

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

CLEAR SPRINGS FOODS, INC.,)

Petitioner,)

vs.)

BLUE LAKES TROUT FARM, INC.,)

Cross-Petitioner,)

vs.)

IDAHO GROUND WATER APPROPRIATORS,)
INC., NORTH SNAKE GROUND WATER)
DISTRICT, and MAGIC VALLEY GROUND)
WATER DISTRICT,)

Cross-Petitioner,)

vs.)

IDAHO DAIRYMEN'S ASSOCIATION, INC.)

Cross-Petitioner,)

vs.)

RANGEN, INC.,)

Cross-Petitioner,)

vs.)

DAVID R. TUTHILL, JR., in his official capacity)
as Director of the Idaho Department of Water)
Resources; and the IDAHO DEPARTMENT OF)
WATER RESOURCES,)

Respondents.)

Case No. CV-2008-0000444

RESPONDENTS' BRIEF

IN THE MATTER OF DISTRIBUTION OF)
 WATER TO WATER RIGHT NOS. 36-02356A,)
 36-07210, and 36-07427)
)
 (Blue Lakes Delivery Call))
)
 IN THE MATTER OF DISTRIBUTION OF)
 WATER TO WATER RIGHT NOS. 36-04013A)
 36-04013B, and 36-07148)
)
 (Clear Springs Delivery Call))
)
 _____)

RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
 David R. Tuthill, Jr., Director

Honorable John M. Melanson, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CASES AND AUTHORITIES..... ii

I. STATEMENT OF THE CASE1

II. ISSUES PRESENTED ON JUDICIAL REVIEW1

III. FACTUAL AND PROCEDURAL BACKGROUND1

 1. Blue Lakes Delivery Call.....1

 2. Clear Springs Delivery Call.....3

 3. IGWA’s Replacement Water Plans4

 4. November 2008 Hearing on Blue Lakes and Clear Springs Delivery Calls.....4

 5. The Hearing Officer’s Recommended Order, Response Order, and the Director’s Final Order5

IV. STANDARD OF REVIEW.....6

V. ARGUMENT.....7

 1. In Balancing The Principles Of Priority Of Right, Optimum Development, And Reasonable Use, The Director Properly Exercised His Technical Judgment In Quantifying Uncertainty Associated With The ESPA Model To Curtail Only Those Ground Water Users That Were Scientifically Certain To Benefit The River Reaches In Which Blue Lakes And Clear Springs Are Located.....10

 2. The Director Properly Exercised His Technical Judgment In Examining The ESPA Model’s Results To Determine That A Usable Quantity Of Water Would Arrive At The Blue Lakes And Clear Springs Facilities As A Result Of Curtailment.....19

 3. In Accordance With His Authority Under The CM Rules, The Director Properly Exercised His Discretion In Phasing-In Curtailment.....26

 4. In Balancing The Competing Property Interests Of Junior And Senior Water Right Holders, The Director Properly Exercised His Authority In Authorizing The Filing Of Replacement Water Plans27

5.	The Director Properly Approved And Accounted For IGWA’s 2005, 2006, and 2007 Replacement Water Plans	33
A.	The Director’s Actions In 2005 and 2006	34
B.	The Director’s Actions In 2007	36
6.	For Purposes Of Administration, It Was Proper For The Director To Examine The Historic Availability Of Blue Lakes And Clear Springs’ Water Rights.....	42
A.	Due To Inherent Seasonal Variation And The Record Before Him, The Director Properly Found No Injury To Clear Springs’ Water Right No. 36-4013A	44
B.	Due To Inherent Seasonal Variation And The Record Before Him, The Director Properly Found No Injury To Blue Lakes’ Water Right No. 36-7210	49
7.	Consideration Of The Public Interest Is Consistent With The State’s Duty To Ensure Optimum Development Of A Limited Resource.....	57
8.	Department’s Response to Certain Issues Raised Solely by IGWA.....	61
A.	The Swan Falls Agreement Does Not Prevent Curtailment Of Junior Ground Water Users	61
B.	The Director Properly Exercised His Discretion In Not Ordering Blue Lakes And Clear Springs To Convert To Ground Water	61
C.	It Was Proper For The Director To Issue The Curtailment Orders On An Emergency Basis.....	62
D.	No Taking Of Junior Ground Water Rights Occurred In The Director’s Administration Of Hydraulically Connected Ground And Surface Water Sources	64
VI.	CONCLUSION.....	65

TABLE OF CASES AND AUTHORITIES

Cases

<i>American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources</i> , 143 Idaho 862, 154 P.3d 433 (2007).....	passim
<i>Baker v. Ore-Ida Foods, Inc.</i> , 95 Idaho 575, 513 P.2d 627 (1973)	59
<i>Barron v. IDWR</i> , 135 Idaho 414, 18 P.3d 219 (2001)	7, 18, 61
<i>Canty v. Idaho State Tax Com’n</i> , 138 Idaho 178, 59 P.3d 983 (2002).....	33
<i>Dovel v. Dobson</i> , 122 Idaho 59, 831 P.2d 527 (1992).....	6
<i>Farm Service, Inc. v. U. S. Steel Corp.</i> , 90 Idaho 570, 414 P.2d 898 (1966).....	31

<i>Greenough v. Farm Bureau Mut. Ins. Co. of Idaho</i> , 142 Idaho 589, 130 P.3d 1127 (2006)	43
<i>Hill v. Standard Mining Co.</i> , 12 Idaho 223, 85 P. 907 (1906)	32
<i>Idaho Conservation League, Inc. v. State</i> , 128 Idaho 155, 911 P.2d 748 (1995).....	60
<i>JR. Simplot Co., Inc. v. Idaho State Tax Comm’n</i> , 120 Idaho 849, 820 P.2d 1206 (1991)	9, 32
<i>Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.</i> , 492 P.2d 123 (Nev. 1972)	31
<i>Mountain Home Irrigation District v. Duffy</i> , 79 Idaho 435, 319 P.2d 965 (1957).....	59
<i>Pearl v. Board of Professional Discipline of Idaho State Bd. of Medicine</i> , 137 Idaho 107, 44 P.3d 1162 (2002).....	32, 33
<i>Schodde v. Twin Falls Water Co.</i> , 224 U.S. 107 (1911).....	7, 58
<i>Union Grain & Elevator Co. v. McCammon Ditch Co.</i> , 41 Idaho 216, 240 P. 443 (1925)	54
<i>Urrutia v. Blaine County, ex rel. Bd. of Comm’s</i> , 134 Idaho 353, 2 P.3d 738 (2000)	6, 18, 61
<i>Washington State Sugar Co. v. Goodrich</i> , 27 Idaho 26, 44 P. 1073 (1915).....	54, 58, 59

Statutes

I.C. § 42-101	18
I.C. § 42-101	58, 60
I.C. § 42-1701A(4)	6
I.C. § 55-101(1)	31, 58
I.C. § 67-5277	6
I.C. § 67-5279	61
I.C. § 67-5279(1)	6
I.C. § 67-5279(3)	7, 10, 65
I.C. § 67-5279(4)	7

Rules

CM Rule 0.....	32
CM Rule 10.15.....	28
CM Rule 20.02.....	60
CM Rule 20.03.....	18, 49, 59
CM Rule 20.04.....	24, 25, 26
CM Rule 40.01.a.....	24, 26, 27
CM Rule 42.01.c.....	24, 43
CM Rule 43.03.b.....	28, 43
CM Rule 43.03.c.....	24

Constitutional Provisions

Idaho Const. Art. XV, § 1	59
Idaho Const. Art. XV, § 3	58
Idaho Const. Art. XV, § 5.....	18
Idaho Const. Art. XV, § 7.....	49

I. STATEMENT OF THE CASE

This is a proceeding for judicial review of a final agency order issued on July 11, 2008, by David R. Tuthill, Jr., Director of the Idaho Department of Water Resources (collectively referred to herein as “Department”). Petitioners and cross-petitioners contend that the Department erred in its response to the delivery calls filed by Blue Lakes Trout Farm, Inc. (“Blue Lakes”) and Clear Springs Foods, Inc. (“Clear Springs”).

II. ISSUES PRESENTED ON JUDICIAL REVIEW

In this brief, the Department will respond to all nineteen issues presented by Blue Lakes, Clear Springs, and the Idaho Ground Water Appropriators, Inc. (“IGWA”). The issues are identified in the respective opening briefs. Because many of the issues overlap, the Department will consolidate its response into eleven issues. The Department will identify the issues that it will be responding to in each section of its brief. Blue Lakes states that it “is aware that the Petitioner, Clear Springs, is addressing certain issues stated in Blue Lakes’ Cross-Petition, and that additional briefing on them here is unnecessary. Blue Lakes reserves the right to concur with Clear Springs in this proceeding on such issues.” *Blue Lakes Opening Brief* at 5. Based on this statement, all responses by the Department to arguments raised by Clear Springs apply equally to Blue Lakes.

III. FACTUAL AND PROCEDURAL BACKGROUND

1. Blue Lakes Delivery Call

The Blue Lakes delivery call was initiated by a letter dated March 22, 2005, requesting that then-Director Karl J. Dreher (“Director Dreher”) “direct the Watermaster for Water District

130 to administer water rights in the Water Districts as required by Idaho Code § 42-607 in order to supply Blue Lakes' prior rights." Record ("R.") Volume ("Vol.") 1 at 1. The Letter stated that Blue Lakes "is entitled to delivery of 197.06 cfs from Alpheus Creek pursuant to water right nos. 36-02356A (5/29/1958 priority for 99.84 cfs), 36-07210 (11/17/1971 priority for 45 cfs), and 36-07427 (12/28/1973 priority for 52.23 cfs)." *Id.* The Letter further stated that Blue Lakes has been receiving between 111 to 137.7 cfs from its three surface water rights. *Id.*

On May 19, 2005, Director Dreher issued an order ("May 2005 Blue Lakes Order"), in response to the March 22, 2005 letter. R. Vol. 1 at 45. Applying the Department's Rules for Conjunctive Management of Ground and Surface Water Resources ("CM Rules"), IDAPA 37.03.11 *et seq.*, Director Dreher found that junior ground water diversions were materially injuring Blue Lakes' water right no. 36-07427. Based on the determined injury, Director Dreher ordered curtailment of ground water rights junior to Blue Lakes' water right no. 36-07427 (December 28, 1973). Curtailment of 57,220 acres was ordered, which the ESPA model estimated would result in providing 51 cfs to the Devil's Washbowl to Buhl Gage spring reach of the Snake River. The Director estimated that this level of curtailment would produce 10 cfs of water directly to Blue Lakes. The Order provided, however, that involuntary curtailment could be avoided if junior ground water users submitted plans providing a sufficient volume of water to offset the identified injury. The Order provided that the replacement water could be phased-in over a period of five years to "lessen the economic impact of immediate and complete curtailment pursuant to IDAPA 37.03.11.040.01.a." *Id.* at 71. The May 2005 Blue Lakes Order was issued prior to a hearing on Blue Lakes' delivery call in order to provide interim relief to the senior water right holder pending resolution of the factual and legal disputes.

2. Clear Springs Delivery Call

The Clear Springs delivery call was initiated by a letter dated May 2, 2005 requesting “water rights administration in Water District 130 . . . in order to effectuate the delivery of Clear Springs Foods, Inc., a/k/a Clear Springs, water rights number 36-04013A, 36-04[0]13B, and 36-07148” to its Snake River Farm. R. Vol. 1. at 2. “As supported by the enclosed graphs and tables, these water rights have not and are presently not being delivered to the partial decree elements provided in the Snake River Basin Adjudication.” *Id.*

On July 8, 2005, Director Dreher issued an order (“July 2005 Clear Springs Order”) in response to the May 2, 2005 letter. R. Vol. 3 at 487. Applying the CM Rules, Director Dreher found that junior ground water diversions were materially injuring water right nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm. Based on the determined injury, Director Dreher ordered curtailment of approximately 52,470 acres of land served by ground water rights junior to Clear Springs’ water right no. 36-04013B (February 4, 1964). The ESPA model estimated that this level of curtailment of would result in produce 38 cfs to the Buhl Gage to Thousand Springs spring reach of the Snake River and the Director estimated that the curtailment would produce 2.7 cfs of water directly to Snake River Farms. The Order provided, however, that involuntary curtailment could be avoided if junior ground water users submitted plans for providing a sufficient volume of water to offset the identified injury. The Order provided that the replacement water could be phased-in over a period of five years to “lessen the economic impact of immediate and complete curtailment pursuant to IDAPA 37.03.11.040.01.a.” *Id.* at 520. The July 2005 Clear Springs Order was issued prior to a hearing on Clear Springs’ delivery call in order to provide interim relief to the senior water right holder pending resolution of the factual and legal disputes.

3. IGWA's Replacement Water Plans

After issuance of the curtailment orders, IGWA filed replacement water plans to mitigate for material injury caused by junior ground water diversions, electing to phase-in its substitute curtailments over the five-year period identified by Director Dreher. In each of the years at issue in this proceeding, IGWA chose to provide replacement water to the impacted reaches of the Snake River where the spring complexes that feed Blue Lakes and Clear Springs' water rights are located. IGWA's replacement water plans generally sought to mitigate material injury by conveying leased surface water through the North Side Canal Company's delivery system to allow incidental recharge of the Eastern Snake Plain Aquifer ("ESPA"); conversion of irrigated acres from ground water to surface water; targeted recharge; and enrollment of some ground water irrigated acres in a federal land fallowing program known as the Conservation Reserve Enhancement Program.

Because IGWA's replacement water plans proposed to provide water to the impacted reaches of the Snake River, as opposed to direct replacement water to Blue Lakes and Clear Springs' facilities, the ESPA Model was used to analyze whether the replacement water plans would provide sufficient water to the affected reach in each year of the five-year substitute curtailment period. IGWA's replacement water plans were reviewed by the Director and Department staff and generally found acceptable.

4. November 2008 Hearing on Blue Lakes and Clear Springs Delivery Calls

On August 1, 2007, Gerald F. Schroeder was appointed by Director David R. Tuthill, Jr. to preside as an independent hearing officer ("Hearing Officer") in the joint hearing on the Blue Lakes and Clear Springs delivery calls. R. Vol. 10 at 1979. "Because of requests by the parties for schedule changes, and matters wholly unrelated to the delivery call proceedings initiated by

Blue Lakes and Clear Springs, *see American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862 (2007), it was not until the summer of 2007 that the parties agreed to a joint hearing schedule and the appointment of an independent hearing officer.” R. Vol. 16 at 3951. All previously undecided matters were “subsumed by” and were to be addressed during the hearing. R. Vol. 9 at 1931.

On November 28, 2007, the hearing commenced. Participating in the hearing were Blue Lakes, Clear Springs, the Department, IGWA, the Idaho Dairymen’s Association, Rangen, Inc., and the cities of Wendell, Shoshone, Paul, Jerome, Heyburn, and Hazelton. The hearing ran for a period of twelve days in which testimony and evidence were presented by the participating parties. “The Department provided witnesses to explain the background of the Department’s action and the administrative record relied upon by the Director in entering the orders at issue and to assist the parties and the hearing officer.” R. Vol. 16 at 3691.

5. The Hearing Officer’s Recommended Order, Response Order, and the Director’s Final Order

On January 11, 2008, the Hearing Officer issued his *Opinion Constituting Findings of Fact, Conclusions of Law, and Recommendation* (“Recommended Order”). R. Vol. 16 at 3690. The Recommended Order approved Director Dreher’s May 2005 Blue Lakes Order and July 2005 Clear Springs Order on all major points, finding, among other things: (1) that the Director properly considered pre-decree information in his review of the delivery calls, *Id.* at 3699; (2) that the Director properly used the ESPA Model and that his assigned uncertainty of 10% was reasonable, *Id.* at 3701-04; (3) that the Director properly considered seasonal variation (also referred to as intra-year and inter-year variation) in analyzing material injury, *Id.* at 3707-08; (4) that the Director’s determination of the amount of water that would directly benefit the Blue

Lakes and Clear Springs facilities if curtailment were ordered was supported by the record, *Id.* at 3710; (4) that the Director properly ordered curtailment, *Id.* at 3714-15; (5) that the Director's acceptance of replacement water plans as a form of mitigation was proper, *Id.* at 3716-17; and (6) that the Director properly exercised his discretion in evaluating the delivery calls, *see generally* R. Vol. 16 at 3690.

On February 29, 2008, the Hearing Officer issued his *Responses to Petitions for Reconsideration and Clarification and Dairymen's Stipulated Agreement* ("Response Order") to clarify some aspects of the Recommended Order, as well as to state that "The Findings of the Director were adopted by the Hearing Officer unless explicitly rejected by the Hearing Officer." R. Vol. 16 at 3839. On July 11, 2008, the Director issued his *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* ("Final Order"). R. Vol. 16 at 3950. The Final Order accepted each of the Hearing Officer's recommendations with a few minor modifications.

IV. STANDARD OF REVIEW

Judicial review of a final decision of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). "The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Urrutia v. Blaine County, ex rel. Bd. of Comm's*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

The court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); *Barron* at 417, 18 P.3d at 222.

V. ARGUMENT

In this case, the Court is called upon to review the Director's exercise of his authority to administer hydraulically connected surface and ground water rights in the Eastern Snake Plain.

Pursuant to I.C. § 42-602, "The director of the department of water resources shall have discretion and control of the distribution of water from all natural sources . . . in accordance with the prior appropriation doctrine." At the heart of this case is a dispute over whether the Director has properly applied the prior appropriation doctrine in the context of the delivery calls filed by Blue Lakes and Clear Springs.

The prior appropriation doctrine as established by Idaho law serves two core objectives: to provide security of right and to ensure the full utilization of the resource. Most of the time these objectives are compatible and the issue of administration is easily resolved based upon seniority of right. Occasionally, however, these core objectives come into tension with one another, as shown in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911). In that case the senior surface water user sought to preclude junior surface water users from damming the Snake River in order to protect the current of the river. Because enforcement of seniority would have

resulted in the senior monopolizing the resource, the United States Supreme Court refused to enforce the senior priority.

In the facial challenge to the conjunctive management rules, the Idaho Supreme Court recognized this tension and stated, “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007).

In surface water administration, the Director’s exercise of his authority is less contentious due in large part to the fact that the impacts of administration are visible. In contrast, the movement of ground water in the unconfined and geologically heterogeneous ESPA is much more complex.

Because of the lack of homogeneity and the size of the ESPA, the impacts of ground water pumping on discrete surface water sources has to be estimated through the use of models and the best professional judgment of the Director. It is simply not possible to know with precision the effect of curtailment of any particular water right on an individual reach of the river, let alone the impact on a specific senior water right. Thus, I.C. § 42-226 provides that “while the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.” Under I.C. § 42-602, the Director is charged with the duty to administer surface and ground water rights in accordance with the prior appropriation doctrine as established by Idaho law, which includes the directive in I.C. § 42-226. Because of the complex nature of the hydraulic connection between surface and ground water, the Director must use his best professional judgment to determine the nature and scope of material injury to senior right holders caused by junior ground water users.

In furtherance of this duty, the Department, with the involvement of the stakeholders, developed the ESPA Model to simulate the impact that ground water pumping has on reaches of the Snake River. The ESPA Model was used by the Director in these proceedings as a basis for curtailment of junior-priority ground water rights that have a greater than 10% depletionary impact on the reaches of the Snake River in which Blue Lakes and Clear Springs divert surface water for fish propagation.

As evidenced by their opening briefs, the parties agree with the Department that the ESPA Model is the best science available for determining the effects of ground water diversions and surface water users on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. Disagreement, however, lies in inherent scientific uncertainties associated with the Model and thereby how to interpret and apply the Model's results in accordance with the prior appropriation doctrine, as established by Idaho law. Blue Lakes and Clear Springs argue that no uncertainty should be applied because the Director is obligated to administer in accordance with strict priority; while IGWA argues that there is so much uncertainty that curtailment should not have been ordered. Ultimately, the resolution to this dispute requires the exercise of professional judgment by the Director. Given the specialized expertise and knowledge of the Director, his finding and conclusions are entitled to deference. *American Falls* at 446, 154 P.3d at 875; *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991).

In this case, the record supports the decisions reached by the Director in responding to the delivery calls filed by Blue Lakes and Clear Springs. The delivery calls were initially before Director Dreher, who, in his review of the information, ordered curtailment of junior ground water rights. The May 2005 Blue Lakes Order and July 2005 Clear Springs Order were

thoroughly examined at hearing through cross-examination and presentation of evidence. All of the information presented at hearing was reviewed by the Hearing Officer, which resulted in the issuance of his Recommended Order that approved all major elements of Director Dreher's orders. The Hearing Officer's recommendation, as well as the record created before him, was subsequently reviewed by the Director, which resulted in acceptance of all major recommendations of the Hearing Officer. Therefore, prior to review by this Court, the record in this case has been reviewed on three separate occasions with no departure from any major finding or conclusion. While the parties disagree with certain aspects of the Final Order, the Director's actions were consistent with the governing constitutional and statutory provisions, were supported by the record, were made upon lawful procedure, and were within the Director's discretion. Thus, the Department respectfully requests that its Final Order be affirmed by this Court on review. I.C. § 67-5279(3).

1. In Balancing The Principles Of Priority Of Right, Optimum Development, And Reasonable Use, The Director Properly Exercised His Technical Judgment In Quantifying Uncertainty Associated With The ESPA Model To Curtail Only Those Ground Water Users That Were Scientifically Certain To Benefit The River Reaches In Which Blue Lakes And Clear Springs Are Located

The ESPA is an unconfined aquifer of great size that is predominately composed of fractured Quaternary basalt. R. Vol. 1 at 45, ¶ 1. Ground water in the ESPA is hydraulically connected to the Snake River and tributary water sources at various places and to varying degrees. R. Vol. 1 at 46, ¶ 7. Numerous factors determine the specific hydraulically-connected reach of the Snake River or spring complexes affected by the pumping of ground water from a well in the ESPA; the magnitude of the depletionary effects to a hydraulically-connected reach or spring complex; the time required for those depletionary effects to first be expressed as reductions in river flow or spring discharge; the time required for those depletionary effects to

reach maximum amounts; and the time required for those depletionary effects to either recede, if ground water pumping from the well ceases, or reach steady-state conditions, if ground water pumping continues. R. Vol. 1 at 47, ¶ 10. The factors include the proximity of the well to the various hydraulically-connected reaches or springs, the transmissivity of the aquifer between the well and the hydraulically-connected reach of the Snake River or springs, the riverbed hydraulic conductivity, the specific yield of the aquifer, the period of time over which ground water is pumped from the well, and the amount of ground water pumped that is consumptively used. *Id.*

In order to better understand these relationships, representatives with the Idaho Water Resources Research Institute, University of Idaho, United States Bureau of Reclamation, United States Geologic Survey, Idaho Power Company, the Department, and consultants representing various entities, including certain entities relying on the discharge of springs in the Thousand Springs area (the “Committee”), developed the ESPA Model to simulate the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries, including springs in the Thousand Springs area. R. Vol. 1 at 48, ¶ 13. This effort was funded in part by the Idaho Legislature and included significant data collection and model calibration intended to reduce uncertainty in the results from model simulations. *Id.* The ESPA Model was developed through a collaborative process by members of the Committee. Tr. p. 794, lns. 20-25; p. 795, lns. 1-25.

Acknowledging that “no model is perfect,” Director Dreher found it was scientifically necessary to quantify uncertainty associated with results from the ESPA Model when he issued the May 2005 Blue Lakes Order and the July 2005 Clear Springs Order. Tr. p. 1133, ln. 9. The uncertainty assigned by the Director to ESPA Model results was 10%. R. Vol. 1 at 49, ¶¶ 16-20. Blue Lakes and Clear Springs argue that the Director should assign no uncertainty to the ESPA

Model, while IGWA argues that uncertainty is so great that the Director's curtailment orders violate the requirement of full economic development of the water resource. *Clear Springs Opening Brief* at 33; *IGWA Opening Brief* at 48.

In his testimony before the Hearing Officer, Director Dreher explained the technical basis for quantifying model uncertainty:

And so for the purposes of administration, I consulted with one of my staff members at the time, Dr. Allan Wylie, on his view of model uncertainty. And collaboratively we came to the conclusion, although it was in the end my determination, that the highest degree of uncertainty in the model results were the outcome of using measured stream gauge records for the purposes of determining Snake River reach gains. And that uncertainty was plus or minus 10 percent.

Now, that was the largest source of uncertainty. And we knew the model had to be -- couldn't be any better than plus or minus 10 percent. And perhaps could be, you know, we hadn't -- the committee hadn't completed its full work of quantifying uncertainty, so hypothetically -- although I'm not aware that any determination has subsequently been made -- hypothetically the uncertainty could have been larger than plus or minus 10 percent. But it was unquantifiable. We could quantify that there was at least 10 percent uncertainty, which means that if - - if -- if there was -- if it was uncertain within that 10 percent criteria that curtailing junior priority ground water use would in fact provide a meaningful supply to the calling senior right, then I made the determination it was not appropriate to curtail such junior priority ground water use if, in fact, we didn't know whether curtailment would result in a meaningful amount of water reaching the calling senior right.

Tr. p. 1166, lns. 7-25; p. 1167, lns. 1-8 (emphasis added); *see also* Exhibit 109.

Clear Springs argues that because ground water is hydraulically connected to surface water, the Director should have curtailed all junior ground water rights. *Clear Springs Opening Brief* at 33. Clear Springs' argument demonstrates a fundamental misunderstanding of the ESPA Model and the complex factors associated with conjunctive administration. The Model divides the Thousand Springs area into six adjacent groupings of spring complexes, or spring reaches, based on the relative magnitude of spring discharge. R. Vol. 1 at 48, ¶ 14. Blue Lakes is located in the Devil's Washbowl to Buhl Gage spring reach and Clear Springs is located in the Buhl

Gage to Thousand Springs reach. R. Vol. 1 at 48, ¶ 15; R. Vol. 3 at 491, ¶ 15. Therefore, only two of the six subreaches in the Thousand Springs area were at issue in the Clear Springs and Blue Lakes delivery calls. “Conjunctive administration requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, *and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.*” *American Falls* at 877, 154 P.3d at 448 (emphasis added) (internal quotations removed). As explained by Dr. Allan Wylie, the 10% trim line “removed wells that . . . could have as little as zero percent impact *on the reach in question.*” Tr. p. 819, ln. 25; p. 820, lns. 1-2 (emphasis added). Meaning that 91 to 100% of the benefit of curtailment would accrue to “other reaches of the river.” Tr. p. 888, lns. 9-10.

IGWA argues that the Director’s decision to curtail junior ground water rights was an abuse of discretion because of the disparity between the amount of water predicted to benefit Blue Lakes and Clear Springs versus the number of acres that would need to be curtailed in order to provide such benefit. *See generally IGWA Opening Brief* at 32-49. To support its position, IGWA cites to certain principles of the prior appropriation doctrine: optimum development, *Id.* at 32 and 35 (citing Idaho Const. Art. XV, § 7; *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973)); reasonable use, *Id.* at 33 (citing Idaho Const. Art. XV, § 5); full economic development, *Id.* (citing I.C. § 42-226); monopolization, *Id.* (citing *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911)); and waste, *Id.* at 40 (citing *United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998); *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982); *Baker; Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957)).

The Department fully agrees that each of the above-mentioned principles are part of Idaho's prior appropriation doctrine. However, IGWA fails to acknowledge that priority of right is also part of the doctrine and must be considered by the Director. As junior right holders, IGWA's members are responsible for their depletive impacts to the ESPA to the extent they cause injury to senior water rights. To the extent that those depletions diminish water rights held by Blue Lakes and Clear Springs, it was appropriate for the Director to order curtailment. The use of the 10% trim line ensured maximum utilization of the resource by not authorizing the curtailment of junior ground water rights where the best available science failed to show any measureable benefit to the reaches of the Snake River in which Blue Lakes and Clear Springs are located. Tr. p. 1230, lns. 2-23. As observed by the Hearing Officer: "The information available to the Director and presented at hearing in this matter justify curtailment of junior ground water users. IGWA objects on various grounds to any curtailment. . . . It is, however, inescapable that spring flows have declined over time and that a portion of that decline is attributable to ground water pumping. . . . Curtailment is proper." R. Vol. 16 at 3714.

At the hearing, Director Dreher explained the consistency between the curtailment orders and the prior appropriation doctrine:

I know that -- that there are those that would disagree with me on that point, but my understanding of water rights administration across the west is you don't curtail junior priority rights, surface or ground water, if it might make a meaningful amount of water available to the senior. You only curtail junior priority rights when you know it will result in a meaningful amount of water being available to the senior.

And the reason it ties back into the 42-226 provision, is that if you're curtailing junior priority rights because it might make a difference but you don't know for sure [] that it will, that's not providing for full economic development pursuant to 42-226. And it's also inconsistent with the -- the portion of the common law doctrine of prior appropriation that promotes maximum utilization of a scarce resource.

You know, it's -- when people characterize the prior appropriation doctrine they're quick to go to the first in time is first in right provision. And in fact that's, you know, cited in Idaho's constitution. But an equally important principle in the prior appropriation doctrine is that that's articulated in Idaho Code 42-226. And that [is] maximum utilization of the resource.

If there's unappropriated water you don't prevent the appropriation of that water by a junior because a senior might need it. You allow for the appropriation of the water by the junior, recognizing that in the event of shortage, that water could be called for by the senior. But again, it's a matter of certainty. You provide for maximum utilization by letting juniors in in the first place. You don't disallow junior appropriations because the seniors might need it. Similarly when it comes to administration of rights, you don't curtail juniors because it might make a difference. You curtailed only those juniors that you know will make a difference.

Tr. p. 1167, lns. 9-25; p. 1168, lns. 1-18.

Director Dreher's articulation resolves the tension between Blue Lakes and Clear Springs' argument for strict priority administration and IGWA's argument that curtailment should not have been ordered because curtailment of junior ground water rights is inconsistent with full economic development.

In spite of this, Clear Springs argues that "Under the law of prior appropriation, a senior water right should be afforded the benefits of uncertainty in water right administration. At a minimum, the Director should not use any 'margin of error' or 'confidence level' for the benefit of either junior or senior water rights. In summary, it should not be applied as a penalty against senior water users exercising their legal right to water right administration in times of shortage."

Clear Springs Opening Brief at 33.¹

¹ Similar to Clear Springs, Blue Lakes argues: "At a minimum, the 'trimmed' water rights should be required to provide mitigation for the impacts of their ground water depletions, because they all affect spring flows to some degree." *Blue Lakes Opening Brief* at 25. Because the purpose of the 10% trim line was to remove junior ground water users from curtailment where there is insufficient scientific evidence to conclude that curtailment will provide any water to the reaches of the Snake River in which the Blue Lakes and Clear Springs facilities are located, it would not be appropriate for the Department to order holders of junior ground water rights that cannot be shown to impact Blue Lakes or Clear Springs to mitigate.

Clear Springs' argument is misplaced for three reasons. First, as explained by Director Dreher during the hearing, the 10% gage uncertainty that was used in these proceedings has a history of use in surface-to-surface water administration in the Big Lost basin:

Q. Are those gauge readings, the uncertainty that's associated with those gauge readings, used [in] surface water administration?

A. It is.

Q. How so?

A. The most analogous use of that information would be in a losing surface water system where a determination of whether or not a call is futile has to be made. And probably the best example of that -- not the only example perhaps, but the best example of that here in Idaho, is in the Big Lost River Basin where the senior surface water rights for irrigation are generally at the downstream end of the Big Lost River system. And more junior rights for surface water irrigation are at the upstream end of the Big Lost system. But the Big Lost River derives its name for a reason. It lo[oses] a lot of water from the upper end to the lower end. And so almost every year a determination has to be made when do you no longer curtail the upstream juniors in a futile effort to supply the downstream seniors.

In other words, when is -- when is the water that would be made available through curtailment of the juniors, essentially lost and not available then to the seniors just because the river lo[oses] so much.

And you know, we've actually issued orders in some cases where the water master has requested a written determination of whether or not the call is futile. And it's because of this gauge uncertainty of plus or minus 10 percent. It's generally about when we're not certain within 10 percent of the quantity of water that would be made available through curtailment, when we're not certain within about 10 percent that that water will actually reach the down stream seniors, we declare the call futile and we allow the upstream juniors to continue to divert.

Tr. p. 1169, lns 8-25; p. 1170, lns. 1-16.

Secondly, just as the 10% trim line removed certain junior ground water rights from administration, proposed mitigation efforts by IGWA that were within the 10% trim line were not credited because of the possibility that those efforts would provide zero benefit to Clear Springs or Blue Lakes.

Q. Dr. Wylie, was the 10 percent clip line, trim line, applied to delivery calls and plans for replacement water substitute curtailment plans?

A. Yes, it was.

Q. And so that use of the 10 percent clip removed certain ground water wells from curtailment; is that correct?

A. Yes. It removed wells that the 10 percent uncertainty analysis suggests could have as little as zero percent impact on the reach in question.

Q. And it also removed certain means proposed for mitigation?

A. It did. It prevented -- it removed mitigation in areas that had -- that could potentially have as little as zero percent impact on the reach in question.

Q. So that use, then, cut both ways; so to speak?

A. Yes.

Tr. p. 819, lns. 18-25; p. 820, lns. 1-9.

Third, if Clear Springs were correct that no margin of error should be assigned to results from the ESPA Model, it would result in the ministerial administration of hydraulically connected ground and surface water sources without regard to the complexities associated with conjunctive administration. As stated by the Court in *American Falls*:

Typically, the integration of priorities means limiting groundwater use for the benefit of surface water appropriators because surface water generally was developed before groundwater. The physical complications of integrating priorities often have parallels in the administration of solely surface water priorities. The complications are just more frequent and dramatic when groundwater is involved.

Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L.Rev. 63, 73 (1987).

Conjunctive administration “requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.” *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). That is precisely the

reason for the CM Rules and the need for analysis and administration by the Director.

Id. at 876-77, 154 P.3d at 447-48.

The assignment of 10% uncertainty to results from the ESPA Model falls squarely within the realm of discretion that should be afforded to the Director in balancing the prior appropriation principles of first in time is first in right, optimum development of the State's water resources, reasonable use, and monopolization. *See* Idaho Const. Art. XV, §§ 5, 7; I.C. §§ 42-101, -226, -602; CM Rule 20.03. If the Director had not taken uncertainty into account and instead ordered curtailment of all ground water rights that were junior to Blue Lakes and Clear Springs, it would have resulted in monopolization of the resource, thereby preventing optimum development of the State's water resources and resulting in waste. However, if the Director had not ordered curtailment of junior ground water users, it would have violated the principle of priority.

The Hearing Officer understood the concepts and therefore approved the use of 10% uncertainty: "It was proper for the Director to determine a margin of error which resulted in the so called 'trim line.' Until a better factor is established, the Director in his best judgment may use 10%." R. Vol. 16 at 3703. In his Final Order, the Director accepted the Hearing Officer's recommendation on this point. R. Vol. 16 at 3958, ¶ 10. While Blue Lakes, Clear Springs, and IGWA are dissatisfied with the determinations made by Director Dreher, the Hearing Officer, and Director Tuthill, the decision to apply 10% uncertainty was undertaken within the Director's discretion with due regard to the complexities of conjunctive administration and the prior appropriation doctrine. I.C. § 42-602; *American Falls* at 875, 154 P.3d at 446. The Final Order should therefore be upheld by this Court on review. I.C. § 67-5279; *Barron* at 417, 18 P.3d at 222; *Urrutia* at 357, 2 P.3d at 742.

2. The Director Properly Exercised His Technical Judgment In Examining The ESPA Model's Results To Determine That A Usable Quantity Of Water Would Arrive At The Blue Lakes And Clear Springs Facilities As A Result Of Curtailment

Similar to the question of uncertainty, the Director was required to exercise his discretion in analyzing the results of the ESPA Model to determine the extent to which curtailment would directly benefit Blue Lakes and Clear Springs. The ESPA Model is a regional model that examines the impacts that ground water pumping has on reaches of the Snake River. R. Vol. 1 at 48-49. Blue Lakes is located in the Devil's Washbowl to Buhl Gage spring reach, which is approximately 24 miles long. R. Vol. 9 at 1908, ¶ 15. Clear Springs is located in the Buhl Gage to Thousand Springs reach, which is approximately 11 miles long. Ex. 262 at 6, ¶ 15. Blue Lakes and Clear Springs' divert water for their fish propagation facilities from discrete springs located within their respective multi-mile spring reaches.

An acknowledged difficulty in using the ESPA Model to predict the direct benefits of curtailment to Blue Lakes and Clear Springs' facilities was explained by Director Dreher at hearing:

In terms of its weaknesses, the main weakness is that it is a regional model. By regional what I mean is that the model can't be used, because of the way it was developed, and the data that was available to develop the model can't be used to simulate the effect of ground water from a particular well, on a particular spring in the Thousand Springs area. Or for that matter, at a particular point, single point on the Snake River. It can't be used that way because the scale -- it wasn't developed [for] that scale. It was developed on a regional scale, not a local scale.

And what's the difference? Well, on a regional scale, the model is an idealized representation of the actual aquifer system. It's not a local model that -- that includes in the model itself a representation of each and every fracture in the basalt, each and every rubble zone between basalt flows. And because it doesn't include representation of those discrete features of the aquifer system, it can't be used to simulate discrete effects. In other words, it can't be used to simulate the effects of a well, on a particular spring, or a particular location. So that's its primary weakness.

Tr. p. 1132, lns. 13-25; p. 1133, lns. 1-8.

In order to apply the results from the ESPA Model that simulate gains to identified river reaches, Director Dreher undertook an analysis to determine how much water would arrive at Blue Lakes and Clear Springs' discrete points of diversion as a result of curtailment. As explained by Director Dreher at hearing:

Q. Mr. Dreher, it's been stated previously that the model was developed for, or best used, on a regional scale to examine gains and losses to a defined reach or reaches of the Snake River. And such as the Devil's Washbowl to Buhl, or Buhl to Thousand Springs reaches. Do you believe that to be the case?

A. I do.

Q. And because the model was developed to determine those gains and losses in particular reaches, how did you then make the determination that if curtailment were ordered, which in fact you did order, that sufficient water would arrive to the calling seniors, Blue Lakes and Clear Springs?

And I could turn you to Exhibit 30 [May 2005 Blue Lakes Order] and Exhibit 138 [July 2005 Clear Springs Order] -- on page 4 of Exhibit 30, paragraph 15; and page 5, paragraph 15, of Exhibit 138 -- and ask you how those findings impacted your decision.

A. I already described earlier that the model can't be used to simulate the effects of a single well, whether it's depleting water or whether that well has been curtailed, on a specific individual spring complex. We can only make those determinations, using the model, to a specific reach.

So in the case of Blue Lakes Trout, the spring -- I'll call it subreach that includes the water supply for Alpheus Creek from which Blue Lakes diverts [] surface water is the Devil's Washbowl to Buhl gauge re[ach][]. There are USGS measurements that are made of individual spring complexes. And in fact those measurements were used during the calibration of the model. In the case of Blue Lakes Trout, the USGS measurements showed that 20 percent of the water available in that subreach from the Devil's Washbowl to Buhl, 20 percent of that total amount of water was available at the head of Alpheus Creek where Blue Lakes and Pristine Springs derive their water supply.

So what we did is, using the principle of linearity, we determined that if 20 percent of the available water was measured as being available at Alpheus Creek, which was the water supply available to Blue Lakes and Pristine Springs, then 20 percent of the benefit from curtailment -- the benefit of curtailment to that

subreach, 20 percent of that benefit would accrue to Alpheus Creek at the source for Blue Lakes and Pristine Springs.

Similarly, 20 percent of any substitute curtailment, or other mitigation actions that would result in increased reach gains to the Devil's Washbowl to Buhl reach -- subreach, 20 percent of those benefits would accrue to Blue Lakes Trout because again, going back to these USGS measurements, when they measured the discharge in the subreach, 20 percent of that available discharge was available to Blue Lakes and Pristine Springs at the source which was the head of Alpheus Creek.

Q. Similarly in Clear Springs at page 5, paragraph 15, I think you arrived at a different percentage but I guess the same rationale, or findings, discussions, information, I guess, that was gathered led you to arrive at a conclusion of 7 percent; is that correct? Page 5 paragraph 15.

A. That's correct. The spring subreach that includes the springs which provide the source of supply for Clear Springs at its Snake River Farm is the Buhl gauge to Thousand Springs reach. And based again upon these USGS measurements, 7 percent of the total measured spring discharge in the Buhl gauge to Thousand Springs reach was available in the spring complex from which Clear Springs diverted water at its Snake River Farm.

Tr. p. 1170, lns. 17-25; p. 1171, lns. 1-25; p. 1172, lns. 1-25; p. 1173, lns. 1-7.

Director Dreher was extensively cross-examined on his percentage assignment of direct benefit to the facilities by attorneys for Blue Lakes, Clear Springs, and IGWA. Tr. pp. 1276-89; Tr. pp. 1415-20; Tr. pp. 1244-47. As articulated by Director Dreher in cross-examination by an attorney for Clear Springs, his determination of direct benefit to Blue Lakes and Clear Springs was the best analysis that he could have performed:

Q. At least at the time, that was, in your view, the best analysis that could have been performed to make that relationship?

A. That's correct.

Q. Okay. If there are additional analysis or methods or other ways to do it now that might -- someone might identify, those might be appropriate also?

A. Certainly. And that was, as I testified yesterday, that's in part why, you know, I issued the order first. Let's begin getting some relief to the injury -- for the injury that's occurring. We'll have a hearing process, we'll sort out factual

disagreements, legal disagreements, and we'll modify these orders as necessary to reflect the best available factual information, the best available scientific basis.

Tr. p. 1420, Ins. 3-17.

The development of information regarding direct benefit to the facilities was important in Director Dreher's analysis of the delivery calls filed by Blue Lakes and Clear Springs because it allowed him to determine if curtailment of junior ground water rights outside the 10% trim line would result in a usable quantity of water arriving at Blue Lakes and Clear Springs' points of diversion. The Hearing Officer found that the use of 20% for Blue Lakes "is supported by the evidence and was proper to be applied." R. Vol. 16 at 3710. As for the 7% figure for Clear Springs, the Hearing Officer found that the proper percentage to utilize, based on information in the record, was 6.9%, not 7%. *Id.* Other than disagreement with the Director's methodology, no alternative science was presented at the hearing to establish different percentages: "Criticism of the former Director's methodology and conclusions did not, however, provide any percentages that could be relied upon above those utilized by the former Director. Recommendations of different percentages would be based on guesses, not defined percentages produced at the hearing." R. Vol. 16 at 3845. In his Final Order, the Director accepted the Hearing Officer's recommendations on these points. R. Vol. 16 at 3957-58, ¶¶ 1, 5.

In the May 2005 Blue Lakes Order, after taking 10% uncertainty into consideration, Director Dreher determined that curtailment of ground water rights junior to Blue Lakes' injured water right no. 36-7427 (December 28, 1973) would result in a benefit of 51 cfs to the Devil's Washbowl to Buhl Gage spring reach, at steady state.² R. Vol. 1 at 51, ¶ 26. Therefore, the

² As defined by Dr. Wylie, "Steady state is -- can best be visualized as a long-term average condition. So if the aquifer stresses remain constant for a very long time then, you know, the constant set of inputs and a constant set of outputs would eventually arise. And that would be the steady state condition. It's a condition that [] rarely exists in nature, but is frequently used in ground water modeling." Tr. p. 798, Ins. 3-9.

amount of water that would directly benefit the Blue Lakes' facility was 10 cfs (20% of 51 cfs). R. Vol. 1 at 72. In order to provide 10 cfs to the Blue Lakes facility, it was necessary to curtail 57,220 acres. R. Vol. 1 at 61, ¶ 77.

In the July 2005 Clear Springs Order, after taking 10% uncertainty into consideration, Director Dreher found that curtailment of ground water rights junior to Clear Springs' injured water right no. 36-4013B (February 4, 1964) would result in a benefit of 38 cfs to the Buhl Gage to Thousand Springs spring reach, at steady state. R. Vol. 3 at 519, ¶ 28. Therefore, the amount of water that would directly benefit the Clear Springs facility was 2.7 cfs. R. Vol. 3 at 519, ¶ 29. In order to provide 2.7 cfs to the Clear Springs facility, it was necessary to curtail 52,470 acres. R. Vol. 3 at 503, ¶ 72.³

Had 10% uncertainty not been factored into the Director's decision, it would have resulted in hundreds of thousands of acres curtailed with no reasonable degree of scientific certainty that such additional curtailment would provide any usable quantity of water to Blue Lakes or Clear Springs. Ex. 462; Ex. 463.

IGWA argues that the amount of water that will arrive at Blue Lakes and Clear Springs' facilities does not constitute a usable quantity that can be put to beneficial use. *IGWA Opening Brief* at 50. In this case, the letters submitted by Blue Lakes and Clear Springs that called for administration of their senior-priority surface water rights were treated by the Director as delivery calls under the CM Rules. R. Vol. 1 at 52, ¶ 35; R. Vol. 3 at 496, ¶ 40. The delivery calls were analyzed by the Director and a determination made, based on review of the

³ The hydrogeologic heterogeneity of the ESPA can be seen by comparing the number of acres curtailed with the amount of water the ESPA Model predicts will accrue to the Blue Lakes and Clear Springs facilities. In curtailing a fairly comparable number of acres, the resulting benefit in cubic feet per second to the Buhl Gage to Thousand Springs spring reach (38 cfs) and direct benefit to Clear Springs (2.7 cfs) is markedly less than the benefit to the Devil's Washbowl to Buhl Gage spring reach (51 cfs) and Blue Lakes (10 cfs).

information available to him, that Blue Lakes and Clear Springs were materially injured within the meaning of the CM Rules and that curtailment of junior ground water rights would result in usable quantities of water reaching the Blue Lakes and Clear Springs facilities. R. Vol. 1 at 70, ¶¶ 24-28; R. Vol. 3 at 518-520, ¶¶ 24-29.

In his review of the evidence and testimony presented at hearing, the Hearing Officer specifically found that “The amount of water that would be delivered to the Spring Users’ facilities is a usable quantity. Using the ESPAM establishes the increased amount of water that will go to the reaches. The percentage of that water that will go to the particular Spring Users is a usable quantity.” R. Vol. 16 at 3710. The Hearing Officer’s recommendation was accepted by the Director. R. Vol. 16 at 3957, ¶ 1.

Even if a usable quantity of water would reach Blue Lakes and Clear Springs’ points of diversion, IGWA argues that the Director erred by not deeming the delivery calls futile because of the length of time in which the ESPA Model predicts curtailment of junior ground water rights would result in appreciable gains to the impacted reaches of the Snake River. *IWGA Opening Brief* at 61. At steady state, the ESPA Model shows that it will take more than 100 years for the full benefit of curtailment to accrue to Blue Lakes and Clear Springs; much of the benefit, however, will occur sooner. Tr. p. 883, lns. 18-19.

The issue of timing is discussed in the CM Rules, was reviewed by the Court in *American Falls*, spoken to at hearing by Director Dreher, and examined by the Hearing Officer. CM Rules 20.04, 40.01.a, 42.01.c., and 43.03.c discuss the delayed impacts of junior ground water pumping on senior water rights and the ability for the Director to order curtailment even when the call might be deemed futile in a traditional surface-to-surface water setting. In *American Falls*, the Court found the CM Rules facially constitutional: “The Rules do give the Director the tools by

which to determine how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversions and use of water from one source impacts others.” *American Falls* at 878, 154 P.3d at 449. During the hearing, Director Dreher discussed the issue with an attorney for Blue Lakes, explaining why administration of junior ground water rights was appropriate:

Q. And then this will be my last question.

If you could explain to me a provision in rule 20.04 that says although a call may be denied under the futile call doctrine, these rules may require mitigation or stage or phased curtailment of a junior priority use if a diversion and use of the water by the holder of the junior priority water right causes material injury even though not immediately measurable.

Could you explain that or give us your characterization of that rule?

A. Well, it -- its gives a partial picture of the complexity of administering hydraulically connected ground water rights with surface water rights, as opposed to the simpler administration of surface water source -- the surface water rights diverting from the same source. And that is this. That in a surface water source, if the call is futile there is no injury. But in a hydraulically connected ground water source, the call can be futile but there would still -- there could still be injury.

Now what does that mean? Well, what it means is that if in the surface water source, using the example the Big Lost River again that we talked about yesterday, if curtailing upstream junior priority right holders would not result in a meaningful supply reaching the downstream seniors, not only is the call futile but there is no injury.

However, if that -- if the upstream juniors are in the aquifer and they're ground water users, curtailing those uses may similarly not result in a meaningful amount of water reaching the senior in a time when they necessarily would need it. However the reason that injury could still be occurring is from depletions that were already -- that had resulted from ground water withdrawals, years or even decades before.

And so even though curtailing that ground water use wouldn't immediately result in an increased supply of water to the senior, injury could still be occurring because of those residual -- the residual effects of prior depletions.

Tr. p. 1368, lns. 5-25; p. 1369, lns. 1-23.

The Hearing Officer understood IGWA's argument and nevertheless deemed that administration of junior ground water rights was proper. R. Vol. 16 at 3714-15. The Hearing Officer's recommendation was accepted by the Director. R. Vol. 16 at 3957, ¶ 1.

3. In Accordance With His Authority Under The CM Rules, The Director Properly Exercised His Discretion In Phasing-In Curtailment

In both the May 2005 Blue Lakes Order and the July 2005 Clear Springs Order, Director Dreher ordered that curtailment be phased-in over a period of five years. Blue Lakes and Clear Springs argue that the Director's decision to phase-in curtailment was unlawful. *Clear Springs Opening Brief* at 42. The argument is advanced in spite of the plain language of the CM Rules and the Supreme Court's decision in *American Falls*. CM Rule 40.01.a states that in response to a delivery call "where the material injury is delayed or long range *may, by order of the Director, be phased-in over not more than a five-year (5) period* to lessen the economic impact of immediate and complete curtailment" Emphasis added. *See also* CM Rule 20.04.

During the hearing, the Director explained his rationale for ordering phased-in curtailment:

And it's one that -- one that I employed because going back to our further discussions ground water rights in Idaho had never been subject to this kind of administration before. And it was permissible under the rule to allow phased in curtailment, to allow the affected right holders time to [take] steps to minimize their economic dislocation, which was going to occur.

....

Now that doesn't diminish the negative impacts that spring uses were already incurring. But the point is this had gone on for a long period of time. And phasing in a solution over a period of five or more years seemed reasonable. And it was specifically allowed for under the rules.

Tr. p. 1180, lns. 18-24; p. 1181, lns. 17-22.

The Hearing Officer approved the decision to phase-in curtailment consistent with CM Rule 40.01.a. R. Vol. 16 at 3715; R. Vol. 16 at 3839. The recommendation of the Hearing Officer was accepted by the Director in his Final Order. R. Vol. 16 at 3957, ¶ 1.

4. In Balancing The Competing Property Interests Of Junior And Senior Water Right Holders, The Director Properly Exercised His Authority In Authorizing The Filing Of Replacement Water Plans

In order to comply with the May 2005 Blue Lakes Order and July 2005 Clear Springs Order, junior ground water users were afforded certain options. One option was involuntary curtailment of ground water rights that were junior to the injured surface water rights held by Blue Lakes and Clear Springs. R. Vol. 1 at 72; R. Vol. 3 at 522. A second option would have been the filing of a formal CM Rule 43 mitigation plan. A third option, which IGWA elected to pursue, was Director Dreher's decision to allow junior ground water users to avoid involuntary curtailment through the filing of what have been deemed "replacement water plans." Blue Lakes and Clear Springs argue that the Director violated his authority in authorizing the filing of these plans. *Blue Lakes Opening Brief* at 31;⁴ *Clear Springs Opening Brief* at 37. "The Director has created a new mitigation scheme—the 'replacement water plan'—that is not provided for by any statute of rule in Idaho." *Id.* The Hearing Officer approved of the Director's decision to authorize the filing of replacement water plans in lieu of ordering curtailment prior to a hearing. R. Vol. 16 at 3715-16. In his Final Order, the Director accepted the Hearing Officer's recommendation. R. Vol. 16 at 3957, ¶ 1.

⁴ Blue Lakes appears to confuse the term "mitigation" with "replacement plan." *Blue Lakes Opening Brief* at 31. In this section, Blue Lakes cites to Exhibits 247 (North Snake Ground Water District's and Magic Valley Ground Water District's Joint Plan for Providing Replacement Water for 2006) and 262 (Order Approving Dairymen's and IGWA's 2007 Replacement Water Plans, Rescinding 2007 Curtailment, and Setting Hearing and Prehearing Schedule), both of which specifically address replacement water plans. *Id.* Replacement water plans are different from mitigation plans and were approved by the Hearing Officer and the Director as a means to avoid involuntary curtailment in lieu of replacing depletions. R. Vol. 16 at 3715-16; R. Vol. 16 at 3957, ¶ 1.

CM Rule 10.15 defines the term “Mitigation Plan” as follows: “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 compensate holders of senior-priority water rights for, material injury caused by the diversions and use of water by the holders of junior-priority ground water rights within an area of common ground water supply.”

CM Rule 43 lists the necessary requirements for a mitigation plan. One factor that the Director may consider in his review of the plan is “Whether the mitigation plan will provide *replacement water*, at the time and place required by the senior-priority water right, *sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source.*” CM Rule 43.03.b (emphasis added).

The authority of the Director to allow junior ground water users to continue diverting after the delivery call was filed by Blue Lakes and Clear Springs and before a record was developed upon which to base a mitigation plan is rooted in the principle that if a senior water user can be made whole during the pendency of the proceeding, curtailment of the junior, which would result in irreparable harm prior to a hearing, should not be ordered. This concept was explained by Director Dreher at hearing:

Q. Mr. Dreher, could you please explain the differences between a mitigation plan which is provided for under the conjunctive management rules, Rule 43 -- that would be Exhibit 11 -- and the substitute curtailment plan that you just described?

A. Well, this could be confusing because the terminology is the same. I’ve used the term mitigation plan and the mitigation plan terminology is used in the conjunctive management rules, but they’re in fact two different things.

The mitigation plan provided under the conjunctive management rules for Rule 43, is a plan that’s filed in advance of a determination of material injury occurring. Or conceivably you could have curtailment as a result of a

determination of injury occurring, and then this mitigation plan being filed in advance of out-of-priority diversions being allowed to resume. When I used the term mitigation plan in the order, that was immediate mitigation. And the concept is that if there's an amount of injury occurring, and that amount of injury can be fully offset, i.e. mitigated, in kind, in time, and in place, then there is no longer any injury. And that concept is -- it's not widely used, but it certainly would apply in a surface water system as well as in a ground wa[ter] system.

So, you know, the main difference is that in the case of these orders, junior priority ground water rights were facing immediate curtailment. We could use the model to simulate how much water that would provide to Blue Lakes or Clear Springs at its Snake River Farms because of that curtailment. And so long as mitigation actions were taken, or replacement water was provided, or substitute curtailment was undertaken such that the increase in discharge in the spring subreach was the same, then the injury would have been deemed to be fully mitigated. But that's not the same as what's described as a mitigation plan under the conjunctive management rules because what's described in the conjunctive management rules is something that's filed in advance.

And not only that, a mitigation plan under Rule 43 of the conjunctive management rules, could provide for out-of-kind mitigation, other consideration as mitigation. Whereas the mitigation contemplated in the order had to be in kind -- in other words water of equal utility -- in time, and in place as what would have resulted from curtailment.

Q. What did you determine was your authority to approve substitute curtailment plans?

A. Well, it goes back to this principle that if -- well, let me back up a second.

What -- what Blue Lakes or Clear Springs Foods at its Snake River Farm, the most that they were entitled to is the water that would have resulted from curtailment of junior priority ground water rights. That's the most that they could get.

Now we could argue about how big the pool of curtailment should or should not be, but the point is that's the most they could get from curtailment of whatever pool of junior priority water rights was determined.

That's the reverse image of how much injury was occurring. So, for example, in the case of Blue Lakes, the injury from junior priority ground water use was 51 CFS because that's the amount of water that would have been realized through curtailment of junior priority rights. So that was the injury.

So the -- the authority, if you will, isn't derived so much from statute or rule, but it's a -- I'll call it a common sense principle. That if the injury can be

completely offset through some other action, in kind, in time, in place, then there is no injury. There no longer is injury. And if there is no injury, then where is the need for authority under the rules to administer injury if there is none basically is what I'm saying. So it's a common sense principle. If the injury can be completely offset in time, in kind, in place, then it doesn't exist.

Tr. p. 1176, lns. 20-25; p. 1177, lns. 1-25; p. 1178, lns. 1-25; p. 1179, lns. 1-19.

As stated in *American Falls*, "Typically the integration of priorities means limiting groundwater use for the benefit of surface water appropriators because surface water generally was developed before groundwater. The physical complexities of integrating priorities often have parallels in the administration of solely surface water priorities. The complications are just more frequent and dramatic when groundwater is involved." *American Falls* at 877, 154 P.3d at 448 (citing Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63, 73 (1987)).

If the Director had not authorized replacement water plans but instead required the filing of a Rule 43 mitigation plan, junior ground water users would have been completely curtailed from the time the May 2005 Blue Lakes Order and July 2005 Clear Springs Order were issued until a plan was filed and an order on the plan issued. The impact on most ground water users likely would have been permanent. In contrast, the benefit of curtailment to Blue Lakes and Clear Springs prior to approval of a mitigation plan would have been limited. Unlike curtailment in a surface water to surface water delivery call, curtailment in a conjunctive management call does not provide immediate and complete relief. "When water is diverted from a surface stream, the flow is directly reduced, and the reduction is soon felt by downstream users unless the distances involved are great. When water is withdrawn from an aquifer, however, the impact elsewhere in the basin or on a hydrologically connected stream is typically much slower." *Id.* (citing Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water*

Under the Appropriation Doctrine, 22 Land & Water L. Rev. 63, 74 (1987)). Here, the full benefits of curtailment will not occur for a hundred years. Ex. 462; Ex. 463.

By authorizing replacement water plans, an appropriate remedy was devised by the Director that made Blue Lakes and Clear Springs whole during the season of need by IGWA, while affording IGWA an opportunity for a hearing prior to involuntary curtailment. If, however, IGWA had not filed an acceptable replacement water plan, involuntary curtailment would have been carried out by the Director, as stated in the May 2005 Blue Lakes Order and July 2005 Clear Springs Order.

Authorizing replacement water plans is akin to a court issuing a preliminary injunction in a civil matter to preserve the status quo, pending final judgment. *Farm Service, Inc. v. U. S. Steel Corp.*, 90 Idaho 570, 586, 414 P.2d 898, 907 (1966). Here, the status quo was Blue Lakes and Clear Springs receiving the water it would have received from immediate curtailment for fish propagation. *See Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 492 P.2d 123, 124 (Nev. 1972) (“Status quo in this case was the growing lawn, plants and trees and that could only have been accomplished by restoring the water to the land. Unless the water was restored to the land it would lie barren and the injury to the respondent and its lessees would continue.”). The replacement water plans authorized IGWA to replace the whole of its depletions, in lieu of involuntary curtailment, until a hearing could be held and a final order issued. Just as senior rights, junior rights are valuable real property rights and the holders of those rights are entitled to protections of due process. I.C. § 55-101(1). “It is the pride of this republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to

the courts of his county.” *Hill v. Standard Mining Co.*, 12 Idaho 223, 239, 85 P. 907, 911-12 (1906).

The Department’s interpretation of its rules, regulations, and statutes are entitled to deference: “[T]he courts are not alone in their responsibility to interpret and apply the law. As the need for responsive government has increased, numerous executive agencies have been created to help administer the law. To carry out their responsibility, administrative agencies are generally clothed with power to construe [the law] as a necessary precedent to administrative action.” *Simplot* at 854, 820 P.2d at 1211. Under *Simplot*, a four-prong test has been developed for agency deference. The first prong asks whether the agency has been entrusted with the responsibility to administer the statute at issue. *Pearl v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002). Here, the first-prong is met as the Director is entrusted with the responsibility to administer the State’s water resources in accordance with the prior appropriation doctrine, as established by Idaho law. I.C. § 42-602; CM Rule 0.

The second prong asks whether the agency’s statutory construction is reasonable. *Pearl* at 113, 44 P.3d at 1168. As evidenced by the Hearing Officer’s approval of replacement water plans and the above argument, the second-prong is satisfied as the Director’s interpretation and application of the prior appropriation doctrine and CM Rules was tailored to preserve and protect the due process rights of all water right holders.

The third prong asks for the court to determine that the statutory language at issue does not treat the precise issue. *Pearl* at 113, 44 P.3d at 1168. The third-prong is met as the CM Rules do not specifically speak to the use of replacement water plans, but certainly authorize the Director to use his discretion in accepting CM Rule 43 mitigation plans that “provide

replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal” Emphasis added.

Finally, the fourth prong asks whether any of the rationales underlying the rule of deference are present. *Pearl* at 113, 44 P.3d at 1168. The rationales to be considered include:

(1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation.

. . . .

If one or more of the rationales underlying the rule are present, and no ‘cogent reason’ exists for denying the agency some deference, the court should afford ‘considerable weight’ to the agency’s statutory interpretation.

Canty v. Idaho State Tax Com’n, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002).

In this case, the first, second, third, and fifth rationales are met: (1) the authorization of replacement water plans was a practical interpretation of the CM Rules to allow junior ground water users to make Blue Lakes and Clear Springs whole during the pendency of the proceedings; (2) the Legislature has not acted to alter or amend any portion of the CM Rules since their adoption; (3) the Director is steeped with expertise in his authority and ability to administer the State’s water resources; and (5) the interpretation advanced by the Director was contemporaneous with the first orders issued in response to delivery calls initiated under the CM Rules. Therefore, the Court “should afford considerable weight” to the Director’s statutory interpretation of the CM Rules. *Id.*

5. The Director Properly Approved And Accounted For IGWA’s 2005, 2006, and 2007 Replacement Water Plans

In response to the May 2005 Blue Lakes Order and July 2005 Clear Springs Order, IGWA elected to file-replacement water plans for approval by the Director to avoid involuntary

curtailment. Blue Lakes and Clear Springs argue that the Director erred in his actions by failing to properly account for shortfalls during the five-year phased-in curtailment period, and failing to carryover shortfalls from one year to the next. However, as demonstrated by the facts in the record and validated by the Hearing Officer, the Director acted within the realm of his discretion in accounting for the replacement water.

A. The Director's Actions In 2005 and 2006

In the May 2005 Blue Lakes Order, the Director determined that Blue Lakes was materially injured and ordered curtailment of ground water rights junior to Blue Lakes' water right no. 36-7427 (December 28, 1973). R. Vol. 1 at 70, ¶ 26. Using the ESPA Model, the Director determined that curtailment of ground water rights junior to December 28, 1973—excluding those rights located within the 10% trim line—would “increase the discharge of springs in the Devil’s Washbowl to Buhl Gage spring reach, which includes the springs from which the water supply for Alpheus Creek from which Blue Lakes Trout diverts surface water, by a total average amount of 51 cfs at steady state conditions.” *Id.* Curtailment was phased-in over the years 2005, 2006, 2007, 2008, and 2009. *Id.* at 73, ¶ 2. In each year of the phased curtailment, junior ground water users were required to provide 10 cfs to the Devil’s Washbowl to Buhl Gage spring reach, ultimately totaling 51 cfs in 2009. *Id.*

In the July 2005 Clear Springs Order, the Director determined that Clear Springs was materially injured and ordered curtailment of ground water rights junior to Clear Springs' water right no. 36-4013B (February 4, 1964). R. Vol. 3 at 519, ¶ 25. Using the ESPA Model, the Director determined that curtailment of ground water rights junior to February 4, 1964—excluding those rights located within the 10% trim line—would “increase the discharge of springs in the Buhl Gage to Thousand Springs spring reach, which includes the springs from

which Clear Springs diverts surface water to the Snake River Farm, by a total average amount of 38 cfs at steady state conditions.” *Id.* at 519, ¶ 28. Curtailment was phased-in over the years 2005, 2006, 2007, 2008, and 2009. *Id.* at 523, ¶ 2. In each year of the phased curtailment, junior ground water users were required to provide 8 cfs to the Buhl Gage to Thousand Springs spring reach, ultimately totaling 38 cfs in 2009. *Id.*⁵

In 2005, IGWA submitted a replacement water plan (“2005 Replacement Plan”) in response to the Blue Lakes delivery call. R. Vol. 3 at 441. Regarding the Blue Lakes call, it was determined by the Director, utilizing the ESPA Model, that IGWA’s efforts would produce 12.2 cfs at steady state in the Devil’s Washbowl to Buhl Gage spring reach. R. Vol. 5 at 819, ¶ 21. Regarding the Clear Spring call, it was determined by the Director, utilizing the ESPA Model, that IGWA’s efforts would produce 8.2 cfs at steady state in the Buhl Gage to Thousand Springs spring reach. R. Vol. 5 at 809, ¶ 21. Therefore, in the first year of the phased-in curtailment period, IGWA’s 2005 Replacement Plan achieved the targeted goals.

On May 30, 2006, a joint replacement water plan (“2006 Replacement Plan”) was filed by IGWA in response to both delivery calls. R. Vol. 5 at 881. Under the May 2005 Blue Lakes Order, since IGWA had delivered 14.4 cfs to the Devil’s Washbowl to Buhl Gage spring reach, it was required to deliver at least an additional 6.6 cfs for a total of 20 cfs in the second year of phased curtailment. R. Vol. 1 at 73, ¶ 2. Under the July 2005 Clear Springs Order, since IGWA had delivered 8.2 cfs to the Buhl Gage to Thousand Springs spring reach, it was required to deliver at least an additional 7.8 cfs for a total of 16 cfs in the second year of phased curtailment. R. Vol. 3 at 523, ¶ 2. The 2006 Replacement Plan was similar in nature to the 2005 Replacement

⁵ In the context of these delivery calls, curtailment of ground water rights that are junior to Blue Lakes and Clear Springs does not result in complete relief to the injured rights. Drought and conversions from flood irrigation to sprinkler irrigation also contribute to the declines experienced by Blue Lakes and Clear Springs. Tr. p. 1119, lns. 24-25; p. 1120, lns. 1-25; p. 1121, lns. 1-3; p. 1134, lns. 20-25; p. 1135, lns. 1-7; Under the prior appropriation doctrine, junior ground water users are only responsible to senior right holders for their depletive impacts.

Plan and stated that it was “submitted to respond to the requirements of both the Blue Lakes Order and the Clear Springs Order.” R. Vol. 5 at 882. No orders were issued by the Director in 2006 regarding the 2006 Replacement Plan.

While Clear Springs and Blue Lakes both argue that the Director failed in his duty to conjunctively administer junior ground water rights in 2006 by not issuing orders following the hearing on the 2005 Replacement Water Plan and the filing of the 2006 Replacement Plan, each ignores what was occurring during that time. On June 2, 2006, days after the 2006 Replacement Plan was filed, and just days before the hearing on the 2005 Replacement Plan, District Judge Wood of the Fifth Judicial District entered his decision “declaring that the Department’s Conjunctive Management Rules upon which the Director has relied in administering the Blue Lakes and Clear Springs calls are facially invalid on constitutional grounds.” R. Vol. 7 at 1288.⁶ A judgment was entered on June 30, 2006, an appeal docketed with the Idaho Supreme Court on July 11, 2006, and a motion for stay filed with the district court on July 20, 2006. *Id.* The stay was denied by the district court, as well as by the Supreme Court. R. Vol. 7 at 1466. Therefore, until the Court issued its decision in *American Falls* on March 5, 2007, which reversed Judge Wood, the Director had no authority to issue orders in this proceeding. 143 Idaho at 862, 154 P.3d at 433.

B. The Director’s Actions In 2007

On April 11, 2007, a joint replacement water plan (“2007 Replacement Plan”) was filed by IGWA in response to both delivery calls. R. Vol. 7 at 1375. On April 30, 2007, Director

⁶ “On July 21, 2006, Blue Lakes and Clear Springs each submitted letters to the Director in response to the 2006 Replacement Water Plan. Both letters state that because of the district court’s June 2 order declaring the Conjunctive Management Rules invalid, all of the Director’s prior actions in this matter are void and must be revisited by the Department.” R. Vol. 7 at 1288.

Tuthill issued a “Notice of Potential Curtailment of Ground Water Rights in the Thousand Springs Area.” R. Vol. 7 at 1357. The Notice was sent to inform water users of the Director’s intent to issue orders on May 14, 2007 that “will implement year three of the five-year phased curtailment schedules . . . in response to the Blue Lakes . . . delivery call [and] . . . Clear Springs . . . delivery call.” *Id.*

On June 15, 2007, in separate orders utilizing the ESPA Model, the Director ordered curtailment of junior ground water rights in response to the delivery calls filed by Blue Lakes and Clear Springs. R. Vol. 7 at 1430 (“2007 Clear Springs Curtailment Order”); R. Vol. 7 at 1462 (“2007 Blue Lakes Curtailment Order”) (collectively referred to herein as “2007 Curtailment Orders”).⁷ In the 2007 Blue Lakes Curtailment Order, the Director accounted for replacement water actions undertaken by IGWA in 2005, 2006, and 2007. R. Vol. 7 at 1462. For 2005, the Director found that IGWA’s 2005 Replacement Plan provided, at steady state, 12.2 cfs to the Devil’s Washbowl to Buhl Gage spring reach, which was 2.2 cfs more than the required 10 cfs in the first year of the phased curtailment period. *Id.* at 1469, ¶ 11. In 2006, the Director determined that IGWA’s 2006 Replacement Plan provided a total of 16.5 cfs, at steady state, to the affected reach. *Id.* at ¶ 12. Since IGWA was required to provide 20 cfs in the second year of the phased curtailment period, the shortfall was 3.5 cfs. *Id.* As discussed above, curtailment was not ordered in 2006 because of the litigation surrounding the CM Rules. *Id.* at 1470, ¶ 14.

Carrying the 3.5 cfs obligation forward into the third year of the five-year phased in curtailment period, the Director determined that IGWA’s 2007 Replacement Plan provided a

⁷ Curtailment orders were not issued on May 14, 2007 because of entry of a temporary restraining order (“TRO”) by District Judge Butler of the Fifth Judicial District in response to a Complaint for Declaratory Relief, Writ of Prohibition, Temporary Restraining Order and Preliminary Injunction filed by IGWA on May 7, 2007. R. Vol. 7 at 1467. The Department moved to dismiss IGWA’s action and was later joined by Blue Lakes and Clear Springs. R. Vol. 7 at 1435; R. Vol. 7 at 1467. On June 6, 2007, the TRO was dissolved by this Court. *Id.*

total of 19.6 cfs, at steady state, to the Devil's Washbowl to Buhl Gage spring reach. *Id.* at ¶ 15. Since IGWA was required to provide 30 cfs to the affected reach in 2007, the shortfall was calculated to be 10.4 cfs. *Id.* The 10.4 cfs shortfall was reduced, however, by 3.3 cfs due to the conditional acceptance of an agreement between the Idaho Dairymen's Association ("IDA"), Thousand Springs Water Users Association, Clear Springs, and members of the Surface Water Coalition ("IDA Agreement"). The IDA Agreement proposed to dry up acres or convey rented storage water through the North Side Canal Company's system. *Id.* at 1471, ¶ 20; 1472, ¶ 27. Based on the 7.1 cfs shortfall to the Devil's Washbowl to Buhl Gage spring reach, the Director ordered curtailment of ground water rights junior to December 9, 1990. *Id.* at 1475, ¶ 10. Enforcement of the order was stayed until July 6, 2007 to allow time for junior ground water users to propose acceptable "mitigation, replacement water supply, or substitute curtailment" plans. *Id.* at 1477.

In the 2007 Clear Springs Curtailment Order, the Director also accounted for replacement water actions undertaken by IGWA in 2005, 2006, and 2007. R. Vol. 7 at 1430. For 2005, the Director found that IGWA's 2005 Replacement Plan provided, at steady state, 8.2 cfs to the Buhl Gage to Thousand Springs spring reach, which was 0.2 cfs more than the required 8 cfs in the first year of the phased curtailment period. *Id.* at 1438, ¶ 11. In 2006, the Director determined that IGWA's 2006 Replacement Plan provided a total of 9.5 cfs, at steady state, to the affected reach. *Id.* at ¶ 12. Since IGWA was required to provide 16 cfs in the second year of the phased curtailment period, the shortfall was 6.5 cfs. *Id.* Again, curtailment was not ordered in 2006 because of the litigation surrounding the CM Rules. *Id.* at 1439, ¶ 14.

Carrying the 6.5 cfs obligation forward into the third year of the five-year phased in curtailment period, the Director determined that IGWA's 2007 Replacement Plan provided a

total of 10.6 cfs, at steady state, to the Buhl Gage to Thousand Springs spring reach. *Id.* at ¶ 15. Since IGWA was required to provide 23 cfs to the affected reach in 2007, the shortfall was calculated to be 12.4 cfs. *Id.* The 12.4 cfs shortfall was reduced, however, by 2.3 cfs due to the conditional acceptance of the IDA Agreement. *Id.* at 1440, ¶ 20; 1441, ¶ 27. Based on the 10.1 cfs shortfall to the Buhl Gage to Thousand Springs spring reach, the Director ordered curtailment of ground water rights junior to February 13, 1977. *Id.* at 1443, ¶ 9. Enforcement of the order was stayed until July 6, 2007 to allow time for junior ground water users to propose acceptable “mitigation, replacement water supply, or substitute curtailment” plans. *Id.* at 1445-46.

On June 18, 2007, IGWA filed its Sixth Request for Hearing, Request for Expedited Hearing, Request for Stay, and Request for Consolidation (“Request for Hearing”). R. Vol. 8, at 1491. On June 29, 2007, IGWA filed a supplemental replacement water plan (“2007 Supplemental Plan”) to augment its 2007 Replacement Water Plan. R. Vol. 9 at 1853. The 2007 Supplemental Plan proposed to “provide an additional 10,000 acre-feet of water through the North Side Canal Company delivery system for late season recharge.” *Id.* at 1854.

On July 5, 2007, the Director rescinded the 2007 Curtailment Orders. R. Vol. 9 at 1903 (“2007 Blue Lakes Rescission Order”); Ex. 262 (“2007 Clear Springs Rescission Order”) (collectively referred to herein as “2007 Rescission Orders”). In the 2007 Rescission Orders, the Director found that with the 10,000 acre-feet of water for late season recharge (combined with the previously accepted 19,500 acre-feet), the approximate 30,000 acre-feet delivery capacity of the North Side Canal system was near its maximum. R. Vol. 9 at 1906; Ex. 262 at 4. Using the ESPA Model, the Director determined that the additional 10,000 acre-feet would result in a 6.6 cfs shortfall to the Devil’s Washbowl to Buhl Gage (Blue Lakes) spring reach, R. Vol. 9 at 1907,

¶ 11; and a 10.7 cfs shortfall to the Buhl Gage to Thousand Springs spring reach (Clear Springs), Ex. 262 at 5, ¶ 11.⁸

Relying on testimony by Department staff during the hearing, Blue Lakes correctly notes that the Director had previously analyzed ESPA Model runs in steady state. *Blue Lakes Opening Brief* at 28. The steady state analysis had resulted in the Director's finding of respective shortfalls of 7.1 and 10.7 cfs to the Devil's Washbowl to Buhl Gage spring reach and Buhl Gage to Thousand Springs spring reaches. As discussed in the 2007 Rescission Orders and approved by the Hearing Officer, the Director also undertook a transient⁹ analysis of the Model runs. For Blue Lakes, the transient analysis demonstrated that if curtailment of junior ground water rights had been ordered on July 1, 2007 for the remainder of the irrigation season, the shortfall in the third year of the phased curtailment period to the Devil's Washbowl to Buhl Gage spring reach would be 2.0 cfs. R. Vol. 9 at 1907, ¶ 12. For Clear Springs, the resulting shortfall in the Buhl Gage to Thousand Springs spring reach would be 2.8 cfs. Ex. 262 at 5, ¶ 12.

As discussed above, the Director had previously determined that the amount of water flowing through the Devil's Washbowl to Buhl Gage spring reach that would directly benefit the Blue Lakes facility was 20 percent. For Clear Springs, that number was 7 percent (adjusted to 6.9 percent by the Hearing Officer). Twenty percent of 2.0 cfs is 0.4 cfs; 7 percent of 2.8 cfs is 0.2 cfs. R. Vol. 9 at 1908, ¶ 16; Ex. 262 at 6, ¶ 16. In order to supply 2.0 cfs to the Devil's Washbowl to Buhl Gage spring reach, which would have resulted in a direct benefit of 0.4 cfs to the Blue Lakes facility, the Director would have had to curtail 5,389 acres. R. Vol. 9 at 1912, ¶

⁸ It should be noted that in the 2007 Clear Springs Curtailment Order, the shortfall was calculated at 10.1 cfs, which results in an increased shortfall of 0.6 cfs in the 2007 Clear Springs Recession Order. As explained by Dr. Wylie at hearing, the reason for the increase was a refined understanding of the IDA Agreement. Tr. p. 831, Ins. 3-25.

⁹ As defined by Dr. Wylie, "Transient is when the aquifer stresses, the inputs and the outputs are allowed to vary over time. So in our case we had a pumping season in the model, and an irrigation season in the model, and a nonirrigation season in the model. Every year was divided into two stress periods." Tr. p. 798, Ins. 10-15.

17. To supply 2.8 cfs to the Buhl Gage to Thousand Springs spring reach, which would have resulted in a direct benefit of 0.2 cfs to the Clear Springs facility, the Director would have had to curtail 14,588 acres.¹⁰ Ex. 262 at , ¶ 17.

Critical in the issuance of the 2007 Rescission Orders was the fact that a hearing had yet to occur on the delivery calls, which were filed in 2005: “The determination to approve IGWA’s Replacement Plan and Supplemental Plan for the balance of the calendar year is directly linked to the need to hold a joint hearing in these matters, the parties’ repeated requests to hold a hearing, and the public interest that a hearing be held and an order issued prior to commencement of the 2008 irrigation season.” R. Vol. 9 at 1912, ¶ 20; Ex. 262 at 10, ¶ 20.

Contrary to arguments advanced by Blue Lakes and Clear Springs, the Director has consistently carried forward all replacement water obligations owed by IGWA and concurs that all obligations must be carried forward in order to properly administer Blue Lakes and Clear Springs’ senior water rights. As stated in the 2007 Rescission Orders, the Curtailment Orders were “rescinded and their rights are no longer subject to curtailment *during this irrigation season*. Junior water right holders, however, should *anticipate that administration of their rights in 2008 will be conducted in accordance with the outcome of the . . . hearing, which may result in curtailment.*” R. Vol. 9 at 1914; Ex. 262 at 12 (emphasis added).

¹⁰ Again, the hydrogeologic heterogeneity of the ESPA can be seen by comparing the number of acres curtailed with the amount of water the ESPA Model predicts will accrue to the Blue Lakes and Clear Springs facilities. In curtailing approximately three times the number of acres in the Buhl Gage to Thousand Springs reach, the resulting benefit between the two reaches in cubic feet per second is quite similar. This is consistent with the discussion in footnote 4, *supra*, where it was shown that in curtailing a similar number of acres, the direct benefit to Blue Lakes (10 cfs) was approximately three times the direct benefit to Clear Springs (2.7 cfs).

6. For Purposes Of Administration, It Was Proper For The Director To Examine The Historic Availability Of Blue Lakes And Clear Springs' Water Rights

In addition to his review of the results of the ESPA Model and his decision to authorize replacement water plans and phase curtailment over a period of five years, the Director undertook an analysis of the historic nature and extent of the senior surface water rights held by Blue Lakes and Clear Springs. Blue Lakes and Clear Springs argue that the Director “unlawfully used pre-decree information,” to examine its water rights in the context of a conjunctive administration delivery call, which constituted a readjudication of its water rights. *Clear Springs Opening Brief* at 24; *see also Blue Lakes Opening Brief* at 18. The Idaho Supreme Court, however, has approved the Director’s authority to examine pre-decree information in the context of a conjunctive administration delivery call, stating that such review does not constitute a readjudication:

Clearly, even as acknowledged by the district court, the Director may consider factors such as those listed above in water rights administration. Specifically, the Director “has the duty and authority” to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water. Additionally, the water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication. For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. I.C. §§ 42-1411(2)(a)-(j). However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686 (1912).

American Falls at 876-877, 154 P.3d at 447-448.

Consistent with the principle of *stare decisis*, *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 593, 130 P.3d 1127, 1131 (2006), the Director’s use of pre-decree information in examining the delivery calls filed by Clear Springs and Blue Lakes was approved by the Hearing Officer in his Recommended Order. R. Vol. 16 at 3699. The recommendation of the Hearing Officer was accepted by the Director in his Final Order. R. Vol. 16 at 3957, ¶ 1.

In that same vein, Clear Springs asserts that the Director violated its partial decrees by reviewing “seasonal variation” in an attempt to limit its water rights. *Clear Springs Opening Brief* at 24. Clear Springs’ argument is misplaced, as it is inherent that spring discharges fluctuate depending on the time of year. R. Vol. 1 at 54-55, ¶ 45-51; R. Vol. 3 at 498-99, ¶ 50-56; Tr. p. 1151, Ins. 5-16. Under the CM Rules, the Director is authorized to examine the seasonal variability of senior water rights in determining material injury, CM Rule 42.01.c, and in his review of mitigation plans filed by the holders of junior ground water rights, CM Rule 43.03.b, c. During cross-examination, Director Dreher stated that those portions of the CM Rules served as the basis for reviewing the seasonal variability associated with the water rights held by Blue Lakes and Clear Springs for purposes of determining material injury. Tr. p. 1345, Ins. 16-25; p. 1346, Ins. 1-22. The Director’s authority to review seasonal variation was approved by the Hearing Officer: “It is proper to consider intra-year and inter-year variations in the spring flows in determining curtailment.” R. Vol. 16 at 3707. The conclusion reached by the Hearing Officer was affirmed by the Director. R. Vol. 16 at 3957, ¶ 1.

Clear Springs further argues that the Director’s review of seasonal variation imparted a “seasonal variation condition” on its partial decrees that limits its water rights. During his testimony, Director Dreher spoke to this issue:

Q. And do you believe, Mr. Dreher, that your use of seasonal variability for purposes of administration somehow diminishes or otherwise alters the partial decrees for Blue Lakes and Clear Springs?

A. I don't believe that it does. And I, you know if others have a dissenting view on that, which they may, I can say that certainly was not my intent. The decrees are the decrees. And that's what the Department -- that's what defines the rights that are subject to administration are those decrees. And the Department does not have any authority to go behind the decrees at all.

But as you pointed out in an earlier question, the decrees are silent about the seasonal variability, as would be expected. Because again, the quantity element is the maximum authorized, it's not quantity entitlement. It's the maximum number authorize that can be diverted and put to beneficial use when it, in fact, is available.

Q. And again that is the difference between adjudication and administration of water rights?

A. Correct.

Tr. p. 1151, lns. 17-25; p. 1152, lns. 1-11.

Prior to Director Dreher's testimony, the Hearing Officer stated that he "was concerned from language in the Orders that the former Director was imposing conditions on the amount of the water rights in issue, limiting the adjudicated amount." R. Vol. 16 at 3707. However,

Following testimony by the former Director it is clear that was not the intent and cannot be the case. The Spring Users retain the full amount of the adjudicated rights which they can use when water is available. *But as a matter of fact the flows fluctuate annually and within the year. That is a matter of science, not a legal conclusion. It is a relevant fact in considering the extent of curtailment.*

Id. at 3707-08 (emphasis added).

A. Due To Inherent Seasonal Variation And The Record Before Him, The Director Properly Found No Injury To Clear Springs' Water Right No. 36-4013A

Despite the fact that seasonal variability is inherent in spring discharge and was properly considered, Clear Springs argues that the Director's reliance on seasonal variability resulted in

his erroneous conclusion that only water right nos. 36-7148 (January 31, 1971) and 36-4013B (February 4, 1964) were materially injured by junior ground water diversions. *Clear Springs Opening Brief* at 24. Clear Springs argues that its next most senior water right, 36-4013A (September 15, 1955) is also materially injured. *Id.*

One thrust of Clear Springs' argument is that the Director erred in his unwillingness to extrapolate long-term trends from moment-in-time measurements at the Clear Springs facility to discharge records that have been kept by Clear Springs since 1988. *Clear Springs Opening Brief* at 27. Exhibit 128A, which was examined at length by Clear Springs' attorney during cross-examination of Director Dreher, is a 1973 memorandum that shows single measurements at Clear Springs from April 1971 and May, June, and July 1972. The measurements show that in those specific moments-in-time, there was sufficient discharge to fill water right no. 36-4013A. Director Dreher was questioned by Clear Springs' attorney about the appropriateness of engrafting those moment-in-time measurements to diversion records that have been kept by Clear Springs since 1988:

Q. Well, I mean, I perceive that your quandary is whether or not the low period for each year occurs every year in March or April or May. And is there sufficient data which would lead you to a conclusion that you could arrive at, that identify when that -- when that period occurs?

A. Well, my quandary is this. Without actual measurements for the entire period in 1971 and 1972, I don't think it's appropriate to look at general trends, or general variations that occurred in 1988 through 2005, and superimpose those back to 1971 and 1972 and say that's what is reasonable to assume happened. That my quandary.

Q. Well, so that -- typically you don't use historical data and either try to extend it forward or extend it back?

A. We use historical data to the extent that we can. But when you take general trends and you try to create specific facts out of general trends I think that -- that's uncertain.

Q. Well, this trend that we're talking about, using this trend it is -- does it not lead you to some general understanding that you would investigate further to determine whether or not that the flows were present year round in 1971 to satisfy the priority?

A. Well, with what data? With what data do we have? We've got -- we have got one month of data in that memo from 1971, three months from 1972. And I'm just not willing to extrapolate those four points into an annual regime of flows based upon general trends from the 1988 through 2005 period.

I mean, about the most you can conclude is that the low from this -- from this historical record is that the low generally occurs sometime in the spring, March, April, May, maybe even February, March, April, May. And the high generally occurs sometime in the fall, you know, October, November, December.

Tr. p. 1407, lns. 18-25; p. 1408, lns. 1-25; p. 1409, lns. 1-3.

Similar to the argument that was rejected by Director Dreher in cross-examination, Clear Springs argues in its Opening Brief that it would be appropriate to use the information contained in Attachment A of the July 2005 Clear Springs Order to determine that water right no. 36-4013A was filled at all times of the year when it was appropriated. "Specifically, Attachment A to the *Clear Springs Order* depicts a graph of the average annual spring flows in the Thousand Springs Area from the early 1900s through 2002. R. Vol. 3 at 526. The graph shows that spring flows were higher in the mid-1950s than in the late 1980s through 2001 timeframe." *Clear Springs Opening Brief* at 26 (emphasis in original). As explained in the July 2005 Clear Springs Order, the Thousand Springs Area is "divided into six adjacent groupings of spring complexes, or spring reaches, based on the relative magnitude of spring discharge" R. Vol. 3 at 490, ¶ 14. The sub-reach in which Clear Springs' facility is located is the Buhl Gage to Thousand Springs spring reach. *Id.* at 490, ¶ 14; 491, ¶ 15. The Buhl Gage to Thousand Springs spring reach is approximately 11 miles long. Ex. 262 at 6, ¶ 15.¹¹ While Clear Springs' facility is located in the Thousand Springs Area, the measured discharge in Attachment A is simply not

¹¹ The subreach in which Blue Lakes is located is the Devil's Washbowl to Buhl Gage spring reach, which is approximately twenty-four miles long. R. Vol. 9 at 1908, ¶ 15.

comparable to anything that might have occurred at Clear Springs' facility in the Buhl Gage to Thousand Springs spring reach during the time that water right no. 36-4013A was appropriated. The purpose of Attachment A in the July 2006 Clear Springs Order was to help visually explain Findings of Fact 5 and 6, which discuss the change in spring discharge in the Thousand Springs Area over time. R. Vol. 3 at 488, ¶¶ 5 and 6. Attachment A should not be used for purposes other than it was intended.

A final argument raised by Clear Springs is that diversion records it kept from 1988 through 2005 demonstrate that water right no. 36-4013A has been injured. *Clear Springs Opening Brief* at 25. Exhibit 158 and Attachment C to the July 2005 Clear Springs Order, R. Vol. 3 at 528, each depict measurements at Clear Springs during the period 1988 through 2004. *Clear Springs Opening Brief* at 26. As explained by Director Dreher at hearing,

Attachment C to Exhibit 138 represents the same -- same type of measurements of diversions to the Snake River Farm[]. But in the case of the Snake River Farm[], Clear Springs Foods supplied data that went back to January of 1988, whereas Blue Lakes only had data available beginning in about March of 1995. And perhaps I should clarify why that is.

In 1994, I believe that was the correct year, the legislature along with enacting statutes that made modifications to the adjudication process, they also enacted statutes providing for the mandatory reporting of measured diversions. And so for the first time beginning in '94, '95, holders of water rights were required to measure and report their diversions through -- there was some optional mechanisms for doing that. But until those statutes were placed -- were passed, the Department did not have measured -- a history of measured diversions at these facilities.

Now in the case of Snake River Farm, Clear Springs Foods for its own purposes, had begun making measurements and keeping records, historical records of measured diversion to their facilities. *But that's, you know, the problem in going too far beyond the dates here is that records simply weren't kept, at least as far as we're aware of. And at least those records, if they were kept, they weren't supplied to the Department. So these attachments in both exhibits represent the historical measured diversions that were available to the Department at the time these delivery calls were made.*

Tr. p. 1138, lns 5-25; p. 1139, lns. 1-8 (emphasis added).

Because there are no historical records that were provided to the Director to show that water right no. 36-4013A was filled at all times of the year when it was appropriated, the best information that existed for the Director to rely upon was the discharge data kept by Clear Springs from 1988 through 2005. Ex. 158; R. Vol. 3 at 528 (Attachment C); Tr. p. 1216, lns. 2-22. It is plain to see in Exhibit 158 that Clear Springs' three most senior water rights, 36-2703 (November 23, 1933), 36-2048 (April 11, 1938), and 36-4013C (November 20, 1940), have always been filled during the period of record, and that Clear Springs' two most junior water rights, 36-4013B (February 4, 1964) and 36-7148 (January 31, 1971), have never been filled, resulting in the Director's order to curtail ground water rights junior to February 4, 1964.

The Director determined that water right no. 36-4013A (September 15, 1955) was not injured because the period of record in which consistent data has been kept shows that the water right has not been met in all months. Exhibit 156 shows that water right no. 36-4013A was filled for a period of 12 months from 1988 through 2001, approximately 11 months in 2002, and approximately 9 months in 2003. Daily discharge data in Exhibit 158 demonstrates that the right was filled during all or portions of 8 months in 2004; all or portions of 3 months in 2005; all or portions of 5 months in 2006; and 3 months in 2007. Inherent seasonal variability and the lack of any historical information to support that water right no. 36-4013A was filled at all times when it was appropriated led the Director to his conclusion that the right was not injured.

Clear Springs' argument that water right no. 36-4013A is injured would stand to reason if water rights were considered quantity entitlements and the Director's role was limited to administer in strict accordance with priority. That argument, however, was rejected by the Court in *American Falls*:

Conjunctive administration “requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.” *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.

143 Idaho at 876-77, 154 P.3d at 447-48.

Administration of water rights is not ministerial and involves consideration of all principles of the prior appropriation doctrine, as established by Idaho law. In a proceeding for conjunctive administration, depletion in and of itself does not automatically constitute material injury. R. Vol. 3 at 518, ¶ 23; Tr. p. 1248, lns. 7-22; Idaho Const. Art. XV, § 7; I.C. § 42-226; CM Rule 20.03. Therefore, the Director must examine the nature and extent of the senior’s water right to determine the impacts of junior ground water diversions.

B. Due To Inherent Seasonal Variation And The Record Before Him, The Director Properly Found No Injury To Blue Lakes’ Water Right No. 36-7210

Like Clear Springs, Blue Lakes argues that the Director erred in failing to conclude that water right no. 36-7210 (November 17, 1971) was injured. *Blue Lakes Opening Brief* at 6. Blue Lakes advances argument similar to Clear Springs regarding seasonal variability and conditioning of its water rights. The Department has already addressed those arguments in the previous section of this brief and will not reiterate them here.

Spring discharge measurements were submitted by Blue Lakes on an annual basis to the Department beginning in 1995. R. Vol. 1 at 56, ¶ 56. Blue Lakes did not, however, provide any additional measurements to the Director for his review. R. Vol. 1 at 56, ¶ 57. The Director reviewed the discharge data for the period of record (1995 through 2004) in Finding of Fact 60 and Attachment C to the May 2005 Blue Lakes Order and concluded that in each month there

was always at least 99.83 cfs to fill water right no. 36-2356A (May 29, 1958); that there was sufficient discharge during seasonal highs to fill water right no. 36-7210 (November 17, 1971), which authorizes diversion of 45 cfs for a combined diversion rate of 144.83; and that there was never sufficient discharge to fill water right no. 36-7427 (December 23, 1973), which authorizes diversion of 52.23 cfs for a combined diversion rate of 197.06 cfs. R. Vol. 1 at 57, ¶ 60; R. Vol. 1 at 78. Based on injury to water right no. 36-7427, the Director ordered curtailment of ground water rights junior to December 23, 1973. R. Vol. 1 at 72.

Blue Lakes argues that there was sufficient discharge at the time it appropriated water right no. 36-7210 to fill it year-round. In support of its argument, Blue Lakes cites to and has attached Exhibit 205 to its brief. Exhibit 205 plots discharge measurements in 1995/1996 and 2004, showing that water right no. 36-7210 was filled for eight months in 1995/1996 and two months in 2004. Daily discharge data in Exhibit 158 shows that the right was filled during all or portions of 3 months in 2004; all or portions of 3 months in 2005; all or portions of 3 months in 2006; and all or portions of 3 months in 2007. Inherent seasonal variability and the lack of any historical information to support that water right no. 36-7210 was filled at all times when it was appropriated led the Director to his conclusion that the right was not injured.

At hearing and in its brief, Blue Lakes argues that evidence, in the form of three moment-in-time measurements from 1977 that are plotted on Exhibit 205, show that there was sufficient discharge in Alpheus Creek to fill water right no. 36-7210 year-round when it was appropriated. Blue Lakes advances much the same argument as Clear Springs that it was error for the Director to not extrapolate trends from the moment-in-time measurements to the period of consistent record (1995-2007). At hearing, Director Dreher spoke to the 1977 measurements during cross-examination by Blue Lakes' attorney:

Q. So, isn't it the case that all the measurements that were taken at the time of the beneficial use examination in 1977 show flows adequate to fully supply Blue Lakes second priority right number 7210? Even if you subtract -- even if you were to assume that these measurements reflect the additional diversion of 25 CFS to Pristine Springs?

A. I'm not sure that that's clear from this data.

Q. Okay. The measurements that are plotted from 1977 --

A. Right. But there's clearly something anomalous about the 1977 measurements.

Q. And what do you mean by that?

A. Well, in every year that we have data the seasonal lows occur in the spring time. And the seasonal maximum discharge occurs in the fall. But in 1977, for whatever reason that can't be explained, it's not explainable by the information available, that pattern is opposite. The measurement made on March 1, 1977, is substantially higher than the measurement made on October 31, 1977. And there's no explanation for that.

Q. There may have been some construction going on or something going on with the measuring device. It's unknown?

A. It's unknown. And even in the historic record in the year 2000, there were high values recorded that were determined to not be actual diversions because of weir submersions after reconstruction. So there are reasons why these measurements may or may not be accurate.

Q. But in any case, whatever anomaly you're seeing, the measurements we have from 1977, all show sufficient flow at the -- at the points of measurement, at the time of the measurement, to fill Blue Lakes 7210 second priority water right; isn't that correct? Even if you subtract off 25 CFS to Pristine Springs?

A. That's correct. But again, I think that measurement in '77 is anomalous and anomaly is not -- it's not possible to explain.

Q. Okay.

A. But it doesn't make sense.

Q. And your assumption was, when you prepared this order, that Blue Lakes, as you assumed with others, had sought to have a field exam performed when flows were at the seasonal high; isn't that correct?

A. No, that's not correct.

Q. And in fact, these measurements were performed close to -- the field exam in March of 1977, following the historic flow pattern, was taken at a time when flows were on the decline towards their annual lows; isn't that correct?

A. Again, because of the anomaly I don't think you can say that.

Q. Well, if you were to apply the same pattern to 1977 --

A. Yes.

Q. -- that would indicate that in March -- not talking about October when the anomaly occurred, but in March of the year, the measured flows at the time of beneficial use examination were on their declining trend seasonally toward a low?

A. They should have been on their declining trend (sic) but it is not clear that the October 31, 1977, measurement is the one that is anomalous. It very likely could be the March 1, 1977, measurement that was made at the -- during the field inspection. That could be the anomalous measurement.

Tr. p. 1353, lns. 18-25; p. 1354, lns. 1-25; p. 1355, lns. 1-25; p. 1356, lns. 1-8.

As explained by Director Dreher, the 1977 measurements are unreliable and should not be used to extrapolate trends in the discharge data from 1995 through 2007, which shows that water right no. 36-7210 has not been filled on a year-round basis. Additionally, there was a lack of information to support Blue Lakes' position:

Q. You would agree that if you could have actual data available to show what their water availability was at the time the rights were established that would be relevant to consider in responding to a delivery call?

A. In my opinion it would be because, to the extent that junior priority ground water diversions have, let's say, increased the variability -- and we can't say that they have -- but had they increased the variability there may have been another component of injury involved than what we were unable to identify here.

Q. And that goes back to the illustration we went through. That the -- when their rights were established you don't have any way to actually know, if you don't start looking until data that came about in '88, whether their rights were established based upon that maximum being available one day, one month, per year, or several weeks or several months?

A. It depends on the water rights. For the water rights involved with Blue Lakes and the water rights involved with Clear Springs at the Snake River Farm, that information does not exist.

Tr. p. 1216, Ins. 2-22.

The Director's analysis of the complex record in this matter led him to the conclusion that water right no. 36-7210 was not injured. The Director's decision that water right no. 36-7210 has not been filled at all times during the period of record is supported by Exhibit 205 and Finding of Fact 60 and Attachment C in the May 2005 Blue Lakes Order, R. Vol. 1 at 57, ¶ 60; R. Vol. 1 at 78.

Blue Lakes further argues that the Director's evaluation of its water rights amounted to burden-shifting to make it re-prove or re-adjudicate its rights. *Blue Lakes Opening Brief* at 20. As discussed previously in this brief, consideration of the variability in spring flow is not a readjudication, but rather a determination of the nature and extent of the water supply available at the time of the perfection of the water right.

In *American Falls*, the Court noted that:

The Rules do give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A & B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579. Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.

American Falls at 877-78, 154 P.3d at 448-49.

The quantity element for a partially decreed water right in the SRBA authorizes a maximum diversion rate when the water is available. Tr. p. 1152, Ins. 5-8. It is therefore consistent that a single measurement at a moment-in-time should be reflected on the partial decree in the quantity element. Licenses that were issued by the Department for the water rights

in this matter reflect that practice of authorizing a maximum rate of diversion based on moment-in-time measurements. Such quantification, however, does not constitute a determination that the full decreed amount is available every hour of every day during the year-round season of use. Rather, under well established law, the senior is only entitled to the supply of water available at the time of perfection of the right. *Union Grain & Elevator Co. v. McCammon Ditch Co.*, 41 Idaho 216, 222, 240 P. 443, 445 (1925); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 43, 147 P. 1073, 1079 (1915). Then, in responding to a delivery call under the CM Rules, the maximum authorized rate of diversion that was partially decreed by the SRBA District Court is not reexamined. Nor is any burden placed on the senior right holder to reprove the maximum authorized rate of diversion. Instead, what was examined by the Director in these matters was the historic water supply available to satisfy the right. As explained by Director Dreher during the hearing:

Q. . . . How does administration differ from adjudication of water rights?

A. Well, in terms of the quantity element, I guess that's what we probably should focus on. I mean, there is no difference in the application of priority date, for example. The court defines what the priority date is, that's the priority date that the Department uses in administration.

On the quantity element, the court defines what the quantity is. In other words the maximum quantity that can be diverted. But in terms of administering water rights, it -- particularly when -- when we're looking at these spring rights that have these variations, it gets more complicated than that. Because the water right is continually defined -- I mean, the court issues the decree that defines the right. But for purpose of administration the right is continually defined based upon the extent and nature of beneficial use. And in the end that really is the definition of the right, the extent and nature of beneficial use. And that's the same standard that the court relies on when it issues the decree.

But when you need to administer something with a variable supply like this, it gets more complicated.

....

But now when it comes to administering hydraulically connected ground water, is ground water automatically subject to curtailment just because the quantity element is not filled because of seasonal variability? That's the more difficult issue. Because curtailing -- if, let's say hypothetically you have a well immediately adjacent to a spring complex such that that well is essentially diverting instantaneously water that otherwise would have been discharged through the spring instantaneously.

Essentially that -- in that situation that well is essentially diverting as if it was a surface water source. And it becomes more straightforward again. But now let's move 10 miles, or 20 miles, back away from the Thousand Springs complex. The depletions from those wells, they have some seasonal variability associated with when ground water was withdrawn, but the effect of those depletions, because of the distance involved, the variation is essentially smoothed out.

And so do you -- the question is do you curtail junior priority ground water rights to provide for water that wouldn't have been available anyway even in spite of the ground water because of the seasonal variation? That becomes the complex factor.

Tr. p. 1141, lns. 18-25; p. 1146, lns. 6-25; p. 1147, lns. 1-4.

Water rights are often recommended by the Department and partially decreed in the SRBA whose quantity element is rarely met during the season of use when the water right may be exercised. One example of this practice is the Department's recommendation of high flow water rights that are only available in short periods of time during the spring run-off but are nevertheless recommended with a season of use that spans the irrigation season. Another example would be the Department's recommendation of water rights on intermittent sources. If the Director were petitioned to administer these types of rights under the CM Rules and did not look at the nature and extent of the rights, administration would result in curtailment of junior ground water users to provide water that was otherwise not historically available.

Here, Blue Lakes and Clear Springs filed delivery calls with the Director seeking administration under the CM Rules. The Director examined each of the water rights held by Blue Lakes and Clear Springs, giving due deference to their status as partially decreed water

rights. R. Vol. 1 at 52, ¶ 34; R. Vol. 3 at 495, ¶ 36. As authorized by the CM Rules, the Director made findings, based on the information reported by Blue Lakes and Clear Springs, that some rights were filled year-round, that some rights were filled during seasonal highs, and that other rights were never filled. R. Vol. 1 at 58, ¶¶ 63-64; R. Vol. 3 at 500, ¶ 61. For those rights that were never filled during the year, curtailment of ground water rights was ordered; but curtailment was not ordered for rights that had no historical record of year-round water availability. R. Vol. 1 at 58, ¶ 65; R. Vol. 3 at 500-01, ¶ 62.

Burden-shifting would have occurred in this case if the Director had failed to defer to the partial decrees for the water rights held by Blue Lakes and Clear Springs that were found never to have been filled during the period of record. Instead, the Director deferred to the partial decrees for those rights and ordered curtailment of ground water rights junior to Blue Lakes' water right no. 36-7427 (December 28, 1973) and Clear Springs' water right no. 36-4013B (February 4, 1964).

Clearly, neither Blue Lakes nor Clear Springs had to reprove their water rights to the Director. The CM Rules allow the Director, however, to examine the nature and extent of a historic water supply available to satisfy the senior's water right when responding to a delivery call. Based on the record before him, the Hearing Officer did not find that burden-shifting had occurred.

Blue Lakes also argues that since 2002, the Department has acknowledged injury to Blue Lakes' 1971 right (36-7210) by curtailing junior surface water rights. *Blue Lakes Opening Brief* at 13-17. Blue Lakes is correct that since 2002 the Department, specifically Ms. Cindy Yenter, watermaster for Water District 130, has been administering surface water rights that divert from Alpheus Creek. However, the vital distinction that must be made is that surface-to-surface water

administration is not directly comparable to surface-to-ground water administration and cannot be used as a basis to assert that the Director's administration of junior ground water rights was incorrect. With the exception of futile call, curtailment of junior surface water rights generally happens on a rote basis because the hydrologic impacts of curtailment can be shown with near scientific certainty. Tr. p. 1122, Ins. 4-24; *American Falls* at 877, 154 P.3d at 448. The same is not true for ground water to surface water delivery calls.

Conjunctive administration of surface and ground water rights did not occur in Idaho until the filing of this and other contemporaneous delivery calls. Tr. p. 1123, Ins. 23-25; p. 1124, Ins. 1-2. The CM Rules prescribe additional considerations for the Director's review when administering ground water rights such as seasonal variability, maximum utilization of the resource, full economic development, optimum use, and the possible requirement of mitigation even if a call is deemed futile. *See generally* CM Rules 20 and 42. The CM Rules simply acknowledge that the application of the objectives of the prior appropriation doctrine must be done based upon the best available science. If there is not a sufficient scientific basis for concluding that a junior water right is causing injury to a senior water right it would be error for the Director to order curtailment solely because a senior right is not being fully satisfied.

7. Consideration Of The Public Interest Is Consistent With The State's Duty To Ensure Optimum Development Of A Limited Resource

In his Recommended Order, the Hearing Officer included a section entitled "The Role of Public Interest in Considering Curtailment." R. Vol. 16 at 3704. In that section, the Hearing Officer stated that "The public interest is a proper interest to be considered when a call is made that requires curtailment." *Id.* In his Final Order, the Director affirmed the Hearing Officer on this issue. R. Vol. 16 at 3957, ¶ 1. Clear Springs argues that the "Director's use of a 'public

interest' criteria to preclude or condition administration of Clear Springs' water rights in this matter exceeded his statutory authority and therefore violated Idaho law." *Clear Springs Opening Brief* at 51. See also *Blue Lakes Opening Brief* at 21-25.

Initially, it is important to note that the use of the term "public interest" in this context is simply referring to the Director's duty to account for all principles of the prior appropriation doctrine in addressing a delivery call, including but not limited to whether strict application of priority would be contrary to other principles of the prior appropriation doctrine as established by Idaho law.

The idea that the interests of the public must be taken into consideration in issues pertaining to the State's authority to administer water resources is deeply rooted in the Constitution, statutes, and case law. While water rights are considered real property, I.C. § 55-101(1), water rights are unique because they are "usufructuary."¹² As a usufructuary right, water rights do not stand on their own; instead, water rights "are the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied" I.C. § 42-101.

Article XV, § 3 of the Idaho Constitution states that "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied" This principle has always been tempered by the requirement that the appropriation of water is subject to reasonableness and beneficial use. *Schodde*, 224 U.S. 107; *Washington State Sugar*, 27 Idaho 26, 44 P. 1073. Therefore, even when an appropriator has control of public water on his or her land, the appropriator cannot prevent the state from regulating inappropriate use of that

¹² "[T]he right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use. . . . [R]unning water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property of the water itself." SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 18 (1911).

water. Idaho Const. Art. XV, § 1. For example, Idaho law prohibits an appropriator from committing waste or applying water in a non-beneficial manner. *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957); *Washington State Sugar*, 27 Idaho 26, 44 P. 1073.

Article XV, § 7 provides for “optimum development of water resources in the public interest.” While Clear Springs asserts that Article XV, § 7 speaks only to the authorities of the Idaho Water Resource Board, *Clear Springs Opening Brief* at 51, its narrow reading of Article XV, § 7 is inconsistent with application by the legislature and interpretation by the judiciary.

CM Rule 20.03, which was deemed facially constitutional by the Court in *American Falls*, specifically incorporates Article XV, § 7 into the CM Rules:

These rules integrate the administration and use of surface and ground water in a manner *consistent with the traditional policy of reasonable use . . . [and] includes the concepts of priority in time and superiority in right in being subject to conditions of reasonable use . . . as provided in Article XV, Section 5, . . . optimum development of water resources in the public interest prescribed in Article XV, Section 7, . . . and full economic development as defined by Idaho law.*

Emphasis added.

Moreover, prior to the CM Rules and *American Falls*, Article XV, § 7 had been applied by the Idaho Supreme Court in water administration cases involving ground water users. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (“We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, § 7.”); *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982) (“[I]t is clearly state policy that water be put to its maximum use and benefit. . . . That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution.”).

Because the Director is mandated under Idaho Code § 42-602 to distribute water in accordance with the prior appropriation doctrine, and CM Rule 20.02 “acknowledge[s] all elements of the prior appropriation doctrine as established by Idaho law,” the public interest must be considered by the Director.

Additional reference to the public interest is contained in Title 42, Idaho Code. Idaho Code § 42-101 states: “Water being essential to the industrial prosperity of the state, and all agricultural development throughout[,] . . . its control shall be in the state, which, in providing for its use, *shall equally guard all the various interests involved.*” Emphasis added. Idaho Code § 42-226 states that “while the doctrine of ‘first in time is first in right’ is recognized, a reasonable use of this right shall not block the full economic development of underground water resources.”

Lastly, in *Idaho Conservation League, Inc. v. State*, the Court was asked to consider whether the SRBA district court was correct in asserting that it was “without jurisdiction” to “consider the public trust doctrine when decreeing water rights.” 128 Idaho 155, 156, 911 P.2d 748, 749 (1995). In affirming the lower court, the Court stated that the jurisdiction of the SRBA limited it to “undertake a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water in the Snake River Basin.” *Id.* (internal quotations omitted). “The state’s ownership of the water that is the subject of the adjudication, is not before the SRBA court, nor is that ownership interest in any way diminished by the adjudication of claimants’ rights.” *Id.* The legislature enacted a statute stating that the public trust does not apply to water.

Idaho’s Constitution, statutes, and common law are replete with reference to the Director’s ability to consider the public interest in carrying out his duties. It was therefore

proper for the Director to accept the Hearing Officer’s recommendation that “The public interest is a proper interest to be *considered* when a call is made that requires curtailment.” R. Vol. 16 at 3704; R. Vol. 16 at 3957, ¶ 1 (emphasis added). Consideration of the public interest is not the weighing of competing interests, but rather it is the State’s sovereign duty to ensure the optimum development of a limited resource.

8. Department’s Response to Certain Issues Raised Solely by IGWA

A. The Swan Falls Agreement Does Not Prevent Curtailment Of Junior Ground Water Users

IGWA argues that “The Blue Lakes Order and Clear Springs Order are contrary to and a total reversal of water administration policy incorporated into the [Swan Falls] Agreement and State Water Plans that provides that aquaculture will be deemed to have adequate water so long as the minimum stream flows at the Murphy Gauge are met.” *IGWA Opening Brief* at 31. In his *Order Granting in Part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment*, the Hearing Officer reviewed and rejected this argument. R. Vol. 14 at 3240-41. The issue was further probed at hearing by IGWA and did not result in the Hearing Officer revisiting his decision. The Hearing Officer’s recommendation was accepted by the Director. R. Vol. 16 at 3957, ¶ 1. The Final Order should therefore be upheld by this Court on review. I.C. § 67-5279; *Barron* at 417, 18 P.3d at 222; *Urrutia* at 357, 2 P.3d at 742.

B. The Director Properly Exercised His Discretion In Not Ordering Blue Lakes And Clear Springs To Convert To Ground Water

IGWA argues that the Director abused his discretion in failing to “compel” Blue Lakes and Clear Springs to convert wholly, or in part, from surface water to ground water. *IGWA*

Opening Brief at 57. In support of its argument, IGWA cites to CM Rule 42.01.a and .h. *Id.* at 59.

It is uncontroverted that Blue Lakes and Clear Springs hold partially decreed water rights for surface water from the SRBA. R. Vol. 1 at 52, ¶ 34; R. Vol. 3 at 496, ¶ 36. If the Director were required to compel Blue Lakes and Clear Springs to change the source listed on its partial decrees from surface water to ground water, that would constitute a readjudication. Under no reading of CM Rule 42 can it be inferred that the Director is mandated to require the holder of a senior-priority surface water right to convert to ground water. Indeed, all factors listed in CM Rule 42 are permissive: “Factors that the Director *may* consider . . . include, but are not limited to the following.” Emphasis added.

C. It Was Proper For The Director To Issue The Curtailment Orders On An Emergency Basis

IGWA argues that the Director’s issuance of the May 2005 Blue Lakes Order and July 2005 Clear Springs Order on an emergency basis prior to a hearing was unlawful and resulted in a deprivation of IGWA’s rights to due process. *IGWA Opening Brief* at 71. At hearing, Director Dreher spoke to his rationale for issuing the orders prior to a hearing:

Q. Mr. Dreher, the last question I’d like to ask you about your 2005 orders would be if you’d turn to Exhibit 30, the Blue Lakes order, page 31, the first full paragraph.

Would you please explain why the orders were issued as emergency orders in accordance with Idaho Code 67-5247?

A. Well, the primary reason that this was done on an emergency basis is -- and I’ll take Blue Lakes as the example since it’s the order that’s referred to as Exhibit 30. The demand for administration was made by Blue Lakes on March 22, 2005. By that point in time the holders of the affected ground water rights undoubtedly had already made planting decisions. They’d already secured their bank loans, they’d already made plans for a full season of operation. And the delivery calls, and my response to those calls, placed a large cloud over those

ground water right holders as to whether they would or would not be able to irrigate crops that in many cases probably had already been planted.

And so I issued the order on an emergency basis to give as much certainty, as early as I could, to the affected holders of the junior priority ground water rights so they knew -- they could start figuring out how they were going to adjust their operations in the year 2005. What they could do.

Now, not stated in this provision is, I felt that it would also give certainty to the holders of the senior priority rights that were being injured. They were -- they were being injured, the shortages they were experiencing were real, and I felt that they too needed certainty to know what was going to happen at least for 2005, to begin to address the injury that they were incurring.

And the other thing that I haven't seen come out in the various actions that have been filed as a result of these orders is that, you know, I had always envisioned -- and of course I'm not in the position any longer -- but I had always envisioned a hearing process similar to what we're going through, to sort out factual discrepancies, disagreements, facts of law. And I always felt that that would take potentially a significant amount of time. A year, two years, three years, perhaps longer. Undoubtedly longer if appeals to the district court, and eventually the supreme court, were filed. And I made the decision that I -- it was inappropriate to allow the injury to go on during that period of time without being addressed.

And so by issuing the order as an emergency order prior to hearing, the injury was being addressed. Now there's plenty of room for argument whether it was being addressed in the right way, to the right extent, but at least it was being addressed for the first time in Idaho's history.

Tr. p. 1182, lns 2-25; p. 1183, lns. 1-25; p. 1184, lns. 1-4.

Regarding IGWA's allegations that the Director's entry of emergency orders violated due process, the Hearing Officer spoke directly to that issue in his Recommended Order:

The Director's Orders for curtailment were entered in the spring and summer of 2005. This hearing occurred in December, 2007. There are reasons. When the Conjunctive Management Rules were challenged, the authority of the Director and the policies of the State were in doubt. There is no remediation for what has occurred. The Director's Orders are supportable and should be enforced. Actions that were taken pursuant to them have been actions that would have been necessary had there been a hearing in a short time from their issuance.

R. Vol. 16 at 3716.

The recommendation of the Hearing Officer was accepted by the Director. R. Vol. 16 at 3957, ¶¶

1.

D. No Taking Of Junior Ground Water Rights Occurred In The Director's Administration Of Hydraulically Connected Ground And Surface Water Sources

Lastly, IGWA states that the Director's issuance of the May 2005 Blue Lakes Order and July 2005 Clear Springs order resulted in the "regulatory taking of water rights. The Ground Water Users are entitled to just compensation for the unlawful deprivation of their water rights." *IGWA Opening Brief* at 76. As explained at hearing by the Director under cross-examination by an attorney for IGWA, administration of junior-priority ground water rights in a conjunctive administration delivery call does not amount to a taking of private property:

Q. Do you consider a water right to be a property right?

A. Yes.

Q. And so when you curtail a water right permanently, you consider that to be a taking of the property right in some sense?

A. No.

Q. Okay. Go ahead and explain that.

A. A water right is a property right. It's a real property right, but it's a special kind of property right. It's a right to use. It's not -- you don't own -- if you hold a water right you don't own the water molecules. The State of Idaho owns the water molecules. But what you have is the right to use that water for a defined beneficial use, subject to conditions that are imposed, including priority date, maximum quantity of water that can be diverted, season of use, and others. Including the condition of interruption if that right, at its priority, is causing injury to one or more rights of a higher priority. It is -- that's one of the conditions that's imposed; it's a condition of interruption. So it's not a taking. It's part and parcel of what comes along with the water right.

Tr. p. 1230, lns 24-25; p. 1231, lns 1-22.

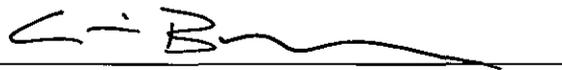
The Hearing Officer weighed this testimony and found that no taking had occurred. The Hearing Officer's recommendation was accepted by the Director. R. Vol. 16 at 3957, ¶ 1.

VI. CONCLUSION

In this case, the actions taken by the Director in responding to the conjunctive administration delivery calls filed by Blue Lakes and Clear Springs were consistent with constitutional and statutory provisions, were supported by the record, were made upon lawful procedure, and were within the Director's discretion. Based on the foregoing, the Department respectfully requests that this Court affirm the Final Order. I.C. § 67-5279(3).

RESPECTFULLY SUBMITTED this 6th day of February 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 6th day of February 2009.

Document Served: **RESPONDENTS' BRIEF**

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