agreement, and curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated

agreement or a mitigation plan approved by the Director.

11. The four letters received on May 14 and 16, 2003, by the Director from Kay Hardy in her capacity as President of Clear Lakes Trout Company, President of Fisheries Development Company, President of Rim View Trout Company, and General Partner in Hardy Properties LP and Personal Representative for the Estate of Earl M. Hardy, demanding that the watermasters for Water District No. 130, and Water District No. 36A in the case of Fisheries Development Company, be directed to administer water rights in the districts that may deplete the supply of water to the spring sources relied upon by the Hardy water rights are either delivery calls under Rule 10.04 of the Conjunctive Management Rules against junior priority ground water rights or demands for the administration of surface water rights pursuant to Idaho Code § 42-607.

12. Rule 40 of the Conjunctive Management Rules applies to the delivery calls made by Kay Hardy against the holders of junior priority ground water rights, but not surface water rights, in Water Districts No. 36A and No. 130.

13. Rules 40 and 42 of the Conjunctive Management Rules require the Director to make determinations regarding “material injury” and the “reasonableness of water diversions” in responding to a delivery call against junior priority ground water rights in Water District No. 130.

14. Rule 40.02.b of the Conjunctive Management Rules requires the watermaster of Water District No. 130 to “regulate the diversions and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director.” IDAPA 37.03.11.040.02.b.

15. Rule 42.02 of the Conjunctive Management Rules provides that the holder of a senior priority surface water right is prevented from making a delivery call for curtailment of pumping of any well under a junior priority ground water right if the ground water right is covered by an approved and effectively operating mitigation plan. IDAPA 37.03.11.042.02. Based upon Findings 10 through 15, the Director concludes that the Stipulated Agreement constitutes “an approved and effectively operating mitigation plan” under Rule 42.02 of the Conjunctive Management Rules.

16. Clear Lakes Trout Company is not entitled to make a delivery call under water rights nos. 36-02659 and 36-07004, or water rights nos. 36-07080, 36-07725, 36-07731, and 36-08089, for distribution of water against the holders of junior priority ground water rights in Water District No. 130 until after December 31, 2003, because it is a party to the Stipulated Agreement described in Findings 10, 11, and 12, and because the mitigation required of ground water right holders under the Stipulated Agreement has either been provided for year 2002 or is being provided for year 2003. In addition, water right no. 36-08089, held by Fisheries Development Company for power generation purposes, is subordinate to all junior priority rights other than rights held for hydropower production, and therefore Fisheries Development is not entitled to seek distribution of water from junior priority rights except from other junior priority rights for hydropower production.

17. Clear Lakes Trout Company is not entitled to have the weir in the Western Diversion Pool adjusted to allow it to divert a minimum of 66 cfs under water right no. 36-02659 from the Western Diversion Pool because adjustment of the weir is governed by separate watermaster instructions described in Finding 41. Litigation regarding these watermaster instructions is currently pending before the Fourth Judicial District Court in *Clear Lakes Trout Co. Inc. v. Idaho Dept. of Water Resources and Clear Springs Foods, Inc.*, Ada County Case No. CV OC 0304746D.

18. Clear Lakes Trout Company is entitled under rights nos. 36-07080, 36-07725, and 36-07731, for use by Fisheries Development Company, to demand distribution of water from holders of junior priority surface water rights; however, there currently are no junior priority surface water rights within Water Districts Nos. 36A and 130 that if curtailed would provide water to the prior rights of Fisheries Development.

19. The delivery call by Rim View Trout Company for distribution of water to water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and 36-07167 is not recognized because based upon facility discharge measurements there has been a sufficient amount of water available to satisfy water rights nos. 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, and although at times there has not been sufficient water to satisfy water right no. 36-07167, this is due to seasonal variations in spring discharge that have not been attributed to ground water diversions and use under junior priority rights. Currently there is adequate water available to fill this right. (See Findings 65 through 71).

20. The delivery call by the Hardy Estate for distribution of water to water right no. 36-07176 for use at the White Springs Hatchery is recognized. Although water available at the spring source is currently insufficient to fill this right, the Department's existing ground water model for the ESPA cannot accurately simulate the effects on individual spring sources caused by diversion and use of ground water from individual wells or groups of wells. However, the 40,000 acre feet per year of replacement water for the Thousand Springs reach is determined by the Director to be adequate mitigation for the entire Thousand Springs reach for the effects of ground water diversions from the ESPA for irrigation use proximate to the Thousand Springs area during the term of the Stipulated Agreement, which is "an approved and effectively operating mitigation plan" under Rule 42.02 of the Conjunctive Management Rules.

21. Although the Hardy Estate was not a signatory to the Stipulated Agreement, the Hardy Estate did have actual notice of the Stipulated Agreement because Kay Hardy, the Personal Representative for the Estate of Earl M. Hardy, signed the Stipulated Agreement in her capacity as President of the Clear Lakes Trout Company.

ORDER

In response to the water delivery calls made by Kay Hardy in her capacity as President of Clear Lakes Trout Company, President of Fisheries Development Company, President of Rim View Trout Company, and General Partner in Hardy Properties LP and Personal Representative for the Estate of Earl M. Hardy, and for the reasons stated in the foregoing Findings of Fact and Conclusions of Law, the Director orders as follows:

IT IS, THEREFORE, HEREBY ORDERED that based on the information and technical resources currently available to the Director, the watermasters for Water Districts No. 36A and No. 130 are directed to continue administering water rights within Water Districts No. 36A and No. 130, under the supervision of the Director, in the same manner that the rights are presently being administered in accordance with the provisions of Idaho Code §§ 42-602 and 42-607, applicable rules adopted pursuant to Idaho Code § 42-603, and the directions and orders of the Director.

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

DATED this 10th day of October 2003.

/Signed/
KARL J. DREHER
Director