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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-0413A, 36-04013B AND 36-7148 (Snake River Farm)	**GROUND WATER DISTRICTS' OBJECTIONS AND BRIEF IN SUPPORT OF MITIGATION PLAN PROVIDING "OTHER APPROPRIATE COMPENSATION"**

COME NOW North Snake Ground Water District (NSGWD) and Magic Valley Ground Water District (MVGWD) (collectively "Ground Water Districts"), through counsel, and on behalf of their ground water district members and those ground water users who are non-member participants in the Ground Water Districts' mitigation activities, and hereby submit this Brief in Support of Mitigation Plan Providing for Other Appropriate Compensation pursuant to the February 20, 2009 *Order On Status Conference and Providing Briefing Schedule on Second Mitigation Plan for Monetary Compensation* ("Order").

I. INTRODUCTION

On December 18, 2008 the Ground Water Districts filed a Second Mitigation Plan for Monetary Compensation proposing to continue with the CREP and the 3,900 conversion acres plus "other appropriate compensation" pursuant to Rules for Conjunctive Management of Surface and Ground Water Resources, ("CM Rules") Rule 43.03.c in the form of an annual cash

payment in the amount equal to actual lost net profit. On February 23, 2009, the Ground Water Districts filed an amendment to their Second Mitigation Plan to include not only monetary compensation but to provide replacement fish in the event that monetary compensation is not acceptable. The Ground Water District's Second Mitigation Plan is in response to Clear Springs Food, Inc.'s ("Clear Springs") objections to all replacement water plans and proposes to provide "other appropriate compensation" rather than direct "replacement water" under CM Rule 43 to address the shortfall of 2.0 cfs after credit is given for the ongoing CREP and conversion acres.

The Department published Notice of the Second Mitigation Plan on February 5 and 12, 2009 with the last day to file protests being February 23, 2009. On February 19, 2009 the Director held a status conference and informed the parties' that the Department's "traditional" view was that the Department did not have the authority to require a calling senior water right holder to accept monetary compensation. The Director asked for briefing on the question of whether the Director has the "authority to approve a mitigation plan providing for monetary compensation as an alternative to replacement water supplies in response to a delivery call without approval of the holder of the calling right." Order at 2. On February 23, 2009, protests to the Ground Water Districts' Second Mitigation Plan were filed by Clear Springs, Rangen, Inc., the Surface Water Coalition, Thousand Springs Water Users Association, Inc. and Blue Lakes Trout Farm, Inc. The Ground Water Districts filed a Motion to Strike these protests for the reason that the issue of whether payment of money or delivery of replacement fish in addition to CREP and conversion acres adequately compensates Clear Springs is a matter solely between the Ground Water Districts and Clear Springs and does not involve any statutory right, claim or interest of the Surface Water Coalition, the Thousand Springs Water Users' Association, Inc.,

Blue Lakes Trout Farms, Inc. or Rangen, Inc. who are not lawful "protestants" or "intervenors" under Rules 155 and 353 of the Department's Rules of Procedure.[1] IDAPA 37.01.01.155, 353.

This brief will discuss the Director's authority to approve the Ground Water Districts' Second Mitigation Plan as originally submitted and as amended.

II. OBJECTIONS TO PROCEDURE AND REQUEST FOR INDEPENDENT HEARING OFFICER

From the outset, the Ground Water Districts object to the Director's premature request for briefing on the issue and the short and inadequate schedule set for briefing. When the Director issued his order on February 20, 2009, requiring briefing, the time period within which protests were due from the date of publication had not expired, and no protests had been filed. Accordingly, there was no issue ripe for briefing at the time of the Director's request. Furthermore, it appeared at the hastily called February 19, 2009, status conference that the Director has already made up his mind to ignore the clear language of CM Rule 43 and reject any kind of "other appropriate compensation" without affording the Ground Water Districts a reasonable opportunity to brief and argue any defenses that Clear Springs may raise in a timely fashion and in compliance with the Department's rules of procedure. Despite the fact that the Department delayed publication for over a month without cause or explanation, it seems that the Director is more concerned with hasty action rather than providing all the parties with the benefits of meaningful due process through notice and hearing as is contemplated under the Department's procedural rules and the CM Rules in particular.

The Ground Water Districts have a right to have their Second Mitigation Plan heard on its own merits, regardless of whether or not there is any other pending mitigation plan. The

[1] See *Motion to Strike Protestants Other Than Clear Springs Foods, Inc.* filed March 2, 2009. The Ground Water Districts request that the Director refrain from reading any briefing submitted by the protestants other than Clear Spring until a ruling on the Motion to Strike has been made.

proceeding on the Second Mitigation Plan should not be biased or judged in any manner based on whether or not the Director believes the Ground Water Districts should be proposing a different plan or proceeding in a different direction. The plain language of CM Rule 43 contemplates and expressly allows for a mitigation plan preventing injury to the calling party by providing either "replacement water" or "other appropriate compensation." Yet, the Director is seemingly predisposed to ignore the clear language of the rule providing for "other appropriate compensation" while reading into the Rule that the calling party must first consent to "other appropriate compensation" but not "replacement water." This mindset compels a thorough inquiry into how and why the "other appropriate compensation" language was written into CM Rule 43.

The Department's records should contain the history of the CM Rules and must be thoroughly researched and analyzed. This is not a small task that would hardly be possible in the short time allowed for briefing even if the Department's files and records were organized and readily available. Prompt efforts by counsel to do so have been fairly unproductive because no complete record is available with few records identified, poorly kept, disorganized and not centralized. While there has been an effort to provide the information that is there, it is obvious that the records are not complete. However, the information disclosed so far indicates that there is nothing in the Department's records that supports the "traditional" view that the "other appropriate compensation" does not mean money, nor is there any records that show that the language was intended to be qualified to require a calling senior to approve of other compensation before the Director could act on a Rule 43 Mitigation Plan. What is obvious is that the "other appropriate compensation" language was intentionally added to CM Rule 43, apparently after comments were submitted on the draft rules. All of this underscores the Ground

Water Districts' objection to the Director's lack of procedure and unfounded "traditional" view which is a clear abuse of discretion and highly prejudicial to the Ground Water Districts.

While Clear Springs' reasoning is unstated, it is noteworthy that in its protest, it requested an independent hearing officer. The Ground Water Districts concur in this request for the reasons outlined above and because the issues presented are entirely legal in nature and best decided by an unbiased and objective hearing officer with legal training.

III. ARGUMENT

Clearly the Director of the Idaho Department of Water Resources ("IDWR" or "Department") has the authority to approve mitigation plans, whether they are interim solutions such as replacement water plans or a more formal mitigation plan under CMR Rule 43. The Director has the authority to approve a mitigation plan entirely, to disapprove it entirely or to provide conditions or other requirements that would make the plan acceptable to IDWR. Inherent in this authority must be the discretion to apply the CM Rules in a manner consistent with their plain meaning.

A. The Plain Language of Rule 43.03.c Provides the Director With the Discretion to Approve a Mitigation Plan that Proposes to Provide Water, Money and/or Fish

The Director is uncertain of whether he can approve a mitigation plan that provides for water and/or "other appropriate compensation" which would include money or fish, without the calling senior-priority water right holder's consent. Any analysis of whether he has the authority must start by reading the plain language of the rule in question.

An agency rule has the same force and effect of law as a statute and the same principles of statutory construction apply. In *Mallonee v. State*, 139 Idaho 615, 619 (2004), the Supreme Court held:

> A rule or regulation of a public administrative body ordinarily has the same force and effect of law and is an integral part of the statute under which it is made just as though it were prescribed in terms therein. The same principles of construction that apply to statutes apply to rules and regulations promulgated by an administrative body. *Higginson v. Westergard*, 100 Idaho 687, 690, 604 P.2d 51, 54 (1979). The phrase, 'rules and regulations,' as routinely used is basically synonymous and with the inclusion of statutes covers the entire authority of the agency in the regulated area.

The Supreme Court of Idaho has stated that:

> The objective of statutory interpretation is to give effect to legislative [agency] intent. *Robison v. Bateman-Hall*, 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). Because "the best guide to legislative intent is the words of the statute itself," the interpretation of a statute must begin with the literal words of the statute. *In re Permit No. 36-7200*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992); *accord Mc Lean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 759 (2006). Where the statutory language is unambiguous, the Court does not construe it but simply follows the law as written. *Mc Lean*, 142 Idaho at 813, 135 P.3d at 759. The plain meaning of a statute therefore will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *Gillihan v. Gump*, 140 Idaho 264, 266, 92 P.3d 514, 516 (2004). In determining its ordinary meaning "effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." *State v. Mercer*, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006) (quoting *In re Winton Lumber Company*, 57 Idaho 131, 136, 63 P.2d 664, 666 (1936)).
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> . . . .
>
> To ascertain legislative intent, the Court examines not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and its legislative history. *Id.*
>
> . . . .
>
> Ambiguity is not established merely because the parties present differing interpretations to the court. *In re Permit No. 36-7200*, *Id.* at 823-24. If the language of the statute is reasonably susceptible of only one interpretation, the statute is unambiguous and there is no occasion to look beyond the text of the statute. *See Id.* at 822-24; *Carrier v. Lake Pend Orielle School Dist. #84*, 142 Idaho at 807, (2006). The first step is to examine the literal words of the statute to determine whether they support the parties' differing interpretations.

State v. Yzaguirre, 144 Idaho 471, 475-76 (2007) (emphasis added). The Idaho Supreme Court has therefore made it clear that the plain, unambiguous language of a statute prevails unless there is clearly contrary legislative intent or unless the plain meaning leads to absurd results. This same analysis should apply to the Director's interpretation of CM Rule 43.03.c.

The CM Rules were promulgated pursuant to Chapter 52, Title 67, Idaho Code, the Idaho Administrative Procedure Act, and Section 42-603, Idaho Code. These rules were also issued pursuant to Section 42-1805(8), Idaho Code, which provides the Director with authority to promulgate[, adopt, modify, repeal and enforce] rules implementing or effectuating the powers and duties of the department. In addition, CM Rule 5 states that "[n]othing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law."

The language of CM Rule 43 is not ambiguous. CM Rule 43.03.c clearly states that one of the factors the director can consider in determining whether a proposed mitigation plan[2] will prevent injury to senior rights includes: "[w]hether the mitigation plan provides replacement water supplies <u>or other appropriate compensation</u> to the senior-priority water right when needed." Rule 43.03.d also continues stating that the director may consider "[w]hether the mitigation plan proposes artificial recharge, <u>compensating</u> senior-priority water rights, or providing aquifer storage . . . . ." (emphasis added). <u>Compensating</u> holders of senior water rights is fully within the meaning of a mitigation plan as defined by Idaho Law. Idaho Code § 42-5201 (13) defines "Mitigation Plan" as "a plan to prevent or <u>compensate</u> for material injury to holders of senior water rights caused by the diversion and use of water by the holders of junior priority ground water rights who are participants in the mitigation plan." (Emphasis added). Nothing limits the compensation under a mitigation plan to replacement water only.[3]

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[2] CM Rule 010.15 defines "Mitigation Plan" as "A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or <u>compensate</u> holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply." (Emphasis added).

[3] Determining a reasonable and fair value for compensating Clear Springs is no different than applying well established standards in Idaho for determining crop losses. Specifically Idaho Jury Instruction 9.09 which summarizes Idaho law states: "[t]he difference between the reasonable value of the crop actually raised upon the

Following the process of statutory interpretation set forth by the Idaho Supreme Court, the language is clear and unambiguous. The unambiguous language in CM Rule 43.03.c must mean something other than replacement water because "compensation" is proposed as an alternative to replacement water supplies and as an alternative to artificial recharge or aquifer storage. There is nothing in the language that limits the Director's discretion or defines what "other appropriate compensation" means. The only logical conclusion is that "other appropriate compensation" means money, or in this case money or fish and the Director has the discretion to determine whether the "other appropriate compensation" in fact compensates the calling water right and is appropriate in the case at hand. It would be arbitrary and a clear abuse of discretion for the Director to disregard the "other appropriate compensation" language or to read into the rule a nonexistent requirement that the calling senior must consent to any approval. There is no limiting language that requires a calling senior to first approve of the "other appropriate compensation" and certainly the Director has never asked or required a calling senior to approve the several replacement water plans that have been approved by the Director in Water Districts 120 and 130 beginning in 2005. Furthermore, the CM Rules survived constitutional challenge without the requirement that the senior approve of the mitigation first.

Not only does the rule, which is an integral part of Idaho law provide the Director with the authority to exercise his discretion and approve a mitigation plan for monetary compensation, but doing so would also be in keeping with the policy behind the CM Rules. The policy behind the CM Rules includes that the administration of ground and surface water resources should be done in a manner to promote the optimum development of the state's water resources in the public interest as provided for in Idaho's Constitution Article XV, Section 7 and provide for full

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land and the reasonable value of the crop which would have been raised upon it under normal conditions during the same year, less the cost of maturing, harvesting and marketing the additional portion of the crop."

economic development of the state's under ground water resources as mandated by I.C. § 42-226.

Finally reading the rule to allow for compensation in the form of money or fish would not lead to an absurd result, not only because it adheres to the plain meaning of the words in the rule and statute, and not only because it would honor the policy behind the CM Rules, but also because it is totally in keeping with the definition of compensation[4] and compensates the senior water right holder for its lost beneficial use, at least in the short-term; in this case the loss of additional fish that is sold for profit.

B. The Director's Authority to Exercise his Discretion to Consider and Approve Monetary Compensation as Part of a Rule 43 Mitigation Plan is Rooted in His Duty to Administer Ground and Surface Water Rights with Consideration of the Public Interest, Full Economic Development of the Resource

The Supreme Court has made it clear that administration of Idaho's ground and surface water rights is not based on strict priority. *American Falls Reservoir District No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, at 870 (2007),(the "*AFRD2*" decision) ("The district court rejected American Falls' position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis."). Article XV, Section 7 of the Idaho Constitution that requires the optimum development of the water resource in the public interest. The Idaho Legislature when approving the Ground Water Act stated that the rule of "first in time, first in right" should be exercised in a manner that does not block full economic development of the state's underground water resources. I.C.§ 42-226. Further, public policy

[4] BLACKS LAW DICTIONARY defines "compensation" as: "Indemnification; payment of damages; making amends; making whole; giving an equivalent or substitute of equal value. That which is necessary to restore an injured party to his former position. . . . equivalent in money for a loss sustained; equivalent given for property taken or for injury done to another . . . An act which a court orders to be done, or money which a court or other tribunal orders to be paid, by a person whose actions or omissions have caused loss or injury to another, in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury."

considerations are found not only in constitutional and statutory language but are also found as part of the Idaho State Water Plan that implores the Director to consider public policy when administering ground water rights, otherwise, "many wells would have to be abandoned" and to administer water rights in order to "minimize the negative impacts on the citizenry." *1992 Idaho State Water Plan* at 18. The current State Water Plan incorporates consideration of the public interest when managing the state's ground water resources:

> It is the policy of Idaho that water be managed with due regard for the public interest as established by state law.
>
> Comment: The constitution and statutes of the State of Idaho declare all the waters of the state, when flowing in their natural channels, including ground waters, and the waters of all natural springs and lakes within the boundaries of the state, to be public waters [Idaho Code 42-101]. Water allocation and management decisions must consider the public interest as established by state law. The State Water Plan is an expression of the public interest.

State Water Plan at 5. The Director cannot lawfully ignore these important considerations nor can he ignore the plain language of CM Rule 43.

C. The Supreme Court Already Determined that CM Rule 43 Is Facially Valid

The Rules were held to be facially constitutional by the Supreme Court in *AFRD2. AFRD2*, 143 Idaho at 883. The Surface Water Coalition in that case specifically challenged Rule 43 claiming that the rule was facially invalid and claiming that the Director was without "constitutional or statutory authority to allow" a junior user to divert under an approved mitigation plan unless a senior calling water right consented to the mitigation or was subordinate to the junior water user. In fact, the Surface Water Coalition specifically argued before the District Court that the rule was facially invalid because it permitted the junior to "'buy' their way out of curtailment . . . . [because the] Director could approve a mitigation plan wholly based upon monetary compensation." *Memorandum in Support of Plaintiff's Motion for Summary*

Judgment at 34-35. But, on appeal, the Supreme Court in *AFRD2* found the rules to be facially valid. *AFRD2*, 143 Idaho at 883. Thus, the Director is with authority to apply the CM Rules as written. Yet, it appears in this case that the Director is deeming himself without discretion to review and approve the Ground Water Districts' Second Mitigation Plan contrary to the plain language of CM Rule 43 and is purportedly attempting to read into the rule an exception that does not exist.

D. The History of the Department's Rules Also Supports the Conclusion that the Director has the Discretion to Approve a Mitigation Plan for Other Appropriate Compensation, At Least in the Short-Term,[5] Without the Approval of the Calling Senior Water Right.

Although the plain meaning of the language should be enough and should end the inquiry, the history and development of the CM Rules are instructive on what the language in Rule 43 means. The CM Rules were adopted through an extensive negotiated rule making process. The CM Rules were promulgated in 1994 and were approved by the Idaho Legislature in 1995. As part of that process, parties were asked for input and comment.

One of the first versions of the CM Rules dated December 29, 1993 contained the predecessor to the current CM Rule 43.03.c. In that draft, mitigation plans[6] were addressed in Rule 40.06 and 06.c stated:

> The mitigation plan <u>must provide</u> for <u>real time replacement water supplies</u> to the senior appropriator during a time of shortage even if the effect of pumping is not felt for many years and will continue to be felt for years after pumping is curtailed.

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[5] Although the Ground Water Districts believe that providing other appropriate compensation can also be approved as part of a long-term mitigation plan based on CM Rule 43's plain language, there is no doubt that the Director could approve such a plan in the short-term under the facts of this case and even the Spring Users' acknowledged that in the past.

[6] Unlike the proposed Water Management Rules' mitigation option that required "in-kind" mitigation only, Rule 43 of the CM Rules provides more flexibility given the fact that surface and ground water administration requires thoughtful, deliberate action that promotes full economic development and the optimum use of the water resource in the public interest.

Exhibit A, (emphasis added). Then, in a draft dated January 11, 1994, the language changed from mandatory, "must provide" to discretionary language that allowed the Director to evaluate "whether the mitigation plan will provide replacement water." Exhibit B. A couple weeks later, on January 20, 1994, mitigation plans were addressed in Rule 40.08 and the "other appropriate compensation" language had been added and the language was changed back to "must provide" to subsection c:

> The mitigation plan must provide for replacement of water supplies <u>or other appropriate compensation</u> to the senior appropriator when needed during a time of shortage even if ....

Exhibit C (emphasis added). Eventually, by *Order Adopting Temporary Rules and Extending Comment Period* dated April 4, 1994, the rule included the "other appropriate compensation" language and couched it in terms of an evaluation by the Director of the acceptability of the plan in Rule 40.09.c:

> <u>Whether the mitigation plan</u> provides for replacement of water supplies <u>or other appropriate compensation</u> to the senior appropriator when needed during a time of shortage....

Exhibit D (emphasis added). The language that allows the Director to evaluate a plan the provides replacement water supplies <u>or</u> other appropriate compensation remains and the current Rule 43.03.c states:

> <u>Whether the mitigation plan</u> provides for replacement of water supplies <u>or other appropriate compensation</u> to the senior-priority water right when needed during a time of shortage....

There is no mandatory language in the current rule and there is no qualification that the senior calling water right must approve the mitigation plan. CM Rule 43 lacks specific language providing that replacement water is the only option or that the senior must consent to other

appropriate compensation. If that was what was intended, then that precise language would appear, yet does not.

Where the party providing mitigation plan presents "other appropriate compensation" to make up any shortfall in replacement water as is the case here, the Director must make a determination of whether the "other appropriate compensation" prevents injury to the senior. In this case, the proposed monetary compensation and also the delivery of replacement fish would completely mitigate any injury when combined with the benefits from CREP and conversions and make Clear Springs whole in satisfaction of the Final Order. The Director must not lose sight of the big picture and bottom line to Clear Springs which is that more water simply means more fish which equates to more profit. This result has previously been determined by the Hearing Officer and confirmed by the Director's Final Order which is pending on appeal.

Allowing for monetary compensation (or fish) in addition to the conversion and CREP acres just makes sense when one considers the CM Rules' history and the policy behind the rules. In fact, the Spring Users' prior comments also support the notion the monetary compensation would be acceptable, at least in the short-term. It is noteworthy that in their June 24, 2004 "Interim Goals and Expectations" submittal to the ESPA Working Group of the Expanded Natural Resources Interim Committee, Clear Springs provided as one of the short-term options:

> 3.B. Where mitigation water is not available, <u>provide mitigation dollars to enable water right holders to remain viable until intermediate and long-term goals take effect.</u>

Exhibit E (emphasis added). This sentiment was further echoed by the Thousand Springs Water Users in its June 24 2004, comments to the same ESPA Working Group, when the association acknowledged that their water rights would not be immediately restored because

efforts to affect aquifer levels take time; and therefor they stated that monetary compensation be part of the mitigation offered to senior users, to wit:

> To the extent that water cannot be provided, in order to forgo the priorities of our rights, our members must receive compensation for the depletionary effects of junior groundwater withdrawls [sic]. Financial compensation should be at a recognized rate for water . . . .
>
> [C]uring the water crisis in an [sic] way that respects and enforces water rights as valuable property requires a multi-faceted effort to provide interim mitigation and relief while the parties develop and implement a credible, long-term plan for aquifer recovery and spring restoration.

Exhibit F (emphasis added).

Today we have a cooperative effort between all stakeholders in working towards restoring aquifer levels through the Comprehensive Aquifer Management Program ("CAMP") process. That being the case, while the state and ground water users and other surface water user stakeholders work to restore aquifer levels, other appropriate compensation must be recognized as a lawful and viable tool to bridge the small gap between replacement water supplied through CREP and conversion and was clearly contemplated and allowed under CM Rule 43. If curtailment in the short-term occurs, then the ground water users will be unable to continue with the long-term CAMP solutions because their economic viability will have been destroyed. This is not in anyone's best interest.

E. The Department Has A Long History and Precedent of Allowing Monetary Compensation to Prevent Injury to Senior Storage Water Right Holders.

The Director already allows monetary compensation to senior users when water is not available or possible. Water District 01 Rental Pool Procedures Rule 7.0 provides for impacts to storage space holders from a prior year's rentals and leases. The amount of reduced storage that is due to the prior year's rentals and leases is determined and then the spaceholder is provided

monetary payment from the "Impact Fund" according to a specific formula. Rental Pool Procedure Rule 7.3. Payment of money is provided because there is no water to compensate the senior storage right holder because the reservoir did not fill.

Thus, when certain factual circumstances are present, the Department allows monetary compensation to "mitigate" for a senior's reduced water supply. Thus, the Water District 01 Rental Pool Procedures show that water administration in Idaho is flexible and recognizes that monetary compensation does in fact prevent injury to a senior when replacement water is unavailable. This lends further support that the Director has discretion to approve a plan that compensates a senior water right holder with money, not water.

The payment of money is not unheard of in water rights cases either. In *Parker v. Wallentine*, the court held that

> Prior to the enactment of the Ground Water Act, the doctrine of prior appropriation, i.e., first in time is first in right, governed the appropriation of ground water in the State of Idaho. Although this doctrine was modified in certain respects by the enactment of the Ground Water Act, the law applicable to ground water used for domestic purposes was not significantly modified by the Act. Under the doctrine of prior appropriation, because Parker's domestic well was drilled prior to Wallentine's irrigation well, Parker has a vested right to use the water for his domestic well. That right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and Parker is required to change his method or means of diversion in order to maintain his right to use the water. *See Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933). *See also* Hutchins, *Protection in Means of Diversion of Ground-Water Supplies*, 29 Cal.L.Rev. 1, 15 (1941).

Parker could not demand only replacement water, rather, through administration of the state's ground water resources, a junior-priority ground water user is allowed to compensate the senior for his injury not just with water, but also for "expenses." The *Parker* case is instructive on the state's policy for optimizing the use of the state's under ground water resources and serves as an

illustration that in certain factual situations when replacement water supplies are not available, money can serve to compensate a senior water right holder.

Similarly, in this case, it is not possible to provide full replacement water to Clear Springs of a quantity and quality acceptable to its facility at Snake River Farms in a manner that makes full economic use of the Eastern Snake Plain Aquifer. Thus, the Ground Water Districts are providing some water to Clear Springs at its Snake River Farms facility by continuing conversions and CREP acres and by participating in exploring further conversion projects and recharge in the CAMP process. However, on a short-term basis, given the policy behind the CM Rules and the plain, unambiguous language of CM Rule 43, the Director has the discretion to approve the Second Mitigation Plan and/or the Amended Second Mitigation Plan that provide Clear Springs some water and some money to compensate for the injury to its Snake River Farm water right. This is a particularly "appropriate" "other compensation" under CM Rule 43.03.c given the fact that Clear Springs adamantly opposes every plan proposed by the Ground Water Districts that would provide replacement water below the rim. Furthermore, the substantial capital costs and uncertainty of attempting to provide an additional 2.0 cfs of direct replacement water cannot be justified or mandated, given the pending appeal of the Final Order to the District Court and the anticipated appeal to the Supreme Court. In the meantime, providing money or fish can easily and immediately prevent any injury to Clear Springs.

F. The Facts of This Case Provide Further Support that the Director Has the Authority to Approve a Mitigation Plan that Provides "Other Appropriate Compensation" Absent a Senior Calling Water Right's Consent

Whether the "compensation" in the form of money or fish, is "appropriate" requires an evaluation of the facts of a particular case and should be a case specific determination resting in the sole and sound discretion of the Director, not the dictates of the calling senior. In fact, the

unique circumstances now faced by the Ground Water Districts, the State and Clear Springs in the case at hand, represents the exact reason that "other appropriate compensation" was included in the rule Otherwise, if replacement water were deemed unacceptable to the calling party for any reason (legitimate or not) or unavailable in a reasonable time or at a reasonable cost, the senior could effectively curtail vast reaches of the aquifer and wreck economic havoc while demanding an insignificantly small amount of replacement water that would not even be utilized to produce fish or profit.

In this case, the unique location of Clear Springs, Snake River Farm makes addressing its shortfall with water particular difficult. Allan Wylie testified to this fact at the hearing on this matter.

> A. The Buhl to Thousand Springs reach is much shorter. This is over 20 miles long, and the Buhl to Thousand Springs reach is 10 miles long. So you get – you don't get as much impact as that impact spreads out radially from a well on this much shorter reach.

Hearing Transcript, p. 825, L. 9-13.

> A. Buhl to Thousand Springs.
>
> Q. The attempt of the 10 percent clip was to try to focus those areas of curtailment that would benefit this reach, this specific reach where the spring users are making their delivery call; is that correct?
>
> A. My intent with identifying the 10 percent was to point out that there is some model uncertainty in where the depletionary -- the benefits to the reach in question is small, that -- that small number could in fact be zero because of model uncertainty.

Hearing Transcript p. 888, L. 15-24

Above the rim solutions appear to be the only solutions acceptable to Clear Springs because of its water quality concerns. Yet, such solutions simply do not result in the necessary water to the reach or to Clear Springs. While there is abundant water below the rim to provide to Clear Springs directly from the Snake River, for example, solutions below the rim are not

acceptable because of water quality issues. Thus, the only viable and effective option at this point pending decision on appeal and the long-term solutions being pursued through CAMP is monetary (or fish) compensation in addition to the conversion and CREP acreages proposed.

Furthermore, there is a pending appeal in this case that could change the outcome to either party. Because of that fact, neither party should be so prejudiced as to be faced with financial ruin nor should destruction of a region's economy be an option. Thus, allowing the junior ground water users to continue their livelihoods during the appeal and providing Clear Springs water, money and fish will protect both sides until a final decision by the Supreme Court is reached. Rule 43.03.c provides the Director with the legal authority to consider the factual circumstances of a case and decide whether the "other compensation" is "appropriate." In this case, there is no doubt that providing Clear Springs with water, money and fish compensates for its injury, and honors the plain language of the rule and the policy behind the rule and state law.

Approving monetary compensation (or fish) in these unique factual circumstances does not necessarily run the risk of setting an adverse precedent;[7] it is simply a sensible, legal, and sound public policy solution to the challenge at hand. As set forth above the Director has the authority to approve other appropriate compensation, including money and/or fish in addition to water and can approve such a mitigation plan with conditions to guard against any perceived misuse of his order approving such a plan.

[7] Equally concerning would be the fact that the Director would ignore the plain language of the rule and the policy being the CM Rules and Idaho law when administering the state's surface and ground water rights. If the only option is curtailment when replacement water is not feasible, no matter what the use is, then theoretically, an absurd result could occur. For instance, if a senior user has an aesthetic pond that is impacted by junior ground water pumping but there is no way to provide replacement water to that pond, then the junior ground water user must curtail to support the aesthetic pond, regardless if this is in keeping with the public interest. The factual circumstances must be considered in determining the adequacy of "other compensation" otherwise, results could become absurd.

IV. CONCLUSION

The Director's discretion in administering water rights certainly includes consideration of the public interest as contemplated by Article XV, Section 7 of the Idaho Constitution that requires the optimum development of the water resource in the public interest. The Director's discretion also includes economic considerations in that full economic development of the state's underground water resources should not be harmed. I.C. § 42-226. The Director's administrative decisions include more than just curtailment, but also include the evaluation of replacement water plans and mitigation plans filed under the CM Rules.

Ground Water Districts have been laboring under an enormous burden to satisfy curtailment orders for four years and have made many attempts to address the injury suffered by Clear Springs at its Snake River Farms facility. But, as the Director and all the parties know, because of the unique location of Clear Springs' Snake River Farms facility, providing direct replacement water through above the rim actions or below the rim direct delivery is not possible or feasible. While the Ground Water Districts are still continuing with the 9,300 conversion acres above the rim and the dried-up acres through CREP program, they are still short 2.0 cfs. Thus, the Ground Water Districts propose to combine monetary compensation or deliver replacement fish equivalent to the 2.0 cfs shortfall to fully mitigate any injury to Clear Springs' Snake River Farm. Since Clear Springs would then have no injury its call would be satisfied as a matter of law.

Submitted this 2nd day of March, 2009.

RACINE OLSON NYE BUDGE &
BAILEY CHARTERED

By: Candee Neff for
Randall C. Budge
Attorneys for North Snake Ground Water District and Magic Valley Ground Water District

CERTIFICATE OF MAILING

I hereby certify that on this 2nd day of March, 2009, the above and foregoing was sent to the following by U.S. Mail, proper postage prepaid and by e-mail for those with listed e-mail addresses:

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Candice Neptune for
Randall C. Budge

Exhibit "A"

CM Rules

Draft-December 29, 1993

DRAFT

Draft - December 29, 1993

IDAPA 37
TITLE 03
Chapter __

000. LEGAL AUTHORITY (Rule 0). These rules are promulgated pursuant to § 42-603, Idaho Code, which provides that 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. These rules are also issued pursuant to § 42-237a.g., Idaho Code, which provides that the Director may supervise and control the exercise of ground water rights from areas of the state which have a common ground water supply which affects the flow of water in any stream or streams in an organized water district. These rules are also issued pursuant to § 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department. ()

001. TITLE AND SCOPE (Rule 1). These rules may be cited as "Rules for Conjunctive Management of Surface and Ground Water." It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently. ()

002. WRITTEN INTERPRETATIONS (Rule 2). In accordance with § 67-5201(16)(b) (iv), Idaho Code, the Department of Water Resources does not have written statements which pertain to the interpretation of the rules of this chapter, or to the documentation of compliance with the rules of this chapter. ()

003. ADMINISTRATIVE APPEALS (Rule 3). Appeals may be taken in compliance with § 42-1701A, Idaho Code, and the department's rules of Procedure, ADAPA 37, Title 01, Chapter 01.

004. SEVERABILITY (Rule 4). The rules governing this chapter are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance is declared invalid, that invalidity does not affect the validity of any remaining portion of this chapter. ()

005.---009. (RESERVED)

010. DEFINITIONS (Rule 10). For the purposes of these rules, the following terms will be used as defined below. ()

valid water right
surface water
ground water

conjunctive management
delivery call
mitigation plan
?

011.---019. (RESERVED)

020. (Rule 20). GENERAL STATEMENTS OF PURPOSE AND POLICIES FOR CONJUNCTIVE MANAGEMENT ()

01. Interconnected surface and ground water. These rules apply to all situations in the state where the use of ground water under junior priorities has an effect upon uses of surface water under valid senior priority water rights. The rules govern the distribution of water from ground water aquifers which are hydrologically connected to streams and springs from which water is diverted under valid water rights or on which unsubordinated instream flow water rights have been established. ()

02. First in time is first in right. These rules implement the principle of "first in time, is first in right" as such principle is defined and interpreted by Idaho statutory and case law. ()

03. Full economic development of underground water. These rules integrate the administration and use of both surface and ground water in a manner that furthers the "full economic development of underground water resources" as set forth in § 42-226, Idaho Code. ()

04. Calls for priority delivery. These rules provide the basis and procedure for responding to calls for priority delivery made by a senior surface water user against junior ground water users. The rules recognize the doctrine of the futile call but also acknowledge that ground water use may have an effect, even though unmeasurable, upon water available to a senior surface water user where the hydrologic connection may be remote and no direct immediate relief would be achieved even if the ground water use was discontinued. ()

05. Reasonable exercise of rights. These rules provide the basis for determining the reasonableness of the diversion and use of water by a petitioner with a senior priority surface water right who requests priority delivery against a junior priority ground water user. The rules also provide the basis for determining the reasonableness of the diversion and use of water by the ground water user against whom the call is made. ()

06. Areas of common ground water supplies. These rules provide the basis for the designation of areas of the state which have a common ground water supply which affects the flow of water in a stream or streams and the procedures which will be followed in incorporating such areas of common ground water supply into existing water districts or creating new districts as provided in § 42-237a.g., Idaho Code. ()

07. Reasonably anticipated average rate of future natural recharge. (Is a rule or definition needed?)

030. (Rule 30) RESPONSES TO CALLS FOR WATER DELIVERY AGAINST JUNIOR GROUND WATER RIGHTS WITHIN AREAS OF THE STATE NOT IN ORGANIZED WATER DISTRICTS OR WITHIN WATER DISTRICTS WHERE GROUND WATER REGULATION HAS NOT BEEN INCLUDED IN THE FUNCTIONS OF SUCH DISTRICTS ()

01. Delivery call (petition). When a delivery call is made by a surface water user (petitioner) alleging that by reason of diversion of water by one or more ground water users (respondents) with later-in-time priorities the petitioner is being deprived of water to which petitioner would otherwise be entitled, the petitioner shall file with the Director a complaint in writing containing, at least, the following in addition to the information required by Department Rules of Procedure 230: ()

a. A description of the water rights of the petitioner and of the water diversion and delivery system being used by petitioner. ()

b. A description of the water rights of the ground water user/s/ (respondents) who are alleged to be interfering with the rights of the petitioner in-so-far as such information is known by petitioner. ()

c. In the event petitioner believes a loss of water supply is being caused by ground water withdrawals within an area having a common ground water supply with the stream or streams from which petitioner receives water, then the petition shall describe in general terms the ground water area within which petitioner desires withdrawals to be regulated. ()

02. Informal resolution. Upon receipt of a petition including information required by subparagraphs 1.a., b., and c., the Director may initially consider the matter for informal resolution under the provisions of § 67-5241, Idaho Code, if doing so will expedite the case without substantially prejudicing the interests of any party. ()

03. Contested case. If no decision can be reached under the provisions of subsection 02 of this section, then the department will consider the matter as a petition for contested case under the Department's adopted Rules of Procedure, IDAPA 37.01.01_____. The petitioner shall serve the petition upon all known respondents as required by Department Rules of Procedure 230. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter. ()

04. Petition for modification of water district. In the event the petition proposes regulation of ground water rights consistent with the priorities of surface water rights in an organized water district, the Department will consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to § 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure. ()

05. Order. Following consideration of the matter of the petition under the Department's Rules of Procedure, the Director may, by order: ()

a. deny the petition in whole or in part, ()

b. grant the petition in whole or in part or upon conditions, ()

b. determine that the petitioned area has a common ground water supply which affects the flow of water in any stream or streams in an organized water district, ()

c. incorporate an area having a common ground water supply into an organized water district following the procedures of § 42-604, Idaho Code, ()

d. create a separate water district following the procedures of § 42-604, Idaho Code, and/or ()

e. determine the need for an adjudication of the priorities of the surface and ground water rights and initiate such adjudication or make interim findings concerning the relative priorities of the rights of the petitioner and respondent ground water users within the area determined to have a common ground water supply, which interim findings shall serve as the basis for priority regulation of uses until such time as modified by the court. ()

05. Upon a finding that the area has a common ground water supply and the incorporation of such area into an organized water district or the creation or a separate water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.

040. (Rule 40) RESPONSES TO CALLS FOR WATER DELIVERY AGAINST JUNIOR GROUND WATER USERS WITHIN AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY WHICH AFFECTS THE FLOW OF WATER IN ANY STREAM OR STREAMS IN AN ORGANIZED WATER DISTRICT ()

01. Responding to a delivery call. When a delivery call is made by a senior surface water user (petitioner) alleging, that by reason of diversion of water by one or more ground water users (respondents) with junior priorities within an area having a common ground water supply which has been included in an organized water district, the petitioner is being deprived of water to which petitioner would otherwise be entitled, and upon a finding by the Director as provided in subsection 02 of this Rule that injury is occurring, the Director, through the watermaster of the water district, shall: ()

a. regulate uses 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 ground water pumping may, by order of the Director, be phased-in over no less than a ____ year period to lessen the economic impact of curtailment, or ()

b. allow out-of-priority diversion of water by ground water users pursuant to an approved mitigation plan. ()

02. Reasonable exercise of rights. In determining whether diversion and use of water under rights will be regulated under subsection a. or b. of the previous section, the Director shall consider whether the petitioner senior surface water right making the call is suffering injury, employing a reasonable means of diversion, and using water with reasonable efficiency. The director will also consider whether the respondent junior ground water user is employing a reasonable means of diversion and using water with reasonable efficiency. ()

03. Determining reasonableness of surface diversions. Factors the Director may consider in determining whether a senior surface water right holder is suffering injury and employing reasonable means of diversion and using water with reasonable efficiency include, but are not limited to, the following: ()

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

b. The extent to which the beneficial use requirements of the senior appropriator could be met with existing facilities and water supplies, including storage water, by employing reasonable diversion and conveyance efficiency and conservation practices. (()

c. The extent to which the beneficial use could be accomplished by the senior surface water appropriator using alternate means of diversion. Where a senior surface water appropriator makes a delivery call on junior ground water rights in an area having a common ground water supply, the senior may be required to first employ reasonable means of diversion including the construction of wells to utilize water from the common ground water supply under the petitioner's surface water right priority. A surface water appropriator is not entitled to command the entirety of large volumes of ground water in an aquifer to support his appropriation contrary to the public policy of full economic development of underground water resources set forth in § 42-226, Idaho Code. ()

04. Determining reasonableness of ground water diversions. Factors the Director may consider in determining whether a junior ground water right holder is employing reasonable means of diversion and using water with reasonable efficiency include, but are not limited to, the following: ()

a. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water pumped, the method of irrigation water application. ()

b. The amount of water being pumped and used compared to the rights held by the pumper. ()

c. The wire-to-water efficiency of the pumping operation. ()

d. The existence of measuring and recording devices. ()

05. Domestic ground water rights exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such

domestic use is within the limits of the definition set forth in § 42-111, Idaho Code. ()

06. Mitigation plan. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: ()

a. Whether the mitigation plan will provide replacement water, at the time and place required by the senior right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the stream at such time and place as necessary to satisfy the rights of diversion from the stream. ()

b. Consideration will be given to the history and seasonal variability of availability of water for diversion so as not to require replacement water at times when the surface right has not historically received a full supply, such as during drought periods. ()

c. The mitigation plan must provide for real time replacement of water supplies to the senior appropriator during a time of shortage even if the effect of pumping is not felt for many years and will continue to be felt for years after pumping is curtailed. ()

d. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. ()

e. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. ()

f. Whether the mitigation plan reasonably calculated the consumptive use component of the ground water withdrawal. ()

g. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. ()

h. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. ()

i. Whether the mitigation plan is consistent with the conservation of water resources and the public interest. ()

j. Whether the mitigation plan reasonably can be monitored and administered to protect senior rights from injury. ()

k. The extent to which diversions under the senior rights for which mitigation is intended are entitled to be protected. ()

l. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. ()

07. Where a mitigation plan has been approved as provided in this rule, the watermaster may permit the use of ground water to continue out of priority order within the water district provided the supplies of augmentation or replacement water are delivered as specified in such approved plan. ()

08. Where a mitigation plan has been approved and the supplies of augmentation or replacement water are not delivered as specified in such approved plan, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of the well or wells otherwise benefitting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior water rights. ()

09. Where a mitigation plan has been approved, the watermaster of the water district shall be empowered to include the costs of administration of the plan within the annual operation budget of the district, to provide for the special assessment of ground water users benefitted by the plan, to collect the assessments and expend funds for the operation of the plan, and to maintain records of the volumes of water made available by the plan and the disposition of such water. ()

050. (Rule 50). DETERMINATION OF AREAS HAVING A COMMON GROUND WATER SUPPLY WHICH AFFECTS THE FLOW OF WATER IN A STREAM OR STREAMS IN AN ORGANIZED WATER DISTRICT ()

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the Eastern Snake Plain Aquifer and interconnected stream systems within Idaho as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho,

USGS Professional Paper 1408-F, 1992 and as delineated on Map Figure ____. ()

a. The Eastern Snake Plain Aquifer is found to be an area of common ground water supply which affects the flow of water in the Snake River upstream of the USGS gaging station at King Hill, Idaho. ()

b. The Eastern Snake Plain Aquifer area of common ground water supply is incorporated into existing Water District 01. Water District 01 is enlarged to encompass the Eastern Snake Plain Aquifer and the surface drainage basin of the Snake River and its tributaries from the point where the river enters the State of Idaho downstream to the USGS gaging station near Murphy, Idaho, excluding the areas encompassed by the following existing Water Districts: ()

27, Blackfoot River
29, Portneuf River
29-C, Mink Creek
29-F, Rapid Creek
29-H, Marsh Creek
29-U, Bill Jackson Creek
31, Mud Lake, Beaver and Camas Creek

(Advisory Committee members note: some special consideration needs to be given to how to handle Eastern Snake Plain Aquifer ground water rights in this sub-basin which may be subject to a priority delivery call by local as well as more remote prior surface water rights)

32-C, Medicine Lodge Creek
33, Little Lost River
34, Big Lost River
36-A, Billingsley and Riley Creeks

(Advisory Committee members note: some special consideration needs to be given to how to handle Eastern Snake Plain Aquifer ground water rights and priority deliver calls by senior surface water rights within this district)

37, Big Wood River
37-A, Corral Creek
37-C, Soldier Creek
37-N, Little Wood River
37-O, Muldoon Creek
37-U, Fish Creek
41, Rock Creek
43-A, Raft River
43-B, Upper Raft River
43-C, Cassia Creek
43-D, Almo Creek
45-A, Basin Creek

45-B, Birch Creek
45-C, Goose Creek
45-F, Marsh Creek
45-K, Cottonwood Creek
45-N, Dry Creek
47-C, Upper Salmon Falls Creek
47-G, Lower Salmon Falls Creek
51-A, Three Creeks
57-C, Castle Creek
57-B, Picket Creek
57-D, Sinker Creek
61-A, Canyon Creek
61-C, Bennett Creek
61-D, Little Canyon Creek
61-E, Cold Springs Creek
61-F, King Hill Creek

c. The actions in modification of water districts which are proposed in subsection b. of this section shall not become effective until completion of the requirements for notice and hearing pursuant to § 42-604, Idaho Code. ()

d. (Approved mitigation plans) - by rule?

02. Big Lost River - Basin 34

(separate rule making is in progress)

Exhibit "B"

CM Rules

Draft-January 11, 1994

Superseded

Draft - January 11, 1994

IDAPA 37
TITLE 03
Chapter __

000. LEGAL AUTHORITY (Rule 0). These rules are promulgated pursuant to § 42-603, Idaho Code, which provides that 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. These rules are also issued pursuant to § 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department. ()

001. TITLE AND SCOPE (Rule 1). These rules may be cited as "Rules for Conjunctive Management of Surface and Ground Water." The rules prescribe procedures for responding to calls for priority delivery of water made by the holder of a valid senior-priority surface water right against a valid junior-priority ground water right which diverts from an area of common ground water supply. It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently. The general rules will address other calls for distribution of water between holders of surface rights and ground water rights with other priority relationships. ()

002. WRITTEN INTERPRETATIONS (Rule 2). In accordance with § 67-5201(16)(b) (iv), Idaho Code, the Department of Water Resources does not have written statements which pertain to the interpretation of the rules of this chapter, or to the documentation of compliance with the rules of this chapter. ()

003. ADMINISTRATIVE APPEALS (Rule 3). Appeals may be taken pursuant to § 42-1701A, Idaho Code, and the department's rules of Procedure, IDAPA 37, Title 01, Chapter 01.

004. SEVERABILITY (Rule 4). The rules governing this chapter are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance is declared invalid, that invalidity does not affect the validity of any remaining portion of this chapter. ()

005.---009. (RESERVED)

010. DEFINITIONS (Rule 10). For the purposes of these rules, the following terms will be used as defined below. ()

valid water right
surface water right

ground water right
surface water
ground water
conjunctive management
delivery call
mitigation plan
forfeiture, abandonment, adverse possession
futile call
material (or appreciable) effect
area of common ground water supply
RAARFNR
equilibrium
full economic development of ground water
reasonable exercise of water rights

011.---019. (RESERVED)

020. (Rule 20). GENERAL STATEMENTS OF PURPOSE AND POLICIES FOR CONJUNCTIVE MANAGEMENT ()

01. Interconnected surface and ground water. These rules apply to all situations in the state where the use of ground water under valid junior-priority rights either individually or collectively has a material effect upon uses of surface water under valid senior-priority water rights. The rules govern the distribution of water from ground water aquifers which are hydrologically connected to surface water sources from which water is diverted under valid senior-priority water rights or on which unsubordinated instream flow water rights have been established. ()

02. First in time is first in right. These rules implement the principle of "first in time is first in right" as such principle is expressed in statutes, constitution and defined and interpreted by ~~Idaho~~ state statutory and case law, including § 42-10_, Idaho Code, and Article XV, Sections 3 and 7, Idaho Constitution. ()

03. Full economic development of underground water. These rules integrate the administration and use of surface and ground water in a manner that furthers the "full economic development of underground water resources" as set forth in § 42-226, Idaho Code. ()

04. Calls for priority delivery. These rules provide the basis and procedure for responding to calls for delivery of water made by a senior-priority surface water user against junior-priority ground water users. The rules recognize the principle of the futile call but also acknowledge that ground water use may have an effect, even though unmeasurable, upon water available to a senior surface water user where the hydrologic connection may be remote and no direct immediate

relief would be achieved even if the ground water use was discontinued. ()

05. Reasonable exercise of rights. These rules provide the basis for determining the reasonableness of the diversion and use of water by a petitioner with a senior priority surface water right who requests priority delivery against a junior priority ground water user. The rules also provide the basis for determining the reasonableness of the diversion and use of water by the ground water user against whom the call is made. ()

06. Areas of common ground water supplies. These rules provide the basis for the designation of areas of the state which have a common ground water supply which affects the flow of water in a surface water source and the procedures which will be followed in incorporating such areas of common ground water supply into existing water districts or creating new districts as provided in § 42-237a.g., and 42-604, Idaho Code. ()

07. Sequence of actions for responding to calls for priority delivery. These rules provide procedures for responding to calls for priority distribution of water from areas having a common ground water supply which have not been incorporated into a water district (Rule 30), within water districts where areas of common ground water supply have been incorporated (Rule 40), and designates areas of common ground water supply (Rule 50).

08. Reasonably anticipated average rate of future natural recharge. These rules provide for administration of the use of ground water resources to achieve the goal expressed in § 42-237a.g., Idaho Code, that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge.

021---029 (RESERVED)

030. (Rule 30) RESPONSES TO CALLS FOR WATER DELIVERY AGAINST JUNIOR-PRIORITY GROUND WATER RIGHTS WITHIN AREAS OF THE STATE NOT IN ORGANIZED WATER DISTRICTS OR WITHIN WATER DISTRICTS WHERE GROUND WATER REGULATION HAS NOT BEEN INCLUDED IN THE FUNCTIONS OF SUCH DISTRICTS ()

01. Delivery call (petition). When a delivery call is made by a surface water user (petitioner) alleging that by reason of diversion of water by one or more ground water users (respondents) with later-in-time priorities the petitioner is being deprived of water to which petitioner would otherwise be entitled, the petitioner shall file with the Director a complaint in writing containing, at least, the following in

addition to the information required by Department Rules of Procedure 230: ()

a. A description of the water rights of the petitioner and of the water diversion and delivery system being used by petitioner. ()

b. A description of the water rights of the ground water user/s/ (respondents) who are alleged to be interfering with the rights of the petitioner in-so-far as such information is known by petitioner. ()

c. In the event petitioner believes a loss of water supply is being caused by ground water withdrawals generally within an area having a common ground water supply with the surface water source from which petitioner receives water, then the petition shall describe in general terms the area of common ground water supply within which petitioner desires junior-priority ground water withdrawals to be regulated. ()

02. Informal resolution. Upon receipt of a petition including information required by subparagraphs 1.a., b., and c., the Director may initially consider the matter for informal resolution under the provisions of § 67-5241, Idaho Code, if doing so will expedite the case without substantially prejudicing the interests of any party. ()

03. Contested case. If no decision can be reached under the provisions of subsection 02 of this rule, then the department will consider the matter as a petition for contested case under the Department's adopted Rules of Procedure, IDAPA 37.01.01_____. The petitioner shall serve the petition upon all known respondents as required by Department Rules of Procedure 230. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter. ()

04. Petition for modification of an existing water district. In the event the petition proposes regulation of ground water rights consistent with the priorities of surface water rights in an organized water district, the Department will consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to § 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure. ()

05. Petition for creation of a new water district. In the event the petition proposes regulation of ground water rights

consistent with the priorities of surface water rights in an area of common ground water supply which affects the flow of water of a surface water source which is not in an existing water district, the Department will consider such to be a petition for organization of a water district and notice of proposed organization of a water district shall be provided by the Director pursuant to § 42-604, Idaho Code. The Department shall proceed to consider the matter under the Department's Rules of Procedure.

06. Order. Following consideration of the matter of the petition under the Department's Rules of Procedure, the Director may, by order: ()

a. deny the petition in whole or in part, ()

b. grant the petition in whole or in part or upon conditions, ()

b. determine that the petitioned area has a common ground water supply which affects the flow of water in any stream or streams in an organized water district, ()

c. incorporate an area having a common ground water supply into an organized water district following the procedures of § 42-604, Idaho Code, ()

d. create a separate water district following the procedures of § 42-604, Idaho Code, and/or ()

e. determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and repondents and initiate such adjudication or make interim findings concerning the relative priorities of the rights of the petitioner and respondents within the area determined to have a common ground water supply, which interim findings shall serve as the basis for priority regulation of uses until such time as modified by the court. ()

07. Upon a finding that an area has a common ground water supply and the incorporation of such area into an organized water district or the creation or a separate water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.

031. (Rule 31) DETERMINING AREAS HAVING A COMMON GROUND WATER SUPPLY WHICH AFFECTS THE FLOW OF WATER IN A STREAM OR STREAMS.

01. The Director will consider all available data and information which describes the relationship between ground

water and surface water in making a finding of an area having a common ground water supply.

02. The information considered may include:

a. water level measurements, studies, reports, computer simulations, pumping tests, hydrographs of stream flow and ground water levels and other such data.

b. the testimony and opinion of expert witnesses at a hearing on a petition for expansion of a water district or organization of a new water district.

03. The findings of the Director shall be included in the Order issued pursuant to Rule 30.06.

032---039 (RESERVED)

040. (Rule 40) RESPONSES TO CALLS FOR WATER DELIVERY AGAINST JUNIOR-PRIORITY GROUND WATER USERS WITHIN AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY WHICH AFFECTS THE FLOW OF WATER IN ANY SURFACE WATER SOURCE AND WHICH HAVE BEEN INCORPORATED IN AN ORGANIZED WATER DISTRICT ()

01. Responding to a delivery call. When a delivery call is made by a senior surface water user (petitioner) alleging, that by reason of diversion of water by one or more ground water users (respondents) with junior priorities within an area having a common ground water supply which has been incorporated in an organized water district, the petitioner is being deprived of water to which petitioner would otherwise be entitled, and upon a finding by the Director as provided in subsection 02 of this Rule that injury is occurring, the Director, through the watermaster of the water district, shall: ()

a. regulate uses 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 ground water pumping 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 ground water users pursuant to a mitigation plan which has been approved by the Director. ()

02. Regulation of uses of water by watermaster. The Director through the watermaster of a water district shall regulate use of water within the water district pursuant to the priorities of water rights under the following procedures:

a. The watermaster shall determine the quantity of surface water of the stream which is available for diversion and shall shut the headgates of junior-priority surface water users as necessary to assure that water is available as called for and in accordance with the respective water rights from the surface water source.

b. Where a call is made by a senior-priority surface water user against a junior-priority ground water user 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 ground water user is a participant in such approved mitigation plan, and the plan is operational, the watermaster shall allow the ground water use to continue out of priority.

c. 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 under the approved mitigation plan which shall be compiled into the annual report which is required by § 42-60_, Idaho Code.

03. Reasonable exercise of rights. In determining whether diversion and use of water under rights will be regulated under subsection a. or b. of the previous section, the Director shall consider whether the petitioner senior-priority surface water right making the call is suffering injury and using water efficiently and without waste. The director will also consider whether the respondent junior-priority ground water user is using water efficiently and without waste. ()

04. Determining reasonableness of surface diversions. Factors the Director may consider in determining whether a senior-priority surface water right holder is suffering injury and using water efficiently and without waste include, but are not limited to, the following: ()

a. 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 surface water right. This may include the seasonal as well as the multi-season and cumulative impacts of all ground water withdrawals from the area of common ground water supply. ()

b. The extent to which the beneficial use requirements of the senior-priority surface water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices. (()

c. The extent to which the beneficial use could be accomplished by the senior-priority surface water right using alternate means of diversion. Where a senior-priority surface water user makes a delivery call against junior-priority ground water rights in an area having a common ground water supply, the senior may be required to first employ reasonable means of diversion including the construction of wells to utilize water from the common ground water supply under the petitioner's surface water right priority. A surface water appropriator is not entitled to command the entirety of large volumes of ground water in an aquifer to support his appropriation contrary to the public policy of full economic development of underground water resources set forth in § 42-226, Idaho Code. ()

d. The futile call principle will prevent a senior-priority surface water right from requiring curtailment of pumping of any well used by a junior-priority ground water right where the right is a participant in an approved mitigation plan. However, where it is established by measurement that a particular junior-priority ground water diversion directly and substantially interferes with the water supply of a prior surface water right, the ground water diversion may be curtailed even though a participant in a mitigation plan unless such plan can directly replace the effects of the ground water diversion on the surface water supply.

05. Determining reasonableness of ground water diversions. Factors the Director may consider in determining whether a junior ground water right holder is using water with reasonable efficiency and without waste include, but are not limited to, the following: ()

a. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water pumped, the method of irrigation water application. ()

b. The amount of water being pumped and used compared to the rights held by the pumper. ()

c. The wire-to-water efficiency of the pumping operation. ()

d. The existence of measuring and recording devices.()

06. Domestic and stock watering ground water rights exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in § 42-111, Idaho Code, nor against any

ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in § 42-1401A(12), Idaho Code. ()

07. Mitigation plan. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: ()

a. Whether delivery of water pursuant to the mitigation plan is in compliance with state law.

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface water source at such time and place as necessary to satisfy the rights of diversion from the surface water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right has not historically received a full supply, such as during drought periods. ()

c. The mitigation plan must provide for replacement of water supplies to the senior appropriator when needed during a time of shortage even if the effect of pumping is spread of many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting for ground water withdrawals and provision of replacement water to take advantage of variability in seasonal water supply. ()

d. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. ()

e. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. ()

f. Whether the mitigation plan reasonably calculates the consumptive use component of the ground water withdrawal. ()

g. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. ()

h. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. ()

i. Whether the mitigation plan is consistent with the conservation of water resources and the public interest. ()

j. Whether the use of water under the mitigation plan reasonably can be monitored and administered to protect senior rights from injury. ()

k. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. ()

l. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior priority rights who do not initially participate in such mitigation plan but who subsequently elect to do so.

m. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. ()

08. Where a mitigation plan has been approved as provided in this rule, the watermaster may permit the use of ground water to continue out of priority order within the water district provided the supplies of water are delivered as specified in such approved mitigation plan. ()

09. Where a mitigation plan has been approved and the supplies of water are not delivered as specified in such approved plan, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefitting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights. ()

10. Where a mitigation plan has been approved, the watermaster of the water district shall be empowered to include the costs of administration of the plan within the annual operation budget of the district, to provide for the special assessment of ground water users benefitted by the plan, to collect the assessments and expend funds for the operation of the plan, and to maintain records of the volumes of water made available by the plan and the disposition of such water. ()

041---049 (RESERVED)

050. (Rule 50). AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY WHICH AFFECTS THE FLOW OF WATER IN A STREAM OR STREAMS IN AN ORGANIZED WATER DISTRICT ()

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the Eastern Snake Plain Aquifer and interconnected stream systems within Idaho as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 and as delineated on Map Figure ____. ()

a. The Eastern Snake Plain Aquifer is found to be an area of common ground water supply which affects the flow of water in the Snake River upstream of the USGS gaging station at King Hill, Idaho. ()

b. The Eastern Snake Plain Aquifer area of common ground water supply is incorporated into existing Water District 01. Water District 01 is enlarged to encompass the Eastern Snake Plain Aquifer and the surface drainage basin of the Snake River and its tributaries from the point where the river enters the State of Idaho downstream to the USGS gaging station near Murphy, Idaho, excluding the areas encompassed by the following existing Water Districts: ()

27, Blackfoot River
29, Portneuf River
29-C, Mink Creek
29-F, Rapid Creek
29-H, Marsh Creek
29-U, Bill Jackson Creek
31, Mud Lake, Beaver and Camas Creek

(Advisory Committee members note: some special consideration needs to be given to how to handle Eastern Snake Plain Aquifer ground water rights in this sub-basin which are subject to a priority delivery call by local as well as more remote prior surface water rights)

32-C, Medicine Lodge Creek
32-D, Birch Creek
33, Little Lost River
34, Big Lost River
36-A, Billingsley and Riley Creeks

(Advisory Committee members note: some special consideration needs to be given to how to handle Eastern Snake Plain Aquifer ground water rights and priority deliver calls by senior surface water rights within this district)

37, Big Wood River
37-A, Corral Creek
37-C, Soldier Creek
37-N, Little Wood River
37-O, Muldoon Creek
37-U, Fish Creek
41, Rock Creek
43-A, Raft River
43-B, Upper Raft River
43-C, Cassia Creek
43-D, Almo Creek
45-A, Basin Creek
45-B, Birch Creek
45-C, Goose Creek
45-F, Marsh Creek
45-K, Cottonwood Creek
45-N, Dry Creek
47-C, Upper Salmon Falls Creek
47-G, Lower Salmon Falls Creek
51-A, Three Creeks
57-C, Castle Creek
57-B, Picket Creek
57-D, Sinker Creek
61-A, Canyon Creek
61-C, Bennett Creek
61-D, Little Canyon Creek
61-E, Cold Springs Creek
61-F, King Hill Creek

c. The actions in modification of water districts which are proposed in subsection b. of this section shall not become effective until completion of the requirements for notice and hearing pursuant to § 42-604, Idaho Code. ()

d. (Approved mitigation plans) - by rule?

02. Big Lost River - Basin 34

(separate rule making is in progress)

Exhibit "C"

CM Rules

Draft-January 20, 1994

DRAFT

Draft - January 20, 1994

IDAPA 37
TITLE 03
Chapter 11

000. LEGAL AUTHORITY (Rule 0). These rules are promulgated pursuant to Section 42-603, Idaho Code, which provides that 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. These rules are also issued pursuant to Section 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department. ()

001. TITLE AND SCOPE (Rule 1). These rules may be cited as "Rules for Conjunctive Management of Surface and Ground Water." The rules prescribe procedures for responding to calls for priority delivery of water made by the holder of a valid senior-priority surface water right against a valid junior-priority ground water right which diverts from an area of common ground water supply. It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently. The general rules will address other calls for distribution of water between holders of surface rights and ground water rights with other priority relationships. ()

002. WRITTEN INTERPRETATIONS (Rule 2). In accordance with Section 67-5201(16)(b)(iv), Idaho Code, the Department of Water Resources does not have written statements which pertain to the interpretation of the rules of this chapter, or to the documentation of compliance with the rules of this chapter. ()

003. ADMINISTRATIVE APPEALS (Rule 3). Appeals may be taken pursuant to Section 42-1701A, Idaho Code, and the department's Rules of Procedure, ADAPA 37, Title 01, Chapter 01.

004. SEVERABILITY (Rule 4). The rules governing this chapter are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance is declared invalid, that invalidity does not affect the validity of any remaining portion of this chapter. ()

005.---009. (RESERVED)

010. DEFINITIONS (Rule 10). For the purposes of these rules, the following terms will be used as defined below. ()

01. Director. The Director of the Department of Water Resources appointed as provided by Section 42-1801, Idaho Code, or his duly delegated designee as provided by Section 42-1701, Idaho Code.

02. Department. The Department of Water Resources created by Section 42-1701, Idaho Code.

03. Conjunctive Management. Legal and hydrologic integration of administration of use of interconnected surface and ground water to recognize water right priorities and to achieve full economic development of water resources.

04. Surface Water Source. Natural rivers, streams, lakes and springs.

05. Ground Water Source. All water under the surface of the ground whatever may be the geological structure in which it is standing or moving as provided in Section 42-230(a), Idaho Code.

06. Delivery Call. A request from a water user for conjunctive management of interconnected surface and ground water.

07. Valid Water Right. The legal right to divert and beneficially use or to protect in place the public waters of the State of Idaho where such right is evidenced by a decree of a court of competent jurisdiction, or a permit or license issued by the Department of Water Resources. For purposes of a delivery call an unadjudicated claim to a water right filed under the provisions of Section 42-243 or Section 42-1409, Idaho Code, shall not be considered to be a valid water right.

08. Area of Common Ground Water. Ground water basins, aquifers and sources which affect the flow of water in any stream or streams.

09. Senior-Priority. A water right with a priority date earlier in time than the priority dates of other water rights being considered.

10. Junior-Priority. A water right with a priority date later in time than the priority date of other water rights being considered.

11. Reasonably Anticipated Average Rate of Future Natural Recharge. The estimated average annual volume of water recharged to a ground water source from natural sources including precipitation, underflow from tributary sources, and stream losses and water incidentally recharged to the ground water source as a result of the diversion and use of water

under valid water rights. The estimate will be based on the conditions of development and use of water at the time the estimate is made and may vary as these conditions change.

12. Water District. An instrumentality of the State of Idaho created by the Director as provided in Section 42-604, Idaho Code, for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the State of Idaho.

13. Watermaster. A person elected and appointed as provided in Section 42-605, Idaho Code, to distribute water within a water district.

14. Mitigation Plan. A document submitted by a ground water user or group of ground water users which identifies options and proposed measures to prevent or compensate holders of senior-priority surface water rights for any material effect of ground water withdrawal upon the water available to such surface water rights.

15. Futile Call. A delivery call which, for physical and hydrologic reasons, cannot be satisfied by curtailing diversions under junior-priority water rights or which would result in waste of the public water resource.

16. Material Effect. A use of water under a junior-priority water right will be found to materially affect a senior-priority water right if:

a. the amount of water available under the senior-priority right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded right, whichever is less,

b. the holder of the senior-priority water right will be forced to an unreasonable effort or expense to divert water under the water right, or

c. the quality of the water available to the holder of the senior-priority right is made unusable for the purposes of the right and the water cannot be restored to usable quality without unreasonable effort or expense.

17. Full Economic Development of Underground Water Resources. The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate which does not exceed the reasonably anticipated average rate of future natural recharge and which does not result in material effect upon valid senior-priority water rights.

011.---019. (RESERVED)

020. GENERAL STATEMENTS OF PURPOSE AND POLICIES FOR CONJUNCTIVE MANAGEMENT (Rule 20). ()

01. Interconnected surface and ground water. These rules apply to all situations in the state where the use of ground water under valid junior-priority rights either individually or collectively has a material effect upon uses of surface water under valid senior-priority water rights. The rules govern the distribution of water from ground water aquifers which are hydrologically connected to surface water sources from which water is diverted under valid senior-priority water rights or on which unsubordinated instream flow water rights have been established. ()

02. First in time is first in right. These rules implement the principle of "first in time, is first in right" as such principle is defined and interpreted by Idaho statutory and case law, including Section 42-106, Idaho Code, and Article XV, Sections 3 and 7, Idaho Constitution. ()

03. Full economic development of underground water. These rules integrate the administration and use of surface and ground water in a manner that furthers the "full economic development of underground water resources" as set forth in Section 42-226, Idaho Code. ()

04. Calls for priority delivery. These rules provide the basis and procedure for responding to delivery calls made by a senior-priority surface water user against junior-priority ground water users. The rules recognize the principle of the futile call but also acknowledge that ground water use may have an effect, even though not immediately measurable, upon water available to a senior surface water user where the hydrologic connection may be remote and no direct immediate relief would be achieved even if the ground water use was discontinued. ()

05. Reasonable exercise of rights. These rules provide the basis for determining the reasonableness of the diversion and use of water by a petitioner with a senior-priority surface water right who requests priority delivery against a junior-priority ground water user. The rules also provide the basis for determining the reasonableness of the diversion and use of water by the ground water user against whom the call is made. ()

06. Areas of common ground water supplies. These rules provide the basis for the designation of areas of the state which have a common ground water supply and the procedures which will be followed in incorporating such areas of common

ground water supply into existing water districts or creating new districts as provided in Sections 42-237a.g., and 42-604, Idaho Code. ()

07. Sequence of actions for responding to calls for priority delivery. These rules provide procedures for responding to calls for priority distribution of water from areas having a common ground water supply which have not been incorporated into a water district (Rule 30), within water districts where areas of common ground water supply have been incorporated (Rule 40), and designates areas of common ground water supply (Rule 50).

08. Reasonably anticipated average rate of future natural recharge. These rules provide for administration of the use of ground water resources to achieve the goal expressed in Section 42-237a.g., Idaho Code, that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge.

021---029 (RESERVED)

030. RESPONSES TO CALLS FOR WATER DELIVERY AGAINST JUNIOR-PRIORITY GROUND WATER RIGHTS WITHIN AREAS OF THE STATE NOT IN ORGANIZED WATER DISTRICTS OR WITHIN WATER DISTRICTS WHERE GROUND WATER REGULATION HAS NOT BEEN INCLUDED IN THE FUNCTIONS OF SUCH DISTRICTS (Rule 30) ()

01. Delivery call (petition). When a delivery call is made by a surface water user (petitioner) alleging that by reason of diversion of water by one or more ground water users (respondents) with later-in-time priorities the petitioner is being deprived of water to which petitioner would otherwise be entitled, the petitioner shall file with the Director a complaint in writing containing, at least, the following in addition to the information required by Department Rule of Procedure 230: ()

a. A description of the water rights of the petitioner and of the water diversion and delivery system being used by petitioner. ()

b. A description of the water rights of the ground water user/s/ (respondents) who are alleged to be interfering with the rights of the petitioner in-so-far as such information is known by petitioner. ()

c. Any information, measurements, data or study results available to the petitioner to support the claim of interference. ()

d. In the event petitioner believes a loss of water supply is being caused by ground water withdrawals generally within an area having a common ground water supply with the surface water source from which petitioner receives water, then the petition shall describe in general terms the area of common ground water supply within which petitioner desires junior-priority ground water withdrawals to be regulated. ()

02. Informal resolution. Upon receipt of a petition including information required by Rules 30.01.a., 30.01.b., and 30.01.c., the Director may initially consider the matter for informal resolution under the provisions of Section 67-5241, Idaho Code, if doing so will expedite the case without substantially prejudicing the interests of any party. ()

03. Contested case. If no decision can be reached under the provisions of Rule 30.02., then the department will consider the matter as a petition for contested case under the Department's adopted Rule of Procedure, IDAPA 37.01.01_____. The petitioner shall serve the petition upon all known respondents as required by Department Rule of Procedure 230. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter. ()

04. Petition for modification of an existing water district. In the event the petition proposes regulation of ground water rights consistent with the priorities of surface water rights in an organized water district, the Department will consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure. ()

05. Petition for creation of a new water district. In the event the petition proposes regulation of ground water rights consistent with the priorities of surface water rights in an area of common ground water supply which affects the flow of water of a surface water source which is not in an existing water district, the Department will consider such to be a petition for creation of a water district and notice of proposed creation of a water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department shall proceed to consider the matter under the Department's Rules of Procedure.

06. Order. Following consideration of the matter of the petition under the Department's Rules of Procedure, the Director may, by order: ()

a. deny the petition in whole or in part, ()

b. grant the petition in whole or in part or upon conditions, ()

c. determine that the petitioned area has a common ground water supply which affects the flow of water in any stream or streams in an organized water district, ()

d. incorporate an area having a common ground water supply into an organized water district following the procedures of Section 42-604, Idaho Code, ()

e. create a separate water district following the procedures of Section 42-604, Idaho Code, and/or ()

f. determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and respondents and initiate such adjudication or make interim findings concerning the relative priorities of the rights of the petitioner and respondents within the area determined to have a common ground water supply, which interim findings shall serve as the basis for priority regulation of uses until such time as modified by the court. ()

07. Upon a finding that an area has a common ground water supply and the incorporation of such area into an organized water district or the creation or a separate water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.

031. DETERMINING AREAS HAVING A COMMON GROUND WATER SUPPLY WHICH AFFECTS THE FLOW OF WATER IN A STREAM OR STREAMS (Rule 31).

01. The Director will consider all available data and information which describes the relationship between ground water and surface water in making a finding of an area having a common ground water supply.

02. The information considered may include:

a. water level measurements, studies, reports, computer simulations, pumping tests, hydrographs of stream flow and ground water levels and other such data.

b. the testimony and opinion of expert witnesses at a hearing on a petition for expansion of a water district or organization of a new water district.

03. A ground water source will be determined to be a common ground water supply if:

a. the available technical information indicates that the ground water source supplies water to the surface water source, or

b. withdrawal of water from the ground water source will cause water to move from the surface water source to the ground water source.

04. The Director will determine the reasonably anticipated average rate of future natural recharge for the area of common ground water supply.

05. The findings of the Director shall be included in the Order issued pursuant to Rule 30.06.

032---039 (RESERVED)

040. RESPONSES TO CALLS FOR WATER DELIVERY AGAINST JUNIOR-PRIORITY GROUND WATER USERS WITHIN AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY WHICH AFFECTS THE FLOW OF WATER IN ANY SURFACE WATER SOURCE AND WHICH HAVE BEEN INCORPORATED IN AN ORGANIZED WATER DISTRICT (Rule 40). ()

01. Responding to a delivery call. When a delivery call is made by a senior surface water user (petitioner) as provided in Rule 40.02 alleging, that by reason of diversion of water by one or more ground water users (respondents) with junior priorities within an area having a common ground water supply which has been incorporated in an organized water district, the petitioner is being deprived of water to which petitioner would otherwise be entitled, and upon a finding by the Director as provided in Rule 40.05. that injury is occurring, the Director, through the watermaster of the water district, shall: ()

a. regulate uses 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 ground water pumping 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 ground water users pursuant to a mitigation plan which has been approved by the Director. ()

02. Delivery call by senior-priority surface water right against junior-priority ground water rights. A petition for priority regulation of ground water uses within a water district must indicate the ground water uses petitioner wishes to have regulated or other relief which is sought.

03. Regulation of uses of water by watermaster. The Director through the watermaster of a water district shall regulate use of water within the water district pursuant to the priorities of water rights under the following procedures:

a. The watermaster shall determine the quantity of surface water of the stream which is available for diversion and shall shut the headgates of junior-priority surface water users as necessary to assure that water is available as called for and in accordance with the respective water rights from the surface water source.

b. Where a call is made by a senior-priority surface water user against a junior-priority ground water user 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 ground water user is a participant in such approved mitigation plan, and the plan is operational, the watermaster shall allow the ground water use to continue out of priority.

c. 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 under the approved mitigation plan which shall be compiled into the annual report which is required by Section 42-606, Idaho Code.

04. 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 senior-priority surface water right making the call is suffering injury and using water efficiently and without waste. The director will also consider whether the respondent junior-priority ground water user is using water efficiently and without waste. ()

05. Determining injury and reasonableness of surface diversions. Factors the Director may consider in determining whether a senior-priority surface water right holder is

suffering injury and using water efficiently and without waste include, but are not limited to, the following: ()

a. 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 water right. This may include the seasonal as well as the multi-season and cumulative impacts of all ground water withdrawals from the area of common ground water supply. ()

b. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the method of irrigation water application.()

b. The amount of water being diverted and used compared to the rights held by the senior-priority surface water right. ()

c. The existence of measuring and recording devices.()

d. The extent to which the beneficial use requirements of the senior-priority surface water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices. (()

e. The extent to which the beneficial use could be accomplished by the senior-priority surface water right using alternate means of diversion. Where a senior-priority surface water user makes a delivery call against junior-priority ground water rights in an area having a common ground water supply, the senior may be required to first employ reasonable means of diversion including the construction of wells to utilize water from the common ground water supply under the petitioner's surface water right priority. A surface water appropriator is not entitled to command the entirety of large volumes of ground water in an aquifer to support his appropriation contrary to the public policy of full economic development of underground water resources set forth in Section 42-226, Idaho Code. ()

f. The futile call principle will prevent a senior-priority surface water right from requiring curtailment of pumping of any well used by a junior-priority ground water right where the right is a participant in an approved mitigation plan. However, where it is established by measurement that a particular junior-priority ground water diversion directly and substantially interferes with the water supply of a prior surface water right, the ground water diversion may be

curtailed even though a participant in a mitigation plan unless such plan can directly replace the effects of the ground water diversion on the surface water supply.

06. Determining reasonableness of ground water diversions. Factors the Director may consider in determining whether a junior ground water right holder is using water with reasonable efficiency and without waste include, but are not limited to, the following: ()

a. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water pumped, the method of irrigation water application. ()

b. The amount of water being pumped and used compared to the rights held by the pumper. ()

c. The existence of measuring and recording devices.()

07. Domestic and stock watering ground water rights exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code. ()

08. Mitigation plan. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: ()

a. Whether delivery of water pursuant to the mitigation plan is in compliance with state law.

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface water source at such time and place as necessary to satisfy the rights of diversion from the surface water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right has not historically received a full supply, such as during annual low-flow periods and extended drought periods. ()

c. The mitigation plan must provide for replacement of water supplies or other appropriate compensation to the senior appropriator when needed during a time of shortage

even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting for ground water withdrawals and provision of replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. ()

d. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. ()

e. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. ()

f. Whether the mitigation plan reasonably calculates the consumptive use component of the ground water withdrawal. ()

g. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. ()

h. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. ()

i. Whether the mitigation plan is consistent with the conservation of water resources and the public interest. ()

j. Whether the use of water under the mitigation plan reasonably can be monitored and administered to protect senior rights from injury. ()

k. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. ()

l. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior priority rights who do not initially participate in such mitigation plan but who subsequently elect to do so.

m. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts and replacement supplies.

n. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. ()

09. Where a mitigation plan has been approved as provided in this rule, the watermaster may permit the use of ground water to continue out of priority order within the water district provided the supplies of water are delivered as specified in such approved mitigation plan. ()

10. Where a mitigation plan has been approved and the supplies of water are not delivered as specified in such approved plan, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefitting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights. ()

11. Where a mitigation plan has been approved, the watermaster of the water district shall be empowered to include the costs of administration of the plan within the annual operation budget of the district, to provide for the special assessment of ground water users benefitted by the plan, to collect the assessments and expend funds for the operation of the plan, and to maintain records of the volumes of water made available by the plan and the disposition of such water. ()

041---049 (RESERVED)

050. AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY WHICH AFFECTS THE FLOW OF WATER IN A STREAM OR STREAMS IN AN ORGANIZED WATER DISTRICT (Rule 50). ()

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the Eastern Snake Plain Aquifer and interconnected stream systems within Idaho as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 and as delineated on Map Figure _____. ()

a. The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River.

b. The Eastern Snake Plain Aquifer is found to be an area of common ground water supply which affects the flow of water in the Snake River upstream of the USGS gaging station at King Hill, Idaho. ()

c. The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer is found to be (1980 conditions):

Surface-water irrigation	4.84 MAF
Tributary basins	1.44 MAF
Precipitation	.70 MAF
Snake River losses	.69 MAF
Tributary-stream and canal losses	.39 MAF
Total	8.06 MAF

d. The Eastern Snake Plain Aquifer area of common ground water supply is incorporated into existing Water District 01. Water District 01 is enlarged to encompass the Eastern Snake Plain Aquifer and the surface drainage basin of the Snake River and its tributaries from the point where the river enters the State of Idaho downstream to the USGS gaging station near Murphy, Idaho, excluding the areas encompassed by the following existing Water Districts: ()

27, Blackfoot River
29, Portneuf River
29-C, Mink Creek
29-F, Rapid Creek
29-H, Marsh Creek
29-U, Bill Jackson Creek
31, Mud Lake, Beaver and Camas Creek
32-C, Medicine Lodge Creek
32-D, Birch Creek
33, Little Lost River
34, Big Lost River
37, Big Wood River
37-A, Corral Creek
37-C, Soldier Creek
37-N, Little Wood River
37-O, Muldoon Creek
37-U, Fish Creek
41, Rock Creek
43-A, Raft River
43-B, Upper Raft River
43-C, Cassia Creek
43-D, Almo Creek
45-A, Basin Creek
45-B, Birch Creek
45-C, Goose Creek

45-F, Marsh Creek
45-K, Cottonwood Creek
45-N, Dry Creek
47-C, Upper Salmon Falls Creek
47-G, Lower Salmon Falls Creek
51-A, Three Creeks
57-C, Castle Creek
57-B, Picket Creek
57-D, Sinker Creek
61-A, Canyon Creek
61-C, Bennett Creek
61-D, Little Canyon Creek
61-E, Cold Springs Creek
61-F, King Hill Creek

e. Response to calls for priority delivery of ground water within Water District 01, Snake River and Water District 31, Mud Lake, Beaver and Camas Creeks will be handled by reciprocity between the watermasters of the two districts.

f. Water District 36-A, Billingsley and Riley Creek is incorporated into Water District 01.

g. The actions in modification of water districts which are proposed in Rule 50.01.c., 50.01.d., and 50.01.e. shall not become effective until completion of the requirements for notice and hearing pursuant to Section 42-604, Idaho Code. ()

Exhibit "D"

Order Adopting Temporary Rules
And
Extending Comment Period

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF ADOPTION OF TEMPORARY RULES FOR THE CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER	**ORDER ADOPTING TEMPORARY RULES AND EXTENDING COMMENT PERIOD**

FINDINGS

Section 42-603 and Section 42-1805(8), Idaho Code, authorize the Director of the Department of Water Resources (Director) to promulgate rules for the distribution of water.

Section 67-5226, Idaho Code, and Department Rule of Procedure No. 840 provide for the adoption of temporary rules if it is reasonably necessary to protect the public welfare or to comply with amendments to governing law.

In order to have conjunctive management water distribution rules effective at the start of the 1994 irrigation season and in order to comply with governing law as construed by the district court, it is necessary for the Director to adopt temporary rules.

The Department of Water Resources is in the process of adopting permanent rules for conjunctive management under Docket No. 37-0311-9301. The present comment period in this rule making expires April 15, 1994.

ORDER

NOW, THEREFORE, IT IS ORDERED that the Director of the Department of Water Resources, hereby adopts the attached temporary rules for the Conjunctive Management of Surface and Ground Water effective on the date of this order.

IT IS FURTHER ORDERED that the comment period for permanent rule making under Docket No. 37-0311-9301 is extended to July 15, 1994.

Signed this 4TH day of April, 1994.

R. Keith Higginson

R. KEITH HIGGINSON
Director

NOTICE OF
TEMPORARY RULES

Docket No. 37-0311-9301

Department of Water Resources

Rules Governing Conjunctive
Management of Surface and Ground Water

ACTION: The action, under Docket No. 37-0311-9301, concerns temporary rule making governing Conjunctive Management of Surface and Ground Water, Title 03, Chapter 11.

AUTHORITY: In compliance with Section 67-5226, Idaho Code, and Department Rule of Procedure No. 840, the department has adopted temporary rules governing the Conjunctive Management of Surface and Ground Water as authorized in Section 42-603, and Section 42-1805(8), Idaho Code.

DESCRIPTIVE SUMMARY: The following is a statement in nontechnical language of the substance of the intended rules:

The rules prescribe procedures for responding to a call for priority delivery of water made by the holder of a senior-priority water right against a junior-priority ground water right which diverts from an area of common ground water supply. The department is also in the process of adopting permanent rules for conjunctive management.

AGENCY CONTACTS: The person designated to represent the agency in this rulemaking proceeding is R. Keith Higginson and such other personnel of the agency as he may designate to assist in this rulemaking proceeding.

R. KEITH HIGGINSON, Director
Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706-2237

IDAPA 37
TITLE 03
Chapter 11

000. LEGAL AUTHORITY (Rule 0). These temporary rules are promulgated pursuant to Idaho Code Section 67-5226 of the Idaho Administrative Procedure Act and Section 42-603, Idaho Code, which provides that 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. These rules are also issued pursuant to Section 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department.

001. TITLE AND SCOPE (Rule 1). These temporary rules may be cited as "Temporary Rules for Conjunctive Management of Surface and Ground Water." The rules prescribe procedures for responding to calls for priority delivery of water made by the holder of a senior-priority water right against a junior-priority ground water right in an area of common ground water supply. It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently.

002. WRITTEN INTERPRETATIONS (Rule 2). In accordance with Section 67-5201(16)(b)(iv), Idaho Code, the Department of Water Resources does not have written statements which pertain to the interpretation of the rules of this chapter, or to the documentation of compliance with the rules of this chapter.

003. ADMINISTRATIVE APPEALS (Rule 3). Appeals may be taken pursuant to Section 42-1701A, Idaho Code, and the department's Rules of Procedure, IDAPA 37, Title 01, Chapter 01.

004. SEVERABILITY (Rule 4). The rules governing this chapter are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance is declared invalid, that invalidity does not affect the validity of any remaining portion of this chapter.

005.---009. (RESERVED)

010. DEFINITIONS (Rule 10). For the purposes of these rules, the following terms will be used as defined below.

01. Director. The Director of the Department of Water Resources appointed as provided by Section 42-1801, Idaho Code, or an employee of the Department who has been delegated to act for the Director as provided by Section 42-1701, Idaho Code.

02. Department. The Department of Water Resources created by Section 42-1701, Idaho Code.

03. Conjunctive Management. Legal and hydrologic integration of administration of rights to the use of water from surface and ground water sources.

04. Surface Water Source. Rivers, streams, lakes and springs when flowing in their natural channels. (Sections 42-101 and 42-103, Idaho Code)

05. Ground Water Source. All water under the surface of the ground whatever may be the geological structure in which it is standing or moving. (Section 42-230(a), Idaho Code)

06. Delivery Call. A request from a water user for administration of water rights under the prior appropriation doctrine.

07. Water Right. The legal right to divert and beneficially use or to protect in place the public waters of the State of Idaho where such right is evidenced by a decree, a permit or license issued by the Department, or a beneficial use right.

08. Area of Common Ground Water Supply. A ground water source within which the use of ground water or changes in recharge affect water in a surface water source.

09. Senior-Priority. A water right with a priority date earlier in time than the priority dates of other water rights being considered.

10. Junior-Priority. A water right with a priority date later in time than the priority date of other water rights being considered.

11. Reasonably Anticipated Average Rate of Future Natural Recharge. The estimated average annual volume of water recharged to a ground water source or area of common ground water supply from precipitation, underflow from tributary sources, and stream losses and also water incidentally recharged as a result of the diversion and use of water for irrigation and other purposes. The estimate will be based on available data regarding conditions of development and use of water existing at the time the estimate is made and may vary as these conditions and the available information change.

12. Water District. An instrumentality of the State of Idaho created by the Director as provided in Section 42-604, Idaho Code, for the purpose of performing the essential governmental function of distribution of the available water among appropriators under Idaho law.

13. Watermaster. A person elected and appointed as provided in Section 42-605, Idaho Code, to distribute water within a water district.

14. Mitigation Plan. A document submitted by a ground water user or group of ground water users and approved by the Director which identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury to a water right caused by withdrawal of water from a ground water source or within an area of common ground water supply.

15. Futile Call. A delivery call which, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by curtailing diversions under junior-priority water rights.

16. Material Injury. A use of water under a junior-priority water right will be found to cause material injury to a senior-priority water right in accordance with Idaho law, through the process described in Rules 30.01 and 40.04.

17. Full Economic Development of Underground Water Resources. The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate which does not exceed the reasonably anticipated average rate of future natural recharge and, in a manner which does not result in material injury to senior-priority water rights and which furthers the principle of reasonable utilization of ground and surface waters as set forth in Rule 20.03.

18. Artificial Ground Water Recharge. A deliberate and purposeful activity or project which diverts, distributes, injects, stores or spreads water to areas from which such water will enter into and recharge a ground water source or area of common ground water supply.

19. Reasonable Ground Water Pumping Level. A level established by the Director either generally for an area or aquifer or for individual water rights on a case-by-case basis, for the purpose of protecting senior-priority ground water users against unreasonable lowering of ground water levels caused by utilization of surface or ground water sources by junior-priority users.

20. Idaho Law. The constitution, statutes, rules and case law of Idaho.

011.---019. (RESERVED)

020. GENERAL STATEMENTS OF PURPOSE AND POLICIES FOR CONJUNCTIVE MANAGEMENT (Rule 20).

01. Distribution of water among senior and junior-priority rights. These rules apply to all situations in the state where the use of water under junior-priority 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 of common ground water supply.

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

03. Reasonable utilization 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 optimum development, full economic development and maximum use as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of ground water in an aquifer to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

04. Calls for priority delivery. These rules provide the basis and procedure for responding to delivery calls made by a senior-priority water user against junior-priority water users. The principle of 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 if ground water use has some appreciable effect, even though not immediately measurable, upon water available to a surface water user in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved even if the ground water use was discontinued.

05. Reasonable exercise of rights. These rules provide the basis for determining the reasonableness of the diversion and use of water by both the senior-priority water right user who requests priority delivery against a junior-priority water user and use of water by the water user against whom the call is made.

06. Areas of common ground water supplies. These rules provide the basis for the designation of areas of the state which have a common ground water supply and the procedures which will be followed in incorporating such areas of common ground water supply into existing water districts or creating

new districts as provided in Section 42-237a.g., and Section 42-604, Idaho Code.

07. Sequence of actions for responding to calls for priority delivery. Rule 30 provides procedures for responding to calls for priority distribution of water within areas of common ground water supply which have not been incorporated into a water district. Rule 40 provides similar procedures for responding to calls within water districts where areas of common ground water supply have been incorporated into the district. Rule 50 designates specific known areas of common ground water supply within the state.

08. Reasonably anticipated average rate of future natural recharge. These rules provide for administration of the use of ground water resources to achieve the goal that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge. (Section 42-237a.g., Idaho Code)

09. Saving of defenses. Nothing in these rules shall affect or in any way limit any person's entitlement to assert any defense or claim based upon fact or law in any contested case or other proceeding.

10. Wells as alternate points of diversion for water rights to a surface water source. Nothing in these rules shall prohibit any holder of a water right from a surface water source from seeking, pursuant to Idaho law, to change the point of diversion of the water to an inter-connected area of common ground water supply.

11. Preservation of Director's authorities. This chapter shall not be construed to limit the authority of the Director in exercising the duties and responsibilities of the director or the department under law.

021---029 (RESERVED)

030. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST JUNIOR-PRIORITY GROUND WATER RIGHTS WITHIN AREAS OF THE STATE NOT IN ORGANIZED WATER DISTRICTS OR WITHIN WATER DISTRICTS WHERE GROUND WATER REGULATION HAS NOT BEEN INCLUDED IN THE FUNCTIONS OF SUCH DISTRICTS (Rule 30).

01. Delivery call (petition). When a delivery call is made by a surface or ground water user (petitioner) alleging that by reason of diversion of water by one or more ground water users (respondents) with junior-priority water rights the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at

least, the following in addition to the information required by Department Rule of Procedure 230:

a. A description of the water rights of the petitioner including a listing of the decree, license, claim or other documentation of such right, the water diversion and delivery system being used by petitioner, and the beneficial use being made of the water.

b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner.

c. Any information, measurements, data or study results available to the petitioner to support the claim of material injury.

d. In the event petitioner believes material injury is being caused by ground water withdrawals generally within a ground water source or area of common ground water supply, the petition shall describe the ground water source or area of common ground water supply within which petitioner desires junior-priority ground water withdrawals to be regulated.

02. Informal resolution. Upon receipt of a petition including information required by Rule 30.01., the Department may initially consider the matter for informal resolution under the provisions of Section 67-5241, Idaho Code, if doing so will expedite the case without substantially prejudicing the interests of any party.

03. Contested case. If no decision can be reached informally under the provisions of Rule 30.02., the Department will consider the matter as a petition for contested case under the Department's adopted Rules of Procedure, IDAPA 37.01.01. The petitioner shall serve the petition upon all known respondents as required by Department Rule of Procedure 203. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter.

04. Petition for modification of an existing water district. In the event the petition proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, the Department may consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho

Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure.

05. Petition for creation of a new water district. In the event the petition proposes regulation of ground water rights from a ground water source or conjunctively with surface water rights within an area of common ground water supply which is not in an existing water district, the Department may consider such to be a petition for creation of a water district and notice of proposed creation of a water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure.

06. Order. Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions:

a. deny the petition in whole or in part;

b. grant the petition in whole or in part or upon conditions;

c. determine an area of common ground water supply which affects the water in a surface water source in an organized water district;

d. incorporate an area of common ground water supply into an organized water district following the procedures of Section 42-604, Idaho Code, provided the water rights of the ground water users which would be included in the water district have been adjudicated;

e. create a separate water district following the procedures of Section 42-604, Idaho Code, provided the water rights to be included in the separate water district have been adjudicated;

f. determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and respondents and initiate such adjudication; or

g. by order as provided in Section 42-237a.g., Idaho Code, prohibit or limit the withdrawal of water from any well during any period it is determined that water to fill any water right is not there available without causing ground water levels to be drawn below the reasonable ground water pumping level, or would affect the present or future use of any prior surface or ground

water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

07. Orders for interim administration. For the purposes of Rules 30.06.d. and 30.06.e., an outstanding order for interim administration of water rights issued by the court pursuant to Section 42-1417, Idaho Code, in a general adjudication proceeding shall be considered as an adjudication of the rights involved.

08. Administration pursuant to Rule 40. Upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a separate water district, the use of water within the district shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.

031. DETERMINING AREAS OF COMMON GROUND WATER SUPPLY WHICH AFFECT THE FLOW OF WATER IN A SURFACE WATER SOURCE (Rule 31).

01. Director to consider information. The Director will consider all available data and information which describes the relationship between ground water and surface water in making a finding of an area of common ground water supply.

02. Kinds of information. The information considered may include any or all of the following:

a. water level measurements, studies, reports, computer simulations, pumping tests, hydrographs of stream flow and ground water levels and other such data; and

b. the testimony and opinion of expert witnesses at a hearing on a petition for expansion of a water district or organization of a new water district.

03. Criteria for findings. A ground water source will be determined to be an area of common ground water supply if:

a. the ground water source supplies water to the surface water source; or

b. withdrawal of water from the ground water source will cause water to move from the surface water source to the ground water source.

04. Reasonably anticipated average rate of future natural recharge. The Director will estimate the reasonably anticipated average rate of future natural recharge for an area of common ground water supply.

05. Findings. The findings of the Director shall be included in the Order issued pursuant to Rule 30.06.

06. Other authorities remain applicable. Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of Idaho's water resources, including, without limitation, those actions available under statutes and rules pertaining to the establishment of ground water management areas and critical ground water areas.

032---039 (RESERVED)

040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST JUNIOR-PRIORITY GROUND WATER RIGHTS FROM GROUND WATER SOURCES OR AREAS OF COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (Rule 40).

01. Responding to a delivery call. When a delivery call is made by a senior-priority water user (petitioner) alleging that by reason of diversion of water by one or more junior-priority ground water users (respondents) from a ground water source or an area of 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 40.05. that material injury is occurring, the Director, through the watermaster, shall:

a. regulate uses 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 pumping where the injury is indirect 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 which 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 the priorities of water rights under the following procedures:

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

b. The watermaster shall regulate the 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 a senior-priority surface water user against a junior-priority ground water user 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 ground water user 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 the surface and ground water users within the water district and records of water provided 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's senior-priority water right making the call is suffering material injury and using water efficiently, without waste, and in a manner consistent with the goal of reasonable use of ground and surface waters as described in Rule 20.03. The director will also consider whether the respondent junior-priority water right is using water in this manner.

04. Determining injury and reasonableness of surface diversions. Factors the Director may consider in determining whether a senior-priority surface water right holder is suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

a. The amount of water available under the senior-priority right.

b. The effort or expense of the senior-priority water right to divert water.

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 water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area of 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, and the method of irrigation water application.

e. The amount of water being diverted and used compared to the rights held by the senior-priority surface water right.

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the senior-priority surface 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, a storage water right holder shall be entitled to maintain a reasonable amount of carry-over storage water 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 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 utilize water from the common ground water supply under the petitioner's surface water right priority.

i. The holder of a senior-priority surface water right will be prevented from requiring curtailment of pumping of any well used by 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.

05. Determining reasonableness of ground water diversions. Factors the Director may consider in determining whether a senior or junior ground water right holder is using water with reasonable efficiency and without waste include, but are not limited to, the following:

a. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water pumped, and the method of irrigation water application.

b. The amount of water being pumped and used compared to the rights held by the pumper.

c. The existence of measuring and recording devices.

06. Domestic and stock watering ground water rights exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code.

07. Mitigation plan. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information:

a. The name and mailing address of the person or persons proposing the plan.

b. Identification of the water rights of the person or persons proposing the plan.

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies.

d. Such information as shall allow the Director to evaluate the factors set forth in Rule 40.09.

08. Notice and hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.

09. Factors to be considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:

a. Whether delivery of water pursuant to the mitigation plan is in compliance with state law.

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface water source at such time and place as necessary to satisfy the rights of diversion from the surface water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right has not historically received a full supply, such as during annual low-flow periods and extended drought periods.

c. Whether the mitigation plan provides for replacement of water supplies or other appropriate compensation to the senior appropriator when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting for ground water withdrawals and provision of replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.

d. Whether the mitigation plan proposes artificial recharge of a ground water source or area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan.

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal.

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors.

g. Whether the mitigation plan reasonably calculates the consumptive use component of the ground water withdrawal.

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan.

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan.

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights and would not result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior rights from injury.

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply.

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior priority rights who do not initially participate in such mitigation plan but who subsequently elect to do so.

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies.

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

10. Actions of the watermaster under a mitigation plan. Where a mitigation plan has been approved as provided in Rule 40.09, the watermaster may permit the use of ground water to continue out of priority order within the water district provided the junior-priority ground water user operates in accordance with such approved mitigation plan.

11. Curtailment of use where diversions not in accord with mitigation plans or mitigation plan is not effective. Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such

approved plan, or the plan fails to mitigate the injury, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefitting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.

12. Collection of assessments within water district. Where a mitigation plan has been approved, the watermaster of the water district shall be empowered to include the costs of administration of the plan within the annual operation budget of the district, to provide for the collection of assessment of ground water users as provided by the plan, to collect the assessments and expend funds for the operation of the plan, and to maintain records of the volumes of water made available by the plan and the disposition of such water.

041---049 (RESERVED)

050. AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY WHICH AFFECTS THE FLOW OF WATER IN A SURFACE WATER SOURCE (Rule 50).

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the Eastern Snake Plain Aquifer and interconnected stream systems within Idaho as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992.

a. The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River.

b. The Eastern Snake Plain Aquifer is found to be an area of common ground water supply which affects the flow of water in the Snake River upstream of the USGS gaging station at King Hill, Idaho.

c. The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer is found to be 8.06 million acre feet (MAF) per year (1980 conditions):

Surface-water irrigation	4.84 MAF
Tributary basins	1.44 MAF
Precipitation	.70 MAF
Snake River losses	.69 MAF
Tributary-stream and canal losses	.39 MAF
Total	8.06 MAF

d. The Eastern Snake Plain Aquifer area of common ground water supply will be created as a separate water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated.

Exhibit "E"

Clear Springs Foods, Inc.
Clear Springs Interim Goals and Expectations
Eastern Snake River Aquifer Working Group
Expanded Natural Resources Interim Committee
June 24, 2004

CLEAR SPRINGS FOODS, INC.
CLEAR SPRINGS INTERIM GOALS AND EXPECTATIONS
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Clear Springs Interim Committee Goals

1. The overarching goal should be to bring the ESPA and the Snake River back into balance by ensuring that groundwater pumping withdrawals are equal to or less than natural and incidental recharge to the system. An appropriate expression of that goal might be:

    A. The development of a program of water rights administration and management, consistent with Idaho's prior appropriation doctrine, which will ensure the long-term sustainability and restoration of the ESPA and the Snake River such that depletions from junior groundwater pumping do not reduce natural discharges from the aquifer to springs and surface supplies.

2. Take immediate (Spring of 2005) steps and stem the decline of key indicator springs, ground water levels and river reach gains through a net reduction in junior ground water depletions. Indicator springs and river reach gains should not fall below 2004 levels. Steps include:

    A. Recharge projects.
    B. Conversions to surface water.
    C. Reduction in depletions (pumping).

3. To provide *short-term* relief while actively pursuing intermediate and long-term goals:

    A. Implement infrastructure improvements or changes to existing systems, or otherwise develop mechanisms, to enable the delivery of mitigation water to those senior water rights impacted by junior groundwater depletions.
    B. Where mitigation water is not available, provide mitigation dollars to enable water right holders to remain viable until intermediate and long-term goals take effect.
    C. Delivery of water through actions otherwise not covered under 1.A., where shortages would result in serious reduction or curtailment of business viability.

4. To provide *intermediate and timely* stabilization of the source of surface (spring) water and groundwater rights throughout the Snake River reach from King Hill to Shelley acknowledging the extent of cumulative depletions caused by groundwater withdrawals from the Eastern Snake Plain Aquifer. Management actions taken shall be in recognition of the depletions identified unless agreed to by all parties. There are two primary tools available for achieving the intermediate stabilization and long-term sustainability of the ESPA and connected surface sources: curtailment of the use of water under junior water rights through priority administration, and providing the legal, technical and policy framework necessary to allow junior water rights holders to continue withdrawals by providing mitigation or replacement water that will prevent injury to senior water rights. Any measures implemented to achieve the stabilization and long-term sustainability must be consistent with the prior appropriation doctrine – meaning that all diversions from, or to, the ESPA must be in priority to other existing water rights or exercised in such a manner that all out-of-priority depletions are fully replaced or mitigated for in order to protect senior water rights.

   A. To appropriately monitor stabilization efforts, the following should be implemented at key target springs. [Birch Creek Springs, White Springs, Malad Springs, Hoagland Tunnel, Curren Tunnel, Len Lewis Springs, Thousand Springs, Box Canyon Creek, Briggs Springs, Clear Lakes Springs, Niagara Springs, Crystal Springs, Blue Lake Springs/Alpheus Creek, Devils Corral Springs, Gifford Springs, Cold Springs, Bonanza Bar Springs, Danielson Springs, Crystal Springs (Boone Creek), Papoose Springs, Spring Creek, Indian Springs]:

      1. Appropriate measuring devices must be timely (2005) installed and monitoring program in place.
      2. Recorded measurements to be reported to all stakeholders timely (monthly).
      3. Measurable discharge range, not less than the 2004 levels and must show improvement within period.
      4. Stabilization should be achieved within 3-5 yrs.

   B. To appropriately monitor stabilization efforts of the entire Eastern Snake Plain Aquifer, the following should be implemented:

      1. Identification of observation wells and definitive monitoring program at critical locations. [above target springs, within WDs 110, 120, 130 and the A & B area]
      2. Identifiable timeframe [2005].

3. Recorded measurements to be reported to all stakeholders timely (monthly).
4. Groundwater levels [not less than 2004 levels] where available or latest available measurements. If 2001 GW levels are the same as 1980 levels would you not expect the spring levels to be the same?

C. To appropriately monitor stabilization efforts of the Snake River reach gains that have suffered declines resulting from groundwater depletions caused by pumping, the following should be implemented:

1. Identification of reaches [Shelley to Neely, Neely to Minidoka, Minidoka to Milner, Milner to King Hill, and sub-reaches identified in the recalibrated groundwater model]
2. Adequate measuring devices, monitoring program, and water rights accounting for the entire reach identified in C.1. above.

5. In an effort to establish reasonable *long-term* restoration objectives for Aquifer levels, Spring flows and Snake River reach gains identified in Part 4 above, the following should be implemented:

A. Using the technical tools (model) and such mitigation actions as are reasonably available (managed recharge, curtailment, conversions, etc.), identify the reasonable levels of restoration that might be expected over the long-term. Such as:

1. Key target springs flow discharges.
2. Aquifer water levels.
3. Snake River reach gains.

B. Identifiable timeframe, 10-15 years, predicated on expected level of long-term restoration.

6. Identifiable funding mechanisms to assist attaining stabilization and restoration. Such as:

A. State, Federal, Private funding sources.

Clear Springs Expectations

1. State and Interim Committee re-affirm the protections afforded water right holders through the Prior Appropriation Doctrine, State law and Idaho State Constitution. Further to affirm that aquaculture water rights are not subordinate to agriculture irrigation or hydropower rights and affirmation of the SRBA process and protection of decreed water rights.

2. State commitment to bring the ESPA and the Snake River back into balance and bring certainty to the current and future economic fabric of water users and related interests (people) in the region. Without such certainty, businesses, investors and an economy that relies upon decreed water rights and the source my not continue to exist.

3. Immediate and meaningful action commencing March 2005 that begins to correct the imbalance.

4. Clear Springs will need to see a plan that is supportable and based on best science (water model) that forecasts goal achievement.

5. Progress must be measured by results (indicator spring flow, groundwater levels & Snake River reach gains).

Summary

The question has been posed to Clear Springs Foods, Inc., "What does it need to continue working beyond March of 2005 to avoid litigation?" This paper is prepared to answer that question.

Critical to any long-term solution is recognition of the principles recited in the Agreement, that is recognition that the Prior Appropriation Doctrine and the Idaho law controls administration of water rights. Those principles can not be disturbed without Constitutional ramifications and taking issues.

This is a priority issue – not a surface water/groundwater issue. Clearly, there must be a strong commitment by all parties for there to be any chance of success. We must get beyond blame and move toward developing viable solutions together if we are to be successful.

Exhibit "F"

ESPA Mitigation and Administrative Framework-The Basics
Submitted to the ESPA Working Group by the
Thousand Springs Water Users Assoc., 24 June 2004

ESPA Mitigation and Administrative Framework – The Basics
Submitted to the ESPA Working Group by the
Thousand Springs Water Users Assoc., 24 June 2004

The Thousand Springs Water Users Association was created, in part, to represent and protect the water rights that our family members established so many years ago. It was also formed to obtaine and distribute mitigation funds and other forms of relief intended to offset losses resulting from declining spring water supplies.

To that extent, the Association hired Judge Daniel Hurlbutt to help develop standards and procedures for administering the mitigation funds the Association will receive in July. With his assistance, notices were sent to more than 550 spring water users in the Thousand Springs Reach, giving them the opportunity to become members in the Association, and to apply for funds. We are currently in the process of receiving those responses.

The individuals and entities that received those letters hold over 650 spring water rights between Bliss and Twin Falls. These rights date from 1878 to the present, and vary in quantity from 0.02 cfs to 900 cfs. 42% of those spring rights have priority dates between 1878 and 1905; 61% between 1878 and 1950. Understand also that a single water right may serve many users. For example, the spring source for the Hagerman Water Users Assoc. serves 60 households, Big Springs serves over 50 households, Banbury at least 20, and so on. The domestic supplies for the cities of Hagerman and Twin Falls are from springs.

Our members depend on the Thousand Springs to support our families, our businesses and employees, and our communities. Our water rights and our spring flows are the foundation of our lives. The chronic declines in spring flows threaten our livelihoods. Declines are so acute that some springs no longer flow, while others are down 15, 30, 50, and as much as 85% from decreed rights. We've heard complaints from those who have lost their drinking water sources, and concerns from a family whose water source has dropped so low that they were forced to install filters to remove the debris coming through their tap. We know of a family who has to choose between turning on the air conditioner, sprinkling the lawn, using the washing machine, or flushing the toilet – they can't do more than one at a time because the sole spring is so low. We've received questions from business owners wondering whether the tourism industry built around the wildlife, recreation, and scenic springs will continue to sustain their businesses. Flows through the wildlife management area have dropped enough to cause ponds to freeze, so that waterfowl fly over Hagerman instead of landing. This directly affects public and private hunting operations. And then there's the retiree who no longer believes that he'll be able to supplement his disabled veteran's pension with his small farm income.

While spring rights for fish propagation have been highly criticized, the greatest beneficial used is by far irrigation. Less than 25% of the spring rights in the Thousand Spring Reach are for fish. Other beneficial uses include stockwater, domestic and commercial use, minimum instream flow, recreation, aesthetics, wildlife, fire protection, and power generation.

There's been grumbling that we can solve this water crisis by simply buying out the fish hatcheries. Buying out a non-consumptive user will not solve the problem. Take Billingsley Creek, for example. Water is supplied to four hatcheries plus a state-operated research facility, a state-owned park, a federal wildlife management area, a private hunt club, several irrigators; it provides minimum flow to for resident fish for fly-fishing, and it provides eye appeal to tourists staying at a local lodge, all before entering the Snake River. Then its available for instream flow, endangered species habitat, wildlife, recreation, irrigation, hydropower, and aesthetics. No, buying out a non-consumptive user will not solve the problem. And in this particular case, it may exasperate the situation if those remaining users are without water, as some of the most senior water rights in the Thousand Springs Reach, dating between 1880 and 1884, are located along Billingsley creek.

So how do we begin to approach this problem? First and foremost to lay the foundation to protect our water supplies and our livelihoods, water rights across the ESPA must be respected and enforced as valuable property rights. This basic need has been the foundation of Idaho's constitution and water laws, its economy, and its culture since the earliest days of statehood. Water rights must be administered as decreed or licensed. There can be no administrative or legislative alteration of the prior appropriation doctrine.

Restoration of the Thousand Springs requires recovery of the Eastern Snake Plain Aquifer from the effects of both ground water withdrawals and drought. We recognize that ESPA recovery, through management of ground water rights and recharge, is a long-term goal that will require significant, ongoing commitment of time and resources from the State of Idaho, the federal government and various water users. We understand that private and public institutional barriers must be overcome to achieve long-term aquifer stabilization and recharge. Thus, we support the concept of a central entity to monitor and administer recharge efforts, and need the flexibility to recharge outside the normal irrigation season. Key to this will be acquiring consistent water supplies. Like groundwater users, spring users are asking for assurances to make business plans from year to year.

In order to protect our livelihoods and our water rights until this long-term goal is met, and avoid widespread curtailment of junior ground water rights, our members require action and relief to mitigate for the effects of ground water withdrawals and the effects of drought. To continue diverting water, junior water right holders must be required to mitigate for the depletionary effects of their withdrawals on senior water right

holders, just as new appropriations are required to provide mitigation for their new water rights. Adequate mitigation and relief is an acceptable, interim alternative to mandatory curtailment.

Obviously, we would prefer mitigation that provides usable water directly to the springs and our diversions. To this end, both private and government-funded projects to increase spring water supplies and improve efficiencies should be continued and expanded.

To the extent that water cannot be provided, in order to forgo the priorities of our rights, our members must receive compensation for the depletionary effects of junior groundwater withdrawls. Financial compensation should be at a recognized rate for water, such as that provided in the recent settlement of the Nez Perce Tribe's Snake River Basin Adjudication instream flow claims. To mitigate for the effects of drought, the Association is pursuing various avenues through standard State and Federal assistance programs. We recognize that financial mitigation and drought relief may not be adequate substitutes for water for specific spring users, such as cities.

As recognized in the one-year Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement, curing the water crisis in an way that respects and enforces water rights as valuable property requires a multi-faceted effort to provide interim mitigation and relief while the parties develop and implement a credible, long-term plan for aquifer recovery and spring restoration. Our members are committed to working with the ground water users, the canal companies, cities, the State of Idaho, and the Idaho congressional delegation to find acceptable solutions.