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DEPARTMENT OF
WATER RESOURCES

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

Filed pursuant to I.R.C.P. 5(e)(1), on June 19, 2009, at 2:02 p.m.
John Melanson, District Judge

CLEAR SPRINGS FOODS, INC., Petitioner, vs. BLUE LAKES TROUT FARM, INC., Cross-Petitioner, vs. IDAHO GROUND WATER APPROPRIATIORS, 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,	Case No. 2008-444 ORDER ON PETITION FOR JUDICIAL REVIEW

vs.

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

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-0413A, 36-04013B, and 36-07148.

(Clear Springs Delivery Call)

IN THE MATTER OF DISTRIBUTIONOF WATER TO WATER RIGHTS NOS. 36-02356A, 36-07210, and 36-07427.

(Blue Lakes Delivery Call)

Ruling:

Remanded on issue of seasonal variation; Director abused discretion in ordering "replacement plan" and failure to provide timely hearings; affirmed in other respects.

Appearances:

John K. Simpson, Travis L. Thompson, Paul Arrington, of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for Clear Springs Foods, Inc.

Randall C. Budge, Candice M. McHugh, Thomas J. Budge, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators, North Snake Ground Water District, and Magic Valley Ground Water District.

Daniel K. Steenson, Charles L. Honsinger, S. Bryce Ferris, of Rigert Law Chartered, Twin Falls, Idaho, attorneys for Blue Lakes Trout Farm, Inc.

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for David R. Tuthill, in his capacity as Director of the Idaho Department of Water Resources.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

J. Justin May, of May Sudweeks & Browning, LLP, Boise, Idaho, attorney for Rangen, Inc.

I.

STATEMENT OF THE CASE

A. Nature of the case

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR" or "Department") issued in response to two separate delivery calls filed by petitioner Clear Springs Foods, Inc. ("Clear Springs") and cross-petitioner Blue Lakes Trout Farm, Inc. ("Blue Lakes") (collectively as "Spring Users"). The delivery calls were filed as a result of reductions in spring flows discharging from the Eastern Snake Plain Aquifer (ESPA) and which Spring Users hold water rights for fish propagation. Cross-petitioners, Idaho Ground Water Appropriators, Inc., North Snake Ground Water District and Magic Valley Ground Water District (collectively as "Ground Water Users") represent various ground water users holding ground water rights from the ESPA junior to those of the Spring Users and to which the delivery calls were directed. The *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* ("*Final Order*"), from which judicial review is sought was issued July 11, 2008, ordered curtailment of junior ground water rights or alternatively a phased-in replacement water plan in lieu of curtailment. Petitioners and cross-petitioners both contend the Department erred in response to the delivery calls and seek judicial review pursuant to the Idaho Administrative Procedures Act, Title 57, Chapter 52, Idaho Code.

B. Course of Proceedings

1. Blue Lakes' Delivery Call

The Blue Lakes delivery call was initiated by hand delivered letter dated March 22, 2005. Record ("R."). Volume ("Vol.") 1 at 1. The letter demanded that then-Director Karl J. Dreher direct the water master for Water District 130 to administer water rights within the district as required by Idaho Code § 42-607 in order to satisfy Blue Lakes' senior rights. The letter stated that Blues Lakes was entitled to delivery of a total of 197.06 cfs from Alpheus Creek pursuant to water rights 36-02356 (52.23 cfs with December 29, 1958, priority), 36-07210 (45 cfs with November 17, 1971, priority) and 36-07427 (52.23 cfs with December 28, 1973, priority). The letter stated that Blue Lakes was only receiving 137.7 cfs and at a low point in 2003 it received only 111 cfs and that the shortages resulted in reduced fish production. The letter expressed that Alpheus Creek is hydrologically connected to the ESPA.

On May 19, 2005, Director Dreher issued an order ("*May 19, 2005, Blue Lakes Order*") in response to Blue Lakes' demand. R. Vol. 1 at 45. Pursuant to the application of the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* IDAPA 37.03.11 *et. seq.* ("CMR"), Director Dreher found that junior ground water diversions from the ESPA were materially injuring the 36-07427 water right. *Id.* at 58-59. The Director ordered a phased-in curtailment of ground water rights junior to the December 28, 1973, priority, determined to be causing the injury. *Id.* at 72-73. The equivalent of 57,220 acres was ordered curtailed based on the application of the ESPA model. *Id.* at 61. ESPA model simulations estimated that the level of curtailment would provide 51 cfs to the Devil's Washbowl to Buhl Gage spring reach of the Snake River, which includes the springs tributary to Alpheus Creek. The Director estimated that the 51 cfs would result in a 10 cfs increase to the springs that are the source for Blue Lakes' water right. The *May 19, 2005, Blue Lakes Order* provided that involuntary curtailment could be avoided by providing replacement water sufficient to offset the injury and that replacement water could be phased-in over a period of five years. *Id.* at 73-74. The Director issued the *May 19, 2005, Blue Lakes Order* on an emergency interim basis to

provide relief to Blue Lakes prior to conducting a hearing. *Id.* at 75. Blue Lakes filed a petition for reconsideration and requested a hearing. Vol. 2. R. at 278.

2. Clear Springs' Delivery Call

The Clear Springs delivery call was initiated by letter dated May 2, 2005, which included a graph depicting spring flow declines. R. Vol. 1 at 2. Clear Springs holds seven water rights for fish propagation at its Snake River Farm facility totaling 117.67 cfs. The graph showed spring flows falling below 85 cfs. The letter requested the administration of surface and ground water rights in Water District 130 to satisfy water rights 36-04013A (15 cfs with September 15, 1955, priority), 36-04013B (27 cfs with February 4, 1964, priority), and 36-07148 (1.67 cfs with January 31, 1971, priority).

On July 8, 2005, Director Dreher issued an order (*July 8, 2005, Clear Springs Order*) in response to Clear Springs' request. R. Vol. 3 at 487. The Director found that junior ground water diversions from the ESPA were materially injuring water rights 36-04013B and 36-07148. *Id.* at 501. The Director ordered a phased-in curtailment of ground water rights junior to the February 4, 1964, priority, determined to be causing the injury. *Id.* at 523. The equivalent of 52,470 acres was ordered curtailed based on the application of the ESPA model. *Id.* at 502. ESPA model simulations estimated that the level of curtailment would provide 38 cfs to the Buhl Gage to Thousand Springs reach of the Snake River, which includes the springs from which Clear Springs diverts for its Snake River Farm facility. The Director estimated that the 38 cfs would result in a 2.7 cfs increase to the springs that provide the source for Clear Springs' water rights. *Id.* at 503. The *July 8, 2005, Clear Springs Order* provided that involuntary curtailment could be avoided by providing replacement water sufficient to offset the injury and that replacement water could be phased-in over a period of five years. *Id.* at 523. The *July 8, 2005, Clear Springs Order* was issued on an emergency interim basis to provide relief to Clear Springs prior to conducting a hearing. *Id.* at 525. Clear Springs filed a petition for reconsideration and requested a hearing. R. Vol. 3. at 557.

3. Ground Water User's Response

The Ground Water Users objected to the *May 19, 2005, Blue Lakes Order* and the *July 8, 2005, Clear Springs Order* and filed petitions for reconsideration and requests for hearings. R. Vol. 1 at 161, Vol. 3 at 547 (Blue Lakes); Vol. 8 at 1499 (Clear Springs). The Ground Water Users also filed a replacement water plan in response to the Director's *May 19, 2005, Blue Lakes Order*, which the Director approved (after requesting that a supplemental plan be filed) on July 6, 2008, but before the issuance of the *July 8, 2005, Clear Springs Order* R. Vol. 3 at 449. On April 26, 2006, the Director issued an *Order Approving IGWA's 2005 Substitute Curtailments* in the Clear Springs delivery call. R. Vol. 5 at 801. This *Order* recognized the substitute curtailment already being provided by IGWA under the Blue Lakes' call, and requested "that, on or before May 30, 2006, the North Snake Ground Water District and the Magic Valley Ground Water District must submit plans for substitute curtailment to the Director..." *Id.* at 811. IGWA submitted no such plan and a hearing was held on June 5, 2006, for the sole purpose of whether the Director should modify his "prior Orders approving the Idaho Ground Water Appropriators' 2005 substitute curtailments in response to both the Blue Lakes delivery call and the Clear Springs delivery call for its Snake River Farms facility." R. Vol. 6 at 1186. Previous to the hearing, the Ground Water users submitted joint replacement plans for 2006 in response to both delivery calls. R. Vol. 5 at 881.

4. Hearing on Petitions for Reconsideration, Recommended Order and Final Order

On July 5, 2007, current Director, David R. Tuthill issued an *Order Regarding Petitions for Reconsideration (Blue Lakes and Clear Springs Delivery Calls)* setting a hearing on the petitions for reconsideration.[1] R. Vol. 9 at 1931. A hearing was held November 28 through December 13, 2007, before independent hearing officer Hon. Gerald F. Schroeder ("Hearing Officer").[2] Previously, on November 14, 2007, the hearing Officer issued an *Order Granting In Part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment*. R. Vol. 14 at 3230. On

[1] Various other interested parties also timely filed petitions for reconsideration. R. Vol. 9 at 1931.

January 11, 2008, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law, and Recommendation.* ("*Recommended Order*"). R. Vol. 16 at 3690. Summarily stated, the *Recommended Order* concluded: 1) In responding to the delivery calls, the Director properly considered pre-decree information regarding the Spring Users' water rights, R. Vol. 16 at 3699; 2) that the Spring User's means of diversion is reasonable and therefore they are not obligated to pursue alternative means of diversion or reuse water; *Id.* at 3700-01; 3) the Director's assignment of 10% uncertainty to the ESPA model and use of the "trim-line" was reasonable, *Id.* at 3703-04, 3711-12; 4) the Director's consideration of seasonal variation in analyzing material injury was reasonable; *Id.* at 3707-08; 5) the Director's determination regarding the amount of useable water resulting from curtailment [through "linear analysis"] was supported by the evidence, *Id.* at 3710; 6) the finding of financial impact of responding to call has limited relevance; Id. at 3713; 7) under the circumstances the orders of curtailment were proper; *Id.* at 3714; and 8) the Director's order of replacement water plans as a form of mitigation was proper, *Id.* at 3715-16.

On February 29, 2008, the Hearing Officer issued *Responses to Petitions for Reconsideration and Clarification and Dairyman's Stipulated Agreement* clarifying aspects of the *Recommended Order*. R. Vol. 16 at 3839. Director Tuthill issued a *Final Order Regarding Blue Lakes and Clear Springs Delivery Call* ("*Final Order*") on July 11, 2008. R. Vol. 16 at 3950. The *Final Order* adopted the findings of fact and conclusions of law of the *July 8, 2005, Clear Springs Order* and the *May 19, 2005, Blue Lakes Order* and orders of the hearing officer except as specifically modified. *Id.* at 3959.

5. Petitions for Judicial Review

Petition for judicial review of the *Final Order* was timely filed by Clear Springs Foods, Inc. on July 28, 2008. Cross-petition for judicial review was timely filed by Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District on August 8, 2008. In addition, Blue Lakes Trout Farm,

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[2] The delay in the delivery call proceedings resulted among other things from a constitutional challenge to the CMR. *See American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resources*, 143 Idaho

Inc. timely filed a cross-petition for judicial review on August 11, 2008. This case was assigned to this Judge in his capacity as a District Judge and not in his capacity as Presiding Judge of the Snake River Basin Adjudication, on July 31, 2008. Intervention in this matter was granted to the Idaho Dairymen's Association on October 2, 2008. Intervention was also granted to Rangen, Inc. on November 25, 2008.

C. Relevant Facts

1. The Water Rights at Issue

a) Blue Lakes

Blue Lakes raises trout for commercial production. Blue Lakes holds three water rights that it uses at its facility. Partial decrees were issued in the SRBA for all three rights in 2000. Water right 36-02356A authorizes a diversion rate of 99.83 cfs with a priority date of May 29, 1958; water right 36-07210 authorizes a diversion rate of 45 cfs with a priority date of November 17, 1971; and water right 36-07427 authorizes a diversion rate of 52.23 cfs with a priority date of December 28, 1973. Hearing Exhibit (Exh.) 31. The three rights authorize a total diversion rate of 197.06 cfs for fish propagation with a year-round period of use (January 1 through December 31). *Id.* The quantity elements are also defined in AFA (acre-foot per annum). *Id.* The AFA is not a quantity limitation as the volume is consistent with the authorized rate of diversion 24 hours per day and 365 days a year. The source for the rights is "Alpheus Creek Tributary: Snake River." *Id.* The decrees do not contain any conditions or limitations on use. The source of Alpheus Creek is discrete springs discharging from the ESPA in the Devil's Washbowl to Buhl reach of the Snake River which is approximately 24 miles long. R. Vol. 9 at 1908.

b) Clear Springs

Clear Springs raises trout and other fish for commercial production. Clear Springs owns six water rights used at its Snake River Farm facility. Partial decrees were

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862, 154 P.3d 433 (2007).

issued in the SRBA for all six rights in 2000. Water right 36-02703 authorizes a diversion rate of 40 cfs with a priority date of November 23, 1933; water right 36-02048 authorizes a diversion rate of 20 cfs with a priority date of April 11, 1938; water right 36-04013C authorizes a diversion rate of 14 cfs with a priority date of November 20, 1940; water right 36-4013A authorizes a rate of diversion of 15 cfs with a priority date of September 17, 1955; water right 36-4013B authorizes a rate of diversion of 27 cfs with a priority date of February 4, 1964; and water right 36-7148 authorizes a diversion rate of 1.67 cfs with a priority date of January 31, 1971. Exh. 301-306. The six water rights authorize a total diversion rate of 117.67 cfs. All water rights are for fish propagation with a year-round period of use. *Id.* The source for the rights is "Springs Tributary: Clear Lake Source is also known as Clear Springs." *Id.* Clear Springs diverts from a collection system that receives spring flows discharging from outlets located on an approximately 300 foot length of the canyon wall. The partial decrees do not contain any conditions or limitations on the use. The springs discharge from the ESPA in the Buhl to Thousand Springs reach of the Snake River which is about 11 miles long. Exh. 262 at 6.

c) General Provision on Connected Sources

Blue Lakes' and Clear Springs' water rights are also subject to the decreed general provision on connected sources decreed in the SRBA for Basin 36, which provides:

> The following water rights from the following sources of water in Basin 36 shall be administered separately from all other water rights in Basin 36 in accordance with the prior appropriation doctrine as established by Idaho law:
>
> | Water Right No. | Source |
> |---|---|
> | NONE | NONE |
>
> The following water rights from the following sources of water in Basin 36 shall be administered separately from all other water rights in the Snake River basin in accordance with the prior appropriation doctrine as established by Idaho law:
>
> | Water Right No. | Source |
> |---|---|
> | NONE | NONE |

> Except as otherwise specified above, all other water rights within Basin 36 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

Exh. 225 and 225A.

d) Ground Water Users

The Ground Water Users are comprised of more than 1700 agricultural, municipal and industrial water users across southern Idaho who divert from the ESPA.

2. Eastern Snake Plain Aquifer (ESPA)

The ESPA is an unconfined aquifer underlying a geographic area of approximately 10,800 square miles of southern and southeast Idaho. R. Vol. 16 at 3691, Exh. 429. The ESPA connects with the Snake River and its tributaries along a number of reaches resulting in either gains or losses to the River depending on the level of the aquifer in relation to the River. R. Vol. 3 at 488-89. The ESPA consists primarily of fractured basalt ranging in a saturated thickness of several thousand feet in the central part of the Eastern Snake River Plain, to a few hundred feet in the Thousand Springs area where the water is discharged through a complex of springs. Water flow through the ESPA is not uniform. Water travels through the system at rates ranging from 0.1 feet per day to 100,000 feet per day depending on subterranean geology, elevation and pressure differentials. *Id.* at 487. The ESPA is estimated to contain as much as one billion acre-feet of water. The ESPA receives approximately 7.5 million acre-feet per year from the following sources: irrigation related incidental recharge (3.4 million acre-feet), precipitation (2.2 million acre-feet) flow from tributary basins (0.9 million acre-feet) and losses from the Snake River and its tributaries (1.0 million acre-feet). *Id.* at 487-88. On average between May 1980 and April 2002, the ESPA discharged approximately 7.5 million acre-feet on an annual basis through spring complexes located in the Thousand Springs area and near the American Falls Reservoir and through the discharge of

approximately 2.0 million acre-feet per year through depletions from ground water withdrawals. *Id.* at 487.

Surface water irrigating on the Eastern Snake Plain began in the 1860's. Spring flow measurements were not taken until 1902. Hearing Transcript (TR.) at 1117 (Dreher Testimony). Irrigators diverted substantially more surface water than the consumptive use required by the crops. From 1902 to the early 1950's average daily springs discharge increased from 4200 cfs to an average of 6800 cfs through incidental recharge. *Id.* Also after the construction of Palisades Dam winter flow were stored in the reservoir as opposed to run through canal systems. Brendecke, R. Supp. Vol. 3 at 4432. In some places the level of the aquifer rose by as much as 100 feet. *Id.* at 1118. The early 1950's marked the beginning of the use of deep well pumps on the ESPA. Spring flows then began to decline as a result of conversion from flood irrigation to sprinker irrigation as well as depletions caused by ground water pumping. *Id.* at 1120. As a result, spring discharges and ESPA ground water levels have been declining in the last 50 years. In 2004, the average daily discharge was approximately 5200 cfs which is higher than the 1902 level of 4200 cfs. *Id.* In the early 2000's, the worst consecutive period of drought years on record for the Upper Snake River Basin further reduced the level of the ESPA. R. Vol. 2 at 488.

In general, spring flows are dependent on aquifer levels. TR. at 1785 (Brendeke); (Harmon at 945); (Exh. 312 at 6, (Brockway). Ground water pumping from the ESPA causes depletion to spring flows in the Thousand Springs reach. *Id.* Further reductions in the aquifer are attributable to drought and conversions from sprinkler to flood irrigation. TR. at 845 (Wylie). Most impacts to the Snake River from ground water pumping from the ESPA are realized within in 20 years. TR. at 864 (Wylie). A moratorium on new ground water permits was issued in 1992. Since that time a reasonable estimate is that approximately 90% of the impacts to the Snake River from ground water pumping have been realized. TR. at 1222 (Dreher).

3. ESPA Model

A ground water model was used by the Director to predict the effects of curtailment. The model has strength and weaknesses. The model was designed to

simulate gains and losses on eleven different reaches as opposed to gains and losses to individual spring complexes. TR. at 806 (Wylie). It was not designed to predict what flows would be at individual springs in response to an administrative action. *Id.* at 857-58 (Wylie); *Id.* at 1133 (Dreher); Brendecke, R. Supp. Vol. 3 at 4456. The model divides the ESPA into approximately 11,500 individual one mile by one mile cells. *Id.* at 801. Despite the lack of homogeneity in the ESPA the model treats all cells as homogenous. The model was developed with input from stakeholders. *Id.* at 1130 (Dreher). The model is well calibrated. *Id.* at 1132. No model is perfect –all models have uncertainty. *Id.* at 1133 (Dreher); TR. at 816 (Wylie).

4. Interim Administration and Formation of Water District

On January 8, 2002, pursuant to I.C. § 42-1417, the SRBA District Court Ordered Interim Administration of water rights located in all or portions of Basins 35, 36, 41 and 47, which included the water rights at issue in this matter. *See* Exh. 8. As a precondition for interim administration Idaho Code 42-1417 requires that water rights either be reported in a director's report or partially decreed. I.C. § 42-1417 (a) and (b). On February 2, 2002, the Director entered an order creating Water District 130 pursuant to I.C.§ 42-604. A Final Order revising the boundaries of the water district was entered January 8, 2003. The water rights at issue in this case are included in the water district. *See* Exh. 29.

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held April 28, 2009. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision or the next business day or April 29, 2009.

IV.

APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code §42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code §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. Idaho Code §67-5279(1); *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). 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.

Idaho Code §67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code §67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code §67-5279(4); *Barron v. IDWR,* 135 Idaho 414, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[3] *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was <u>not</u> substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.* 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

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[3] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934,939 (1993).

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, 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 evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section §67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2P.3d 738 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline,* 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.,* 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct.App. 1996).

V.

ISSUES PRESENTED FOR JUDICIAL REVIEW

A. Issues Raised by Spring Users

Director's Consideration of Conditions Prior to Entry of Partial Decree Including "Seasonal Variability"

1. Whether the Director's reliance on pre-decree conditions, and in particular "seasonal variations" in spring flows, in determining material injury to senior rights of Spring Users, was arbitrary, capricious or contrary to law?

2. Whether the Director's determination that Clear Springs' water right 36-4013A was not materially injured based on "seasonal variation" was factually contrary to the substantial evidence in the record?

3. Whether the Director erred both factually and as a matter of law in finding that Blue Lakes' water right 36-7210 was not materially injured by junior ground water pumping?

Director's use of the 10% "Trim-Line" in Applying ESPA Model

4. Whether the Director's use of a 10% "trim-line" resulting in the exclusion of certain junior priority groundwater rights from administration was arbitrary, capricious or contrary to law?

Director's Apportionment of affects of Curtailment to Reach Gain Segments

5. Whether the Director's use of a percentage of the reach gains to the Snake River to reduce the quantity required for mitigation in lieu of curtailment was arbitrary, capricious and contrary to law?

"Replacement Water Plans"

6. Whether the Director exceeded his statutory authority through the implementation of a "replacement water plan" process not provided for by statute or administrative rule?

7. Whether the Director's acceptance of "replacement water plans" in 2005, 2006 and 2007, despite Ground Water Users failure to comply with mitigation requirements set forth in the Director's orders, was contrary to law, exceeded the Director's authority or was arbitrary, capricious or a abuse of discretion?

8. Whether the Director's failure to properly account for and require Ground Water Users to fully perform outstanding mitigation obligations in 2005 (Clear Springs only), 2006 and 2007 (Spring Users) is arbitrary, capricious and contrary to law?

9. Whether the Director's procedures for submission, review, approval and performance of mitigation plans are arbitrary, capricious, contrary to law and the constitutional rights of Spring Users?

10. Whether use of phased-in curtailment or mitigation obligations of junior Ground Water Pumpers was contrary to law?

Public Interest Considerations

11. Whether the Director's consideration of the "public interest" in limiting or precluding administration of junior water rights is contrary to law?

B. Issues Raised by Ground Water Pumpers

Sufficiency of Evidence Regarding Material Injury

12. Whether the Director's finding that senior Spring Users suffered material injury was supported by substantial evidence that additional water accruing from curtailment of junior ground pumpers would enable Spring Users to increase fish production?

Swan Falls Agreement, State Water Plan and Full Economic Development of Ground Water Resources

13. Whether the Director's ordering of curtailment violates the State of Idaho's obligation to manage the ESPA in accordance with the minimum flows prescribed by the Swan Falls Agreement and the State Water Plan?

14. Whether the Director's ordering of curtailment is consistent with the full economic development provision of the Ground Water Management Act, I.C. 42-226 *et. seq*. by curtailing tens of thousands of ground water-irrigated acres to fractionally increase quantities to senior Spring Users?

15. Whether the Director abused discretion by failing to compel Spring Users under the CMR to convert from a surface water source to a ground water source?

Futile Call

16. Whether the Director abused discretion by failing to apply the futile call doctrine with respect to the amount of time required for curtailment to produce increased spring flows?

Application of ESPA Model

17. Whether the Director erred by failing to account for known uncertainties in the ESPA Model resulting in curtailment without a reasonable degree of certainty that additional water will accrue to spring flows?

Due Process

18. Whether the Director exceeded his authority by ordering curtailment on an emergency basis without a prior hearing?

VI.
ANALYSIS AND DISCUSSION

A. The Director's reliance on pre-decree conditions, and in particular "seasonal variations" in spring flows, in determining material injury to senior rights is not contrary to law but in this case the Director impermissibly used the material injury analysis to shift burden of proof to senior.

The Spring Users assert that the Director erred as a matter of law by considering pre-decree conditions regarding the historic seasonal variability of spring flows in determining material injury to senior rights resulting from ground water pumping. The Spring Users hold multiple rights to the spring flows that supply water to their respective facilities. The rights are stacked and vary in priority. In determining material injury to the individual rights the Director took into account the inherent seasonal fluctuations in the spring flows in existence at the time the water rights were appropriated. To the extent the Director determined that a particular right was not historically satisfied on a continuous basis at the time of the appropriation the Director did not find injury to the right if current flows were sufficient to meet the decreed quantity for the water right

during any portion of the decreed period of use. Ultimately, the Director did not require the Ground Water Users to supply replacement water for seasonal lows where the full amount of the decreed right had historically never been satisfied. The Spring Users assert that this is a re-adjudication of their decreed rights. The argument being that the water rights were decreed for a specific quantity on a year-round basis and the Director is relying on historical conditions as opposed to the decreed elements of the water right. The seasonal variations are not reflected in the partial decrees. The issue of whether reliance on pre-decree conditions in responding to a delivery call constitutes a re-adjudication of the senior's decreed right is a difficult question. Perhaps the Hearing Officer summarized it best in referring to it as a "slippery situation." R. Vol. 16 at 3238. The short answer is it depends on the allocation of the burden of proof.

The CMR expressly authorize the Director to take seasonal variability into account in determining material injury to a senior right. CMR 010.14 defines "material injury" as "[h]inderance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set for in Rule 42." CMR 042.01.c provides:

> 042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42)
>
> 01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently without waste, include but are not limited to:
>
> c. Whether the exercise of junior-priority ground water rights *individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right.* This may include the seasonal as well as the multi-year cumulative impacts of all ground water withdrawals from and area having a common ground water supply.

CMR 043.03.b provides with respect to mitigation plans:

> Consideration will be given to the history and seasonal availability of water for diversion *so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods* and extended drought periods.

(emphasis added). The Director's replacement water plan, despite creating issues addressed elsewhere in this opinion, is akin to a mitigation plan. Had the Director approved a mitigation plan in accordance with CMR 43 he would be acting according to the law by not requiring *"replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods."*

An undisputed fact in this case is that the spring flows inherently fluctuate between high and lows on a seasonal basis and between years from factors other than ground water pumping. R. Vol. 16 at 3707-08. Therefore if all ground water pumping by all junior appropriators was eliminated, seasonal variations in flows would still exist. As a result, a decreed spring flow right may never have historically received the decreed flow rate for the entire decreed period of use. Ground water pumping by subsequent appropriators also can influence the timing and degree of these seasonal variations. Pursuant to the CMR, to the extent junior ground water pumpers are not the cause of the seasonal lows then there is no material injury or concomitant obligation to supply mitigation for the seasonal reductions in flows pursuant to a mitigation plan. CMR 010.14 (defining "material injury"); CMR 043.03.b (no replacement water where surface right has not historically received a full supply). Although considered as one of the factors in the material injury analysis, the determination is essentially akin to the application of the futile call doctrine. If ground water pumping by juniors is not the cause of the injury to the senior rights or not reducing the supply available to senior rights then curtailment should not result in providing a usable quantity of water to the senior. Director Dreher acknowledges this point throughout his testimony in explaining the material injury analysis.

> Q. You also I believe testified that with respect to the seasonal variation question, that if junior ground water rights were to be curtailed to provide seasonal highs on a year round basis, then there would be no ground water development. Could you explain that?
>
> A. Well, if the water rights held by the spring users are interpreted to mean that any time, at any time during the year when their authorized quantity is not being filled that injury is occurring, then their could be no ground water use because **if you curtailed all ground water on the plain there would be instances during the year when some, not necessarily all, but when some of the full quantity of the springs rights would not be met.**

Q. Curtailing juniors wouldn't produce water at that time and during --at that place in this [sic] quantities?

A. Not for all of the rights. But potentially for some of the rights it would, but not for all of the rights.

TR. at 1376 (Dreher Testimony)(emphasis added).

Q. Then the third step would be to see **if you curtailed the ground water pumper, for example, would that water arrive at the spring within a reasonable time in a reasonable quantity**?

A. Well, **that's the opposite image of injury**. I mean, you can evaluate, you know, are junior priority ground water rights reducing the supply available to the senior by simulating what would happen if you curtailed those junior priority.

TR. at 1249 (Dreher Testimony)(emphasis added).

Q. Mr. Dreher, do reduced spring flows necessarily constitute material injury?
A. **Only to the extent that those reductions in spring flow are the result of depletions associated with junior priority rights.**

TR. at 1152 (Dreher Testimony)(emphasis added).

Q. And again, I want to follow up on the issue of injury. If you assume that someone had a water right that was 100 cfs water right on the decree, and they were only receiving 50 cfs, if you would curtail juniors and convert 25 cfs, would that additional shortage of 25 cfs be considered injury also?

A. No.

Q. Because it's attributable to some other effects?

A. That's correct.

Q. Or its not attributable to junior depletions?

A. That's correct.

TR. at 1376-77 (Dreher Testimony). *See also Final Order* (R. Vol. 16 at 3950) ("Consequently, seasonal variations must be considered to **determine what the Spring Users would have received throughout the year absent junior water user's appropriations**") (citing *Recommended Order* at 19.)).

In responding to a delivery call the Director applies a ground water model to simulate the effects of curtailment of junior rights determined to be impacting senior rights. It follows that if all rights junior to the injured senior are curtailed, over time the seasonal fluctuations should return to as they existed at the time of the senior's appropriation.[4] The seasonal low flows will still be present and curtailment of juniors will not result in eliminating these seasonal lows. (i.e. seniors appropriated subject to the seasonal fluctuations prior to the subsequent ground water appropriation by juniors). As such, it becomes futile to curtail in an attempt to increase seasonal lows. It also would be contrary to law to require juniors to provide replacement water or other mitigation to compensate for these seasonal lows. Futile call is a well established part of the prior appropriation doctrine. *See e.g. Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976); *Martiny v. Wells*, 91 Idaho 215, 419 Idaho 470 (1966); *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921); *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904). Accordingly, taking into account seasonal variability is not necessarily a re-adjudication of the water right despite the partial decrees not including conditions pertaining to seasonal fluctuations. Rather, taking seasonal variability into account is a consequence of administering water rights based on the effects of curtailment simulated through the ground water model, the inherent fluctuating characteristics of spring flows, and the application of the futile call doctrine. Therefore is not arbitrary or capricious or contrary to law. Taking into account seasonal variability is also authorized under the CMR.

Simply put, a determination of material injury requires the Director to determine what portion of a senior's water deficit is caused by naturally occurring seasonal lows as opposed to the portion of the deficit that results from the exercise of junior rights. Both the material injury analysis under the CMR and the futile call doctrine require the director

[4] The flows may even return to lower than historical levels based on declining aquifer levels resulting from reductions in incidental recharge. In which case no amount of curtailment will result in increasing spring flows back to historical levels. *See* Brendecke, R. Supp. Vol. 3 at 4432 (never get back to pre-1955 levels).

to exclude any water deficit attributable to such seasonal variations. Juniors cannot be curtailed to provide water that a senior would not have received anyway due to seasonal variations; nor can juniors be required to provide replacement water for such amounts. In making the factual determination as to what portion of a senior's deficit is attributable to seasonal variations, the Director necessarily needs to examine evidence that would show what those seasonal variations looked like before pumping by hydraulically connected juniors – i.e. what were the seasonal variations at the time of the senior's appropriation? Such evidence may include computer modeling and/or historic records of spring discharges. An examination of evidence relative to seasonal variations of springs at the time of the senior's appropriation in not a re-adjudication of the senior's right; rather such examination is necessary to tease-out the effects of seasonal variations from the effects of groundwater pumping by juniors.

However, the justification of seasonal variability under aspects of futile call is not the end of the analysis. The problem arises, as occurred in this case, where there is disagreement or lack of data regarding historic flow conditions at the time of the senior's appropriation for purposes of determining whether or not material injury exists or, put differently, whether curtailment of juniors would be futile with respect to seasonal lows. In sum, who has the burden of proving the historical conditions and what is the evidentiary standard? *American Falls Reservoir Dist. No. 2 v. IDWR,* 143 Idaho 862, 154 P.3d at 433 (2007) (*AFRD #2*) involved a facial constitutional challenge to the CMR. The district court declared the CMR to be facially unconstitutional for failing to "also integrate the concomitant tenets and procedures relating to a delivery call, which have historically been necessary to give effect to the constitutional protections pertaining to senior water rights. . . ." *Id.* at 870, 154 P.3d at 441. The district court concluded that "under these circumstances, no burden equates to impermissible burden shifting." *Id.* at 873, 154 P.3d at 444. The issue arose as a result of senior surface users asserting the CMR were unconstitutional because the Rules required the senior making the call to prove material injury after the Director requested information from the surface users for the prior fifteen irrigation seasons instead of automatically giving effect to the decreed

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However, this is also an aspect of futile call and should be determined pursuant to the appropriate burden of proof and evidentiary standard. See

elements of the water right. The Idaho Supreme Court held that the CMR were not facially defective for failure to include the applicable burdens of proof and evidentiary standards but held that "**the Rules do not permit the shifting of the burden of proof . . . requirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules.**" *Id.* at 874, 154 P.3d at 445 (emphasis added). The Court held further that:

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

Id. at 877-78, 154 P.3d at 448-49. The problem is that if aspects of futile call are cloaked in part of the material injury determination and not subject to the applicable burdens of proof then the burdens of proof are effectively circumvented.

In the instant case the Director found no material injury to certain water rights after taking into account seasonal variations despite the spring flows falling below the decreed amounts. There was disagreement between the Director and the Spring Users over whether or not the rights in question were historically satisfied up to their decreed quantities on a continuous basis or whether the rights were in fact impacted by seasonal lows. Further, there was a lack of data regarding the flows at the time some of the rights were appropriated. The Director noted in his testimony "so without additional historic

measurements, we're just not in a position to make a determination, a factual determination as to whether the seasonal variations are or are not more pronounced now than they were when these rights were first established." TR. at 1150-51. Despite the lack of data no presumptive weight was accorded the partial decree. This becomes painfully obvious in the respondent's brief. "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.**" *Respondent's Brief* at 48 (emphasis added). "**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.**" *Id.* at 50 (emphasis added). In effect, the lack of data regarding historical conditions and the insufficiency of the evidence regarding conditions at the time of the appropriation was construed against the Spring Users. The Spring User is put in the position of having to prove up the historical use of his water right as opposed to defending against a futile call where the senior is accorded the established burdens of proof — this in effect became a re-adjudication of the quantity element of the right. While it is appropriate for the Director to address aspects of futile call and pre-decree information as part of the material injury analysis it is inappropriate to shift the burden of proof to the senior. In sum, seasonal variability is relevant to simulating and establishing the effects of a delivery call but not as a means for establishing the quantity to which a senior is entitled *viz a viz* a material injury analysis. Otherwise a senior right holder is put in the position of having to re-prove the historical beneficial use of the right. Presumably, this was already accomplished in the SRBA. The distinction is in the allocation of the burden of proof and evidentiary standard. Ultimately the result maybe the same, but the determination cannot be made based on a re-quantification of the senior's right, rather must be made based on determining the effects of curtailment of junior right holders.

Accordingly, this Court concludes that seasonal variations are relevant in predicting the affects of curtailment as opposed to re-defining the scope of the water right. However, if addressed as part of a material injury analysis, the Director must apply the concomitant burdens of proof and evidentiary standards.

Therefore, this matter shall be remanded for that purpose.

B. The implementation of a "trim-line" margin of error in applying the ESPA model is supported by the evidence and is not arbitrary and capricious.

The Director used the ESPA model to simulate the effects of curtailment of ground water rights junior to Clear Springs' 36-0413B water right (diversion rate of 27 cfs with February 4, 1964, priority) and to Blue Lakes' 36-07427 water right (diversion rate of 52.23 cfs with December 28, 1973, priority). A limitation of the ESPA model with respect to the instant delivery calls is that the model cannot predict or target the effect of well withdrawals on the particular springs from which the Spring Users are diverting. The model is designed to predict the effects of withdrawals to particular sub-reaches. The ESPA model divides the Thousand Springs area into six adjacent sub-reaches. Blue Lakes' diverts from discrete springs located in the Devil's Washbowl to Buhl Gage spring reach, which is approximately twenty four miles long. Clear Springs' diverts from discrete springs located in the Buhl Gage to Thousand Springs reach, which is approximately 11 miles long.

The model simulations demonstrated that curtailment of junior priority ground water rights would result in increased spring discharges to the Buhl Gage to Thousand Springs spring reach by an average of 38 cfs. The model simulations demonstrated that curtailment of junior priority ground water rights would result in increased spring discharges to the Devil's Washbowl to Buhl Gage spring reach by an average of 51 cfs. In conjunction with running the model simulations in response to both delivery calls, the Director assigned a 10 % margin of error factor, excluding from administration those junior rights identified by the model to be causing injury but within the 10 % margin of error or "trim-line." [5] The Director concluded that rights outside of the trim-line were not subject to administration because of the uncertainty that they would contribute water to the particular sub-reach. The Director also determined that rights outside of the trim-line could not be used in conjunction with providing mitigation for injury.

[5] Junior rights predicted by the model to provide less than 10 % of the quantity curtailed to the particular spring reach were excluded from administration.

The margin of error used by the Director was not established in conjunction with the development of the model nor was it developed pursuant to any scientific methodology or peer review process.[6] Rather, in responding to the delivery calls the Director determined that because the model is a simulation it does not have 100 % certainty and therefore must have a margin of error or uncertainty factor. TR. at 1166 (Dreher Testimony). The finding that the model does not have 100 % certainty and should have a margin of error is supported by the evidence. No party offered testimony that the model has 100 % certainty. There was testimony presented that the margin of error was probably much higher than 10 % but that it had yet to be quantified by any scientific methodology. TR. at 1901-02 (Brendecke testimony) (10% not adequate -- 50% probably too high). The Director arrived at the 10 % margin of error by using the margin of error assigned to stream flow gauges used in the administration of surface rights. The Director reasoned that the margin of error for the ground water model cannot be better (less) than that for a surface gauge. Given the composition and lack of homogeneity of the ESPA this finding is consistent with the evidence. The Hearing Officer concluded that the Director's reasoning was sound as a matter of common sense until a better margin of error is established. This Court agrees that the evidence, albeit conflicting[7], supports the use of the 10 % margin of error as a minimum and is not arbitrary or capricious. That is all that is available. No evidence was presented to establish a higher margin of error or to controvert that the margin of error is less than 10%.

The next issue concerns the application of the margin of error to exclude from administration junior rights falling within the margin of error. The Director justified excluding water rights within the margin of error based on applying a "full economic development of the aquifer" analysis. The Director reasoned:

> You only curtail junior priority rights when you know it will result in a meaningful amount of water being available to the senior.

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[6] Development of the ESPA model has not proceeded to the point where a margin of error has been developed. R. Vol. 16 at 3702.

[7] Exh. 312, Brockway Testimony at 12 (not possible to assign confidence level without extensive research).

> And the reason ties back to 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 its also inconsistent with – the portion of the common law doctrine of prior appropriation that promotes maximum utilization of a scarce resource . . . [A]n equally important principle in the prior appropriation doctrine is that that's articulated in Idaho Code 42-226. And that[s] maximum utilization of the resource.

TR. at 1167-68 (Dreher testimony). The Hearing Officer justified the use of the trim-line to exclude juniors from administration based on "public interest" considerations which are incorporated into CMR 020.03. CMR 020.03 provides:

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

The Hearing Officer concluded although the CMR acknowledge the prior appropriation doctrine:

> [CMR] 020.03 acknowledges other elements. . . . In *American Falls* [*AFRD #2*] the Supreme Court determined that the Conjunctive Management Rules are not facially unconstitutional. Rule 020.03 is at the heart of the rules and how they will be applied. Had any rule been subject to a facial challenge, 020.03 was one. It was adopted October 7, 1994, and has remained untouched by the Legislature or the Supreme Court. It incorporates the law as it developed. "First in time, first in right" is fundamental to water administration but is subject to consideration of the public interest. The Director is not limited to counting the number of cubic feet per second in the decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of the consequences to the State, its communities and citizens. These conclusions have significance in

> several issues in this case. They affect the Director's use of the so-called "trim line," a point of departure beyond which curtailment was not ordered.

R. Vol. 16 at 3706.

Although "full economic development" of ground water and "public interest criteria" may bolster the Director's use of the trim-line, the Court concludes that the use of a trim-line for excluding juniors within the margin of error is acceptable simply based on the function and application of a model.[8] This case does not involve a "battle of the models." Rather, there is only one model involved that was developed with input from various stakeholders and calibrated using data over a 22 year period. The Hearing Officer found that that despite its limitations, the ESPA model is the best science and administrative tool available. R. Vol. 16 at 3703. The evidence also supports the position that the model must have a factor for uncertainty as it is only a simulation or prediction of reality. As such, the ESPA model, less any assigned uncertainty, must represent the most conclusive evidence regarding the significance of the hydraulic connectivity of ground water wells to a particular sub-reach and the effects of curtailment to that particular sub-reach. Given the function and purpose of a model it would be inappropriate to apply the results independent of the assigned margin of error. Accordingly, the Director did not abuse discretion by applying the 10 % margin of error "trim line."

C. The Director's Apportionment of Flows to Spring Complexes is supported by the Evidence and is not Arbitrary or Capricious.

The ESPA model was designed to predict the effects of curtailment to sub-reaches but not to specific spring outlets within the sub-reach, which is a significant limitation with respect to responding to these two delivery calls. Blue Lakes diverts from Alpheus Creek which is fed from specific springs located in the Devil's Washbowl to Buhl Gage spring reach. The Devil's Washbowl to Buhl Gage sub-reach is approximately 24 miles

long. In conjunction with applying the ESPA model, Director Dreher determined that curtailment of 57,220 acres would result in a gain of 51 cfs to the sub-reach. Through the use of USGS data for particular springs used to calibrate the model, the Director concluded that the springs that supply Alpheus Creek would realize 20 % of the gain or 10 cfs. The remainder of the gain exits the aquifer through other spring outlets in the sub-reach. Clear Springs' diverts from a 300 foot section of springs located in the Buhl Gage to Thousand Springs reach, which is approximately 11 miles long. In conjunction with applying the ESPA model, Director Dreher determined that curtailment of 52,470 acres would result in a gain of 38 cfs to the sub-reach. Through the use of the USGS data the Director determined that the springs that supply Clear Spring's facility would realize 6.9 % of the gain or 2.7 cfs. The remainder of the gain to the sub-reach exits the aquifer through other spring outlets. The Hearing Officer concluded that the percentage calculations that would accrue to the respective springs were supported by the evidence. R. Vol. 16 at 3710. The Hearing Officer also found that the percentages of the gains that would accrue to the respective springs supplying the Spring User's facilities were usable quantities. R. Vol. 16 at 3710. While the methodology used by the Director to estimate the percentage allocation to the specific spring complexes is far from perfect, this Court agrees that the percentage allocation is supported by the evidence. The percentages allocated to the spring complexes are based on the spring flow data used to calibrate the ESPA model. While there was testimony presented that there may exist more accurate methods for determining gains to particular spring complexes, no evidence of the specifics for implementing the alternative methods or the results of such methods were presented. *See* TR. 1866-67, (Brendecke Testimony); Exh 312 at 12-13 (Brockway Testimony). Accordingly, given the data and methodology available to the Director, in light of the limitations of the model, despite being subject to differences of opinion, the apportionment was not arbitrary or capricious. While the Court does not find the methodology to be arbitrary or capricious, the end result however, raises significant issues with respect to the disparity between the useable quantity of water made available to the Spring Users and the scope of the curtailment to the Ground Water Users.

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[8] The Court included the Director's reliance on full economic development to show that the Director acknowledged that the concept of full economic development can appropriately be considered in

D. Reasonable Use and Full Economic Development, Public Interest Criteria, the Swan Falls Agreement and the State Water Plan

The Hearing Officer recommended curtailment or replacement water in lieu of curtailment based on the respective percentages calculated by the Director concluding:

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

R. Vol. 16 at 3713.

The Ground Water Users argue that the Director essentially protected the full extent of the Spring User's rights "to the level they could reasonably expect when their rights were adjudicated" without taking into consideration the requirement of full economic development of the aquifer, public interest criteria or the Swan Falls Agreement and the State Water Plan.

The Ground Water User's point out the significant disparity between the amount of water use curtailed and the anticipated benefit to Blue Lakes and Clear Springs:

> Assuming the typical annual diversion of four acre-feet per acre for ground water rights located in the zone of curtailment, the curtailment of 57,220 ground water-irrigated acres eliminates the use of 228,880 acre-feet annually. The estimated gain of 10 cfs to Blue Lakes amounts to 7,276.0 acre-feet at steady state—just 3.2 percent of the total amount curtailed acre-feet. The disparity is even more severe with respect to Clear Springs where, assuming an annual diversion of four-acre feet per acre, the curtailment of 52,470 acres eliminates the use of 209,880 acre-feet at steady state. The estimated gain to the Snake River Farm of 2.6 cfs amounts to 1,896.8 acre-feet annually, or 0.9 percent of the total amount curtailed.

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conjunctively administering ground and surface water sources.

Ground Water User's Opening Brief at 16.

This Court agrees in part and disagrees in part with position of the Ground Water Users. To add more perspective in the case of Clear Springs, the Director determined the wells impacting the sub-reach supply water to 52,470 acres. At an inch (.02 cfs) per acre standard approximately 1049 cfs is required to irrigate 52,470 acres. In essence the Director ordered curtailment of the diversion of 1049 cfs to provide a senior right with 2.7 cfs. In the case of Blue Lakes, the Director determined the wells impacting the reach supply water to 57,220 acres. At the same inch per acre standard 1144 cfs is required to irrigate 57,220 acres. The Director essentially ordered the curtailment of 1144 cfs to provide a senior right with 10 cfs. While the Director did take into account full economic development and the Hearing Officer considered the public interest criteria in support of using the margin of error trim-line, this Court reads the law regarding the state's policy of full economic development of ground water resources as standing for more than just lending support for factoring a margin of error into a scientific model to account for uncertainty. However, for the reasons discussed at length below, in the end, the result turns on the limitations of the model as applied to these particular set of circumstances; the constitutionally engrained burdens of proof; and treating all ground water pumpers as being similarly situated, which they are not.

1. The "Full Economic Development" policy of the Ground Water Act applies to hydraulically connected spring rights.

The prior appropriation doctrine is deeply rooted in Idaho law. Article 15 § 3 of the Idaho Constitution provides:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . Priority of appropriation shall give the better right as between those using the water . . . .

Idaho Const. Art. 15 § 3; *see also Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888) (recognizing doctrine prior to statehood). A core tenet of the prior appropriation doctrine is the principle of "first in time first in right." 1899 Idaho Sess.

Laws 380 (codified at I.C. § 42-106) ("As between appropriators first in time is first in right."). Originally the Idaho Constitution was silent as to the appropriation of ground water. In 1899, the Idaho legislature addressed ground water by declaring that subterranean waters were subject to appropriation. 1899 Idaho Sess. Laws 380 (codified at I.C. § 42-103) ("The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within the state shall hereafter be acquired . . . .") Historically, the prior appropriation doctrine was also applied to disputes involving ground water. *Hinton v. Little*, 50 Idaho 371, 296 P. 582 (1931); *Silkey v. Tiegs*, 51 Idaho 344, 5 p. 2d 1049 (1931).

In *Noh v. Stoner*, 53 Idaho 651, 26 P. 531 (1933), the Idaho Supreme Court addressed the issue of maintenance of water tables in a dispute involving a junior well interfering with a senior ground water right. The Court concluded that senior well owners were protected absolutely to the extent of their historical pumping level. Junior well owners could continue to pump so long as they held the senior harmless for the cost modifying or lowering the senior's means of diversion such that the senior received the same flow of water. *Id.* at 657, 26 P.2d at 1114. In 1951, the Idaho legislature enacted the Ground Water Act, Idaho Code 42-226 *et. seq.*, which among other things, modified the common law ruling in *Noh*. 1951 Idaho Sess. Laws, ch. 200 § 1, p.423. Although amended several times since its enactment, in 1953 the Act was amended to include provisions still in effect today and that are relevant to these proceedings. These provisions include in relevant part:

> The traditional policy of the state of Idaho, requiring the water resources of the state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of the state as said term is hereinafter defined *and, 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 resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels* as may be established by the director of the department of water resources as herein provided.

I.C. § 42-226 (emphasis added). Idaho Code § 42-230 of the Act defines ground water as "all water under the surface of the ground whatever may be the geological structure in which it is standing or moving."

In *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973), the Idaho Supreme Court addressed the application of the Ground Water Act in a dispute between ground water pumpers. The Court noted that the holding in *Noh* was "inconsistent with the full economic development of our ground water resources" and that "the Ground Water Act was intended to eliminate the harsh doctrine of *Noh*." *Id.* at 581-82, 513 P.2d at 633-34. The Court concluded that the Act is "consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest." *Id.* at 584, 513 P.2d at 636 (citing Idaho Const. Art. 15 § 7). Ultimately the Court held that the Ground Water Act "clearly prohibits the withdrawal of ground water beyond the average rate of future recharge" but that:

> [A] senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development. . . .
>
> In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water to promote full economic development of the resource . . . .
>
> We conclude that our legislature attempted to protect historic water rights while at the same time promoting full economic development of ground water. Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of diversion demands an unreasonable pumping level his historic means of diversion will not be protected.

Id. at 584, 513 P.2d at 636 (citations omitted).

In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), a subsequent case that addressed the application of the Ground Water Management Act to a domestic water right, the Idaho Supreme Court acknowledged "Article XV § 7 of the Idaho Constitution

provides in relevant part: 'There shall be constituted a water resource agency . . . which shall have the power to formulate and implement a state water plan for optimum development of resources in the public interest . . . under such laws as may be prescribed by the legislature.' . . . The Ground Water Act was the vehicle chosen to by the legislature to implement optimum development of water resources." *Id.* at 511-12, 650 P.2d at 653-54.

Although the cases addressing the Ground Water Act involve disputes between ground pumpers, the language of the Act extends its application to hydraulically connected surface sources. Idaho Code 42-237(a) and (g) provide in relevant part:

> a. In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources *in his sole discretion* is empowered . . . .
>
> g. To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. *Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act*[9], *the present or future use of any prior surface or ground water right* or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated rate of future natural recharge.

(emphasis added).

"Where a statute is clear and unambiguous the expressed intent of the legislature must be given effect. . . . There is no indication that the words of the Ground Water Act

[9] The language "contrary to the policy of this act" modifies "any prior or surface or ground water right" and therefore must be given effect. Senior surface and ground water users are protected in their means of diversion so long as their appropriations are consistent with the policy of the Act. *See supra* I.C. § 42-226 for declared policy of Act (" *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 resources. . .*).

should be interpreted in any way other than as they are normally used." *Parker* at 511, 650 P.2d 653 (citation omitted). Accordingly, under this Court's plain reading of the language of the Act, any surface water appropriation fed from a hydraulically connected ground water source regulated by the Act is effected by the Act. The Court's reading of the Ground Water Act is also consistent with the "Reasonable Use of Surface and Ground Water Policy" embodied in Rule 020.03 of the CMR, the constitutionality of which was upheld by the Idaho Supreme Court in *AFRD#2*. *See supra* ("An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule").

The policy of full economic development of ground water resources is consistent with the prior appropriation doctrine which incorporates a "public interest" component. *See Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 123 (1912) (appropriator not entitled to entire flow of river to support means of diversion); *Poole v. Olavson*, 82 Idaho 496, 502 356 P.2d 61, 67 (1960) (policy of law of state is to secure maximum use and benefit, and least useful use of its water resources); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1091 (1915) (policy of state to require highest and greatest possible duty from water of the state); *Farmer's Cooperative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 535-36, 102 P. 481, 491-92 (1909) (economy must be required and demanded in the use and application of water); I.C. § 42-101 ("Water being essential . . . depending upon its just apportionment to, and economical use by, those making beneficial application of the same. . . ."); Idaho Const. Art XV § 5 (such priority of right shall be subject to such reasonable limitations . . .); Idaho Const. XV § 7 (State Water Resource Agency shall have power to formulate and implement state water plan for optimum development of water resources in the public interest).

Ultimately what this means is that a senior surface right that depends on a connected aquifer for essentially what amounts to "dead storage" to support the means of diversion may not be not absolutely protected in the historic means of diversion to the extent the "dead storage" is not subject to appropriation or development by subsequent appropriators. While the senior would still be protected as to the full quantity of the water right, the means of diversion may have to be modified to access the full quantity.

In the end, what constitutes reasonable or acceptable amount of "dead storage" is a determination left to the Director. **Accordingly, the Director did not act contrary to law by considering the public interest and full economic development in considering the scope of curtailment of ground water wells in order to satisfy the rights of the senior Spring Users.**

2. The Director did not err in his application of the full economic development or public interest analysis.

The next issue is whether the Director erred or abused his discretion in the determination of what constitutes full economic development. The Director used full economic development for his implementation of the "trim-line." The application of the "trim-line" effectively reduced the scope of curtailment in the case of Blue Lakes' delivery call from 300,000 acres to 57,220 acres and in the case of Clear Springs' delivery call from 600,000 acres to 52,470 acres. R. Vol. 16 at 3711. The Director concluded that this result was not a monopolization of the resource.[10] The Ground Water Users point to the significant disparity between the useable quantities of water made available to the Spring Users and the scope of the curtailment to the Ground Water Users. This Court notes that the disparity is further exacerbated by the fact that the majority of the projected increase to the respective sub-reaches is water not used by the Spring Users and discharges from the aquifer through other spring complexes. While this Court acknowledges the disparity, ultimately the case has to be evaluated within the context of the standard of review.

The evidence in this case is overwhelming that the curtailment of ground water does not result in a timely proportionate increase to spring flows. Implicit in the CMR is the acknowledgment that there will be a disparity in the ground water use curtailed and the quantity of surface water produced. For example, the CMR provide for phased-in curtailment or mitigation where the effects of curtailment will not be immediately measurable. CMR 020.04, 040.01a. The CMR do not establish an acceptable or

[10] Without the trim line the scope of curtailment would have been much larger. Accordingly, ground pumpers were permitted to continue to use water.

reasonable ratio nor has the Legislature. Nor do the CMR require that a surface right holder automatically convert to ground water pumping. Instead the CMR speak in terms of "reasonableness." Accordingly, any public interest or full economic development analysis has to start with the premise that a certain amount of undeveloped water or "dead storage" is acceptable. The reasonable use of surface and ground water provisions of CMR 020.03 and the full economic development provision of the Ground Water Act contemplate a certain amount of balancing of the reasonable exercise of senior priority rights against the State's policy of full economic development of its water resources. Finally, and right, wrong or indifferent, the Director is vested with a large amount of discretion in making the determination as to what is "reasonable." *AFRD #2* at 875, 154 P.3d at 446.

A significant issue in *AFRD #2* was the lack of objective criteria provided in the CMR, particularly with respect to the "reasonableness standard." This problem was addressed at length in the opinion of the district court:

> The application of the CMR's is further problematic because of the absence of any objective standards from which to evaluate the criteria the Director is to consider when responding to a delivery call. The CMR's list the various criteria the Director is to consider when responding to a delivery call, and then evaluate these criteria in the context of a "reasonableness standard." However, there is nothing more concrete to establish what is or is not reasonable. . . . The way the CMR's are now structured, the Director becomes the final arbiter regarding what is "reasonable" without the application or governance of any express objective standards or evidentiary burdens. The determination essentially becomes one of discretion, which is inconsistent of the constitutional protections specifically accorded water rights. **The absence of any meaningful burdens also eliminates the possibility for any meaningful judicial review of the Director's action as under applicable standards of review, as any reviewing court would always be bound by the Director's recommendation as to what constitute reasonableness.**

American Falls Reservoir District # 2 v. IDWR, Gooding Dist. Court Case No. CV-2005-0000600, page 95 (June 2, 2006) (Hon. R. Barry Wood) (emphasis added). The Idaho Supreme Court upheld the constitutionality of the CMR despite the lack of objective standards or criteria. *AFRD #2* at 875-76, 154 P.3d at 446-47. If it is possible to define such standards, perhaps this is a matter for the legislature to address.

This however, does not mean the Ground Water Users were entirely without recourse. "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge in some other constitutionally permissible way, the senior's call." *AFRD # 2*, at 877, 154 P.3d at 449. The parties were given the opportunity for a hearing and to present evidence in defense of the call and what is "reasonable." However, no results of alternative methodologies were presented from which to review the Director's determination of reasonableness. The ESPA model only predicts gains that would accrue to the specific sub-reaches as opposed to the specific spring complexes. The Director ordered curtailment based on the quantities that would accrue to the two sub-reaches. Replacement water was ordered based on estimated quantity that would accrue to the spring complexes supplying the facilities as a result of the curtailment. For want of a better available methodology, the Director treated all ground pumpers determined to be impacting the entire sub-reach the same, even though a well immediately adjacent the spring complex may have much more significant of an impact to spring flows than a well 40 miles away. Evidence was presented by experts for both parties that methods exist for more particularly analyzing which wells more directly impact specific spring complexes. TR. at 1866-67 (Brendeke Testimony); (Exh. 312 at 12-13, Brockway). Those methods may well have reduced the scope of the curtailment to produce the same quantity of useable water to the Spring Users specific spring complexes, thereby making the Director's scope of curtailment "unreasonable." However, the results of any other methodology supporting a more targeted scope of curtailment were not presented at the hearing.[11] The Director made the determination based on the evidence and administrative tools that he had available.

The Director also made the finding that the Spring Users were employing reasonable diversion, conveyance efficiency and conservation practices pursuant to CMR 042.01.g. *May 19, 2005, Blue Lakes Order* at 59; *July 8, 2005, Clear Springs Order* at 36. He further found that based on the results of a field inspection there were no alternate

[11] The Court can only surmise that the Ground Water Users deliberately decided not to present such evidence. To have done so may have resulted in the interest of one ground water user being pitted against another. Thus far the ground water users have presented a united front in this litigation.

means of diversion or alternate points of diversion. *Id.* Director Dreher, in his testimony explained why it was not reasonable to require the Spring Users to drill horizontal wells in order to obtain their water.

> A. Well, in my view it wasn't reasonable because those horizontal wells would simply capture water that otherwise would have been discharged through other spring complexes. And so it would have, assuming that other water right holders where the source of supply was the spring also drilled horizontal wells, essentially it would result in, you know a number of entities constructing and further constructing horizontal wells, essentially competing with each other for the same source of supply. It was not going to increase the supply overall and therefore was not reasonable.
>
> Q. Were there any other reasons that you determined that requiring spring users to drill horizontal wells was not a reasonable requirement?
>
> A. Well, if –there was a need to construct a horizontal well, and if the horizontal well would have enhanced [] the suppl[y]—which I already said it wouldn't have. – I determined that it wasn't –that was not a reasonable expense that should be born by the senior if the need for the horizontal well was caused by injury from junior priority rights.

TR. at 1360 (Dreher Testimony). The Director not only determined that sinking a horizontal well would not enhance water supplies but would also interfere with the spring flows of other spring users.

In the end, the Director balanced the reasonable use of the senior surface rights against the State's policy of full economic development and the public interest as required by the CMR. While there may be significant disagreement over the Director's determination of reasonableness and the result ultimately reached, no concrete evidence was presented of viable reasonable alternatives. **Accordingly, based on the applicable standard of review, this Court cannot conclude that that Director abused discretion or acted arbitrarily or capriciously in his determination.**

3. The Swan Falls Agreement and State Water Plan, while defining full economic development of the ESPA, are insufficient for administering rights on a smaller scale.

The Ground Water Users argue that the scope of curtailment also violates the provisions of the State Water Plan and the Swan Falls Agreement. The Ground Water Users' argument is that to the extent curtailment of ground water rights to maintain spring flows results in flows exceeding the minimum flow requirements at the Murphy Gauge, the State Water Plan and Swan Falls Agreement are violated. The Hearing Officer concluded on summary judgment that that the Spring Users were not parties to the Swan Falls Agreement and rejected the argument. R. Vol. 14 at 3240. While the Spring Users were not parties to the Swan Falls Agreement, the State Water Plan and the Swan Falls Agreement establish at least on a macro scale what constitutes "full economic development" of the ESPA. The intent of the Swan Falls Agreement was to provide for full development of the ESPA below Milner Dam and satisfy Idaho Power's hydropower rights by meeting the minimum flow requirements at the Murphy Gauge.[12] *See* Exh. 437 at 5. For the reasons previously discussed, the rights of the Spring Users are subject to the full economic development provisions of the Ground Water Act and the CMR.

The Ground Water Users argue that management of the ESPA based on the minimum flows at the Murphy Gauge not only facilitates full economic development but also provides protection to both spring users and hydropower rights. This is only partially true. The State Water Plan and Swan Falls Agreement establish an overall cumulative minimum for spring flows as measured at Murphy Gauge. The Murphy Gauge is located on the main stem of the Snake River well below the Thousand Springs area. Neither the State Water Plan nor the Swan Falls Agreement establishes minimum flows for the particular sub-reaches or individual spring complexes at issue in this matter.

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[12] In brief terms, the State Water Plan sets a "zero flow" at Milner Dam to allow for full development of the River above Milner. The source for the Snake River below Milner relies on tributary flows and gains from spring discharges from the ESPA. The State Water Plan also sets minimum flows at the Murphy Gauge located below the Swan Falls Dam on the Snake River. Development of the ground water on the ESPA affects the minimum flows. In resolution of a dispute over the status of Idaho Power's hydropower rights, the State and Idaho Power entered into the Swan Falls Agreement. Among other things, the Swan Falls Agreement provided for the amendment of the State Water Plan raising the minimum flows at Murphy and for the development of additional ground water "trust rights" on the ESPA. The intent being that Idaho Power would be guaranteed minimum flows and the ESPA would be fully developed once the minimum flows were reached. In 1992, a moratorium was placed on the issuance of new rights.

The Thousand Springs area is divided into six different sub-reaches and according to the Director's finding regarding the trim-line, pumping in one sub-reach may have no effect on the spring flows in a different sub-reach. Therefore, it is possible for ground water pumping to disproportionately deplete a particular sub-reach without affecting other sub-reaches and still satisfy the terms of the Swan Falls Agreement. It is also possible for ground water pumping immediately adjacent to a spring complex to impact the spring complex and still satisfy the terms of the State Water Plan and Swan Falls Agreement. In other words, it is possible to over-develop a particular sub-reach and still satisfy the Swan Falls Agreement.

Second, the Swan Falls Agreement only provides a minimum protection for spring flows if the Director administers ground water rights on a long range and on an anticipatory basis to meet the minimum flows at Murphy Gauge. At one point between 2000 and 2004 there was concern that the flows at Murphy Gauge would drop below the minimum flows. As a result of the delayed effect of curtailing ground water rights, Director Dreher was prepared to issue curtailment orders to *surface right holders* on the Snake River and then follow up later with the curtailment of ground water rights if necessary. TR. at 1421-22. If surface rights were curtailed to meet the minimum flows, none of the water realized from the curtailment would have benefitted the aquaculture facilities.[13] *Id.* Accordingly, because the Swan Falls Agreement does not define full economic development on a more regional basis and until such time as the ESPA is administered on a long range basis to meet the minimum flows[14], the Swan Falls

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[13] Former Director Dunn illustrated this problem in his testimony when he explained his understanding of what would happen if the flows at Murphy were to drop below the minimums.

> Its my opinion that the state would be obligated to do one of two things. Either have obtained storage water upstream that can be released down to augment the flow; or they're going to have to compensate Idaho Power Company in dollars to help then recover the loss of energy because the flows went down.

TR. at 1047 (Dunn).

[14] Meaning the aquifer is managed such that sources other than ground water rights from the ESPA do not need to be relied on to satisfy minimum flows in times of shortage even on a short term basis. If the minimum flows are in danger of not being met then by implication spring flows are reduced. Relying on non-ESPA sources to satisfy minimum flows effectively bypasses the springs affording no relief to the Spring Users.

Agreement and State Water Plan are not conclusive of full economic development in responding to individual delivery calls.

E. The replacement water plans.

In the May 19, 2009 Blue Lakes *Order*, the Director found that Blue Lakes' water right no. 36-07427 suffered material injury, due to the pumping of junior priority ground water rights. Based on this determination, the Director ordered curtailment of 57,220 acres, which would produce 10 cfs to Blue Lakes. The Director further concluded that "[u]nless a replacement water supply of suitable water quality for use by Blue Lakes Trout is provided by the holders of junior priority ground water rights causing material injury to water right no. 36-07427, or by the ground water district(s) or irrigation district through which mitigation can be provided, the Director should order the curtailment of such rights..." R. Vol. 1 at 71. In sum, the Director ordered replacement water in lieu of curtailment provided by the holders of the junior ground water rights. On June 7, 2005, the Director partially approved the Ground Water Users' replacement water plan, without a hearing. However, the Director ordered that the ground users had seven days to amend their plan to sufficiently provide for the full 10 cfs required by the Director's original *Order*. On July 6, 2005, the Director approved the ground water user's supplemental replacement water plan.

Similarly, in his July 8, 2005 *Order*, the Director found material injury to Clear Springs' water right nos. 36-04013B and 36-07148. Again, the Director ordered curtailment of acres, but to be "offset by verified substitute curtailment, until there is no longer material injury." *Id.* at 520. In 2006, the Ground Water Users filed a joint replacement water plan in response to both *Orders* issued by the Director. R. Vol. 5 at 881. However, this plan was not approved by the Director, and the Director did not order curtailment at that time. On June 29, 2007, the Ground Water Users submitted another replacement water plan. This plan was submitted in response to an *Order Curtailing Junior Priority Ground Water Rights*, issued by the Director on June 15, 2007. R. Vol 7 at 1446. On July 5, 2007, the Director approved the Ground Water Users' replacement water plan. In addition, the Director ordered that a joint hearing, presided over by an

independent hearing officer, commence in the matter of both the Clear Springs and the Blue Lakes delivery calls. *Id.*

Under the CMR, the Director is charged with determining material injury to a senior water user in an organized ground water district, after that user has initiated a call by filing a petition with the Director. *See* CMR 040 and CMR 042. As a part of this process, if the Director finds material injury, he must determine what amount of water is owed to the senior user, in order to determine if curtailment of junior water rights is necessary. In this case, both parties argue that the Director exceeded his authority when he ordered replacement water in his May 19, 2009 Blue Lakes and his July 8, 2005 Clear Springs *Orders*. First, the Ground Water Users argue that the Director exceeded his authority by not providing the parties an opportunity for a hearing before ordering a replacement water plan. Second, the Spring Users argue that the Director does not have the power to order replacement water under the CMR. Third, the Spring Users argue the Director also exceeded his authority when he approved replacement water plans without a hearing, as required by the CMR. Finally, the Spring Users argue that the Director abused his discretion when he did not order curtailment after finding that the initial replacement water plans were insufficient to satisfy senior surface rights.

1. I.C. § 42-607 and the CMR do not expressly require the Director to hold a hearing before issuing an order of curtailment in an organized water district.

Blue Lakes and Clear Springs initiated the delivery calls at issue in this matter by requesting that the watermaster for Water District 130 administer water rights in Water District 130. Water District 130 contains water rights that are hydrologically connected through the ESPA to both Clear Springs' and Blue Lakes' water rights. I.C. § 42-607 provides for the distribution of water rights within a water district:

> **42-607. Distribution of water.**
> It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of

> water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; provided, that any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such stream or water supply, and the watermaster shall close all headgates of ditches or other diversions having no adjudicated, decreed, permit or licensed right if necessary to supply adjudicated, decreed, permit or licensed right in such stream or water supply. So long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user.

I.C. § 42-607 makes clear that a watermaster in an organized water district, such as Water District 130, must administer adjudicated or licensed rights in times of shortage in order to supply senior water users. The legislature authorized the Director to create such water districts under I.C. § 42-604, in order to allow for ease of administration in times of shortage. There is no express requirement under this section for the watermaster to hold a hearing prior to shutting off the headgates or ditches of junior water right holders. However, because water rights are property rights, a due process argument can be made that notice and a hearing are indeed required before curtailment of such rights by a watermaster under I.C. § 42-607 even absent an expressed requirement for a hearing within the statute itself.

I.C. § 42-603 authorizes the Director to adopt rules and regulations for the distribution of water. The CMR supplement the Director's authority in I.C. § 42-607. The CMR expressly distinguish between delivery calls made within an organized water district (CMR 040), calls made outside an organized water district (CMR 030), and calls made within a ground water management area (CMR 040). The CMR treat delivery calls made outside of an organized water district as a "contested case" under IDAPA 37.01.01[15], and expressly provide for notice and an administrative hearing process. CMR 030.02. Similarly, CMR 041.01 also requires a hearing, once a delivery call is initiated in a ground water management area:

041. ADMINISTRATION OF DIVERSION AND USE OF WATER WITHIN A GROUND WATER MANAGEMENT AREA (RULE 41).

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority ground water right against holders of junior-priority ground water rights in a designated ground water management area alleging that the ground water supply is insufficient to meet the demands of water rights within all or portions of the ground water management area and requesting the Director to order water right holders, on a time priority basis, to cease or reduce withdrawal of water, the Director shall proceed as follows:

> **a.** The petitioner shall be required to submit all information available to petitioner on which the claim is based that the water supply is insufficient.
>
> **b.** *The Director shall conduct a fact-finding hearing* on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area.

(emphasis added). However, the CMR do not require the same procedure before an order of curtailment is entered in an organized water district, under CMR Rule 40:

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

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

> **a.** Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that

[15] IDAPA 37.01.01 consists of IDWR's procedural rules.

> regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or
>
> **b.** Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.
>
> **02.** Regulation of Uses of Water by Watermaster. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in Section 42-604, Idaho Code, and under the following procedures: ...

In an organized water district, as in this case, according to the CMR, the Director must either order curtailment of the junior water rights, or allow out-of priority diversions pursuant to an approved mitigation plan. Mitigation plans under the CMR are governed by Rule 43:

> **043. MITIGATION PLANS (RULE 43).**
> **02.** Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights.

Once a mitigation plan has been proposed, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer, as set out in I.C. § 42-222, which provides in relevant part:

> Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. *Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon.*

(emphasis added). While the CMR are vague with respect to procedural framework components, the Idaho Supreme Court acknowledged such and upheld the constitutionality of these rules in *AFRD#2*. As such, the Director is required to follow the procedures for conjunctive administration as outlined in the CMR when responding to a delivery call between surface and ground water users.

3. The Director exceeded his authority by ordering replacement water without a hearing and approving a mitigation plan without a hearing.

In this case, the Director issued two orders in response to the delivery calls initiated by Clear Springs and Blue Lakes. In each order, the Director ordered curtailment, but allowed the junior Ground Water Users time to submit "replacement water plans." The face of each order contained the following paragraph:

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

R. Vol. 1, at. 75 and R. Vol. 3, at. 525. As a result, while I.C. § 42-607 and the CMR do not provide for a hearing before an order of curtailment is entered, the Director appropriately provided for a hearing, should any person aggrieved by his orders request one. After the Director entered his May 19, 2005 Blue Lakes *Order*, the Ground Water Users filed a request for a hearing within the 15-day timeframe, on June 2, 2005. The Ground Water Users now argue that their due process rights have been violated because they were not afforded a hearing at that time.[16] IDWR contends that the Director was

[16] The Ground Water Users have filed six requests for hearing in this matter. Blue Lakes also filed at least one request for hearing. *See* July 5, 2007 *Order Approving Dairymen's and IGWA's 2007 Replacement*

within his authority to order replacement water without a hearing in either delivery call because such orders were issued on an "emergency basis." This Court disagrees.

The Director categorized the circumstances surrounding these calls as an emergency because the Ground Water Users had already made preparations for the upcoming irrigation season. As a result, the Director believed that the Ground Water Users required certainty as to what they were obligated to provide to the senior users, prior to the start of the irrigation season. All delivery calls are emergencies in this sense. However, the urgent nature of a delivery call does not excuse the Director from following the procedural requirements set out in the CMR, and in his own orders. The Director and IDWR are correct that issuing an initial order is proper because it puts the junior Ground Water Users on notice as to what is owed to the seniors, and places the senior Spring Users on notice as to what amount of water they are entitled to pursuant to the Director's investigation and determination of material injury. For practical reasons, before the Director can hear evidence about water supply, diversion, and use of water, he must first issue an order, informing the parties of his initial determination of material injury. However, once a hearing is requested by one of the parties pursuant to the provisions of the curtailment order itself, the Director is then required to hold a hearing. IDAPA 37.01.01.740; I.C. § 42-1701A.

Further, this is consistent with constitutional due process requirements. The Federal and the Idaho State Constitutions require that no state "shall deprive any person of life, liberty, or property without due process of law." U.S. Const., Amend. 14 §1; Idaho Const. art. I, § 13. A court must weigh three factors in order to determine what procedures are required to satisfy constitutional due process: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, (1976). Generally, notice and a hearing are required by law before

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Water Plan, Rescinding 2007 Curtailment, and Setting Hearing and Prehearing Schedule, R. Vol. 9, 1910. Clear Springs also filed a request for hearing on July 25, 2005. R. Vol. 3 at 557.

deprivation of property rights, except in "extraordinary situations." *Lowder v. Minidoka County Joint School Dist.*, 132 Idaho 834, 840, 979 P.2d 1192, 1198 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, (1971)). In some cases, however, taking into consideration the *Mathews* factors above, a postdeprivation hearing will satisfy constitutional due process. *Zinermon v. Burch*, 494 U.S. 113, 128-129, 110 S. Ct. 975, 984-985 (1990).

In this case, the Director did not provide a hearing before issuing orders of curtailment.[17] In addition, he did not hold a hearing on the 2005 orders of curtailment until 2007. Taking into consideration the interests of the senior and junior water users along with the Director's interest in efficiently administering water rights, this Court finds that providing the parties with a hearing after the initial curtailment orders were issued would have been consistent with due process. A hearing is not required before the curtailment orders are issued because, as mentioned above, the Director is required by the CMR to make an initial material injury determination and must put both the senior and junior water users on notice of his decision. However, after the initial order is issued and pursuant to the constitutional requirements of due process, the parties pursuant to notice and upon request are entitled to a hearing before the junior rights are curtailed and before the senior rights are injured further.

4. The Director's order of replacement water was a mitigation plan for purposes of the CMR.

The Spring Users argue that the Director does not have the authority under the CMR to order a replacement water plan. They contend that the Director must either order curtailment of junior rights, or accept out-of-priority diversions pursuant to an approved mitigation plan. IDWR in turn argues that the Director has the authority to order replacement plans in order to offset the injury suffered by the senior water users as an alternative to curtailment, pursuant to his authority under I.C. § 42-602. Further, IDWR argues that the Director is not limited to the procedures set out in the CMR, because

[17] The Director did hold a hearing on June 5, 2006, for the sole purpose of reviewing 2005 mitigation plans. *See* R. Vol. 6 at 1186. In addition, the Director ordered a hearing in front of an independent hearing officer, which took place in late 2007. *See* R. Vol. 7 at 1446.

under Rule 5, "[n]othing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law."

Replacement water is a tool that the Director may use when administering water rights under I.C. § 42-602, in order to offset injury to senior users during times of shortage. Generally, however, replacement water provided by a junior to satisfy a senior water right is delivered directly to the senior's place of use in order to replace the water that the senior cannot receive via his traditional means of diversion. In this case, the Director ordered that "replacement water" be delivered to Clear Springs and Blue Lakes via a number of methods, including substitute curtailment and aquifer recharge. Due to the unique relationship between surface and ground water, replacement water delivered via recharge and substitute curtailment is delayed, whereas replacement water delivered directly to the senior's place of use has an immediate effect. Therefore, there is a distinct difference between a replacement water plan in the traditional sense and the replacement water plan ordered in this case. The replacement water plan ordered in this case is for all intents and purposes a mitigation plan under the CMR. Perhaps Mr. Luke characterized it best in this testimony where he states: "Yeah. It seems like semantics to me." TR. at 748 (Luke). While the Director has the authority to order replacement water in order to immediately offset injury, in this case, the Director's "replacement plan" was instead a "mitigation plan" within the application of the CMR.

Finally, while it is true that the Director's authority is not limited to the standards set out in the CMR, the CMR provide the mechanism for the Director to use when conducting conjunctive administration. The Idaho Supreme Court upheld the constitutionality of these rules in *AFRD#2*. Therefore, the Director should adhere to the CMR when responding to a conjunctive management delivery call.

5. The Director exceeded his authority when he did not provide opportunity for a hearing in response to the submission of the Ground Water Users' mitigation plans.

As mentioned above, CMR 043 sets out the procedures for responding to the submission of a mitigation plan. Once a junior water user files a mitigation plan with the

Director, the Director must hold a hearing as determined necessary before approving such a plan. Rule 43 requires the Director to follow the procedures for a transfer under I.C. § 42-222. In this case, the Director did not provide for a hearing after the junior Ground Water Users submitted mitigation plans. Instead, he approved such plans without a hearing, and therefore exceeded his authority.

Without providing an opportunity for a hearing consistent with CMR 043, the Director had no authority to approve a mitigation plan and should therefore have issued an order curtailing junior ground water pumping. While the Director held a hearing in June 2006, this was almost one year after his initial approval of the Ground Water User's Blue Lakes mitigation plan, and is an untimely response to a delivery call under *AFRD#2*. R. Vol. 6 at 1186. As was cited by all parties in this case, the Idaho Supreme Court held in *AFRD#2* that before having a hearing, "[i]t is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the original facts." *Id.* at 875, P.3d at 446. However, the Court also held that "a timely response is required when a delivery call is made and water is necessary to respond to that call." *Id.* at 874, P.3d at 445. Clearly, this is such a case. Because the Director waited one year to hold a hearing on mitigation plans that were submitted to him soon after issuing his curtailment orders, he abused his discretion. The delay in holding a hearing as required by the CMR was unreasonable, in light of the "emergency" nature of all delivery calls. Under the CMR, a more appropriate course of action for the Director to follow would have been to issue the initial curtailment order, provide the junior Ground Water Users time to submit a mitigation plan before making that order final, and then hold a hearing on the order of curtailment and material injury (as discussed in the previous section) and the mitigation plan at the same time.[18]

[18] This matter was further complicated by the overlap between the two delivery calls. A mitigation plan submitted by the Ground Water Users in response to the Blue Lakes call was determined by the Director to apply to both delivery calls, even though it was submitted by the Ground Water Users prior to the Director's *July 8, 2005, Clear Springs Order*. *See* R. Vol. 5 at 805-811. The Director did not require an additional mitigation plan specific to Clear Springs until April 2006, nine months after his *July 8, 2005, Clear Springs Order*. *Id.* Thereafter, the Director held a hearing on the sufficiency of the mitigation plans submitted by the Ground Water Users. However, this hearing took place almost a year after approving the Ground Water Users 2005 mitigation plan and eleven months after issuing his *July 8, 2005, Clear Springs Order*. R. Vol. 6 at 1186.

In his July 5, 2007 *Order Approving Dairymen's and the Ground Water Users' 2007 Replacement Water Plan, Rescinding 2007 Curtailment, and Setting Hearing and Prehearing Schedule*, the Director stated that the reason for the delay in hearing was due to "legal maneuvering of the parties, requests by the parties for schedule changes, and matters wholly unrelated to the delivery call proceeding initiated by Blue Lakes *see AFRD#2*." R. Vol. 9 at 1910. In addition, the Hearing Officer and IDWR argue that because the constitutionality of the CMR was up on review before the Supreme Court, the Director was within his discretion to delay the hearing. None of these factors provide an excuse for failure to conduct a timely hearing. When the Director recognized material injury to Clear Springs and Blue Lakes under the criteria set out under CMR 042, he was obligated to follow the procedures outlined in the CMR and provide the parties with due process. By delaying the hearing on this matter, both parties continued to suffer injury and uncertainty, at great expense to both sides.

6. The Director abused his discretion when he did not order curtailment once he found that the mitigation plans were inadequate to satisfy Clear Springs' and Blue Lakes' rights.

In 2005, the Ground Water Users submitted mitigation plans that were approved by the Director, both of which appeared to be sufficient to satisfy senior priority rights under the Director's original curtailment orders. However, in 2006 the Director did not approve the Ground Water Users' 2006 mitigation plans, due to Judge Wood's decision that the CMR were unconstitutional. At the time, the Director argued that he could not have approved mitigation plans until the Idaho Supreme Court heard the matter. The Spring Users argue that the Director still had the duty to administer water rights under Title 42, including the duty to accept mitigation plans. However, at that time, the Director took no action.

In 2007, after the Idaho Supreme Court's decision reviewing the CMR in *AFRD#2,* the Director once again ordered curtailment. R. Vol 7 at 1446. The Ground Water Users in turn submitted a joint mitigation plan in response to the Director's *Order of Curtailment*. The Ground Water Users were required by the Director to provide 30 cfs under phased-in curtailment, but the joint mitigation plan provided for only 19.6 cfs to

Blue Lakes. As a result, enforcement of the Director's *Order* was stayed so that the juniors could have a chance to provide the full amount of water required. In addition, the Ground Water Users were also required to provide 23 cfs under the phased-in curtailment. However, the Ground Water Users' mitigation plan provided for only 10.6 cfs to Clear Springs. Again, curtailment was suspended by the Director so that the junior Ground Water Users could submit another plan. Finally, after the Ground Water Users submitted a supplemental joint mitigation plan, the Director approved it without a hearing, even though the amount of mitigation provided still fell short of what he initially required. *See* Director's *Order*, R. Vol. 9 at 1911. The Director approved the Ground Water Users supplemental plan because he found that the senior users were owed less replacement water for two reasons: 1) it was late in the irrigation season, so they required less water and 2) the Director used a different analysis to determine how much water would be needed by the senior users (he used a 'steady-state' version of the model originally, but in this determination, switched to a 'transient' analysis). In any event, the Director acknowledged in his *Order* approving the supplemental plan that the amounts in the plan were insufficient to meet the senior's needs. However, the Director rescinded his earlier *Order of Curtailment* and approved the mitigation plan regardless. *Id.*

The Spring Users argue that the Director abused his discretion by approving mitigation plans that admittedly were insufficient to satisfy senior surface rights. This Court agrees. Under CMR 040, the Director, upon a finding of material injury, is required to order curtailment of junior rights, or accept out-of-priority diversions pursuant to an approved mitigation plan. CMR 043 provides the factors that the Director should take into account when approving such a plan:

> **03. Factors to Be Considered.** Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:
>
> > **a.** Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law.
> >
> > **b.** *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*. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.
>
> **c.** Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority *water right when needed during a time of shortage* even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable.
>
> ...
>
> **o.** Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions.

(emphasis added). The CMR contemplate that the Director will take into account whether or not the plan will satisfy the senior priority water rights, and only approve such a plan if it accomplishes that goal, unless some other agreement can be reached between the Spring Users and the Ground Water Users. For instance, CMR 040.05 provides:

> **05. Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective.** Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or *the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights*, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.

(emphasis added). In this case, no agreement between the parties was reached, and the mitigation plan was by the Director's own admission inadequate to satisfy senior priority rights. *See* Director's *Order*, R. Vol. 9 at 1911. As stated above, the Idaho Supreme Court upheld the constitutionality of the CMR as the guidelines and procedures for conjunctive administration in the State of Idaho. The Director is obligated to follow the rules when administering ground and surface water rights in an organized water district in

response to a delivery call. As such, under the CMR, if a mitigation plan is not sufficient to satisfy senior priority water rights, the Director must order immediate curtailment. The rules do not provide for another alternative.

While the Court has determined that the Director abused his discretion and exceeded his authority by failing to hold a timely hearing on proposed mitigation plans and ordering replacement water without holding a timely hearing, and failing to order curtailment after finding the mitigation plans to be inadequate, the Court recognizes, as did Justice Schroeder, that the remedy at this point is to move forward since a hearing was ultimately held and curtailment may yet be ordered on remand.

F. The use of phased-in curtailment or mitigation obligations by junior Ground Water Pumpers is not contrary to law.

The use of phased-in curtailment is expressly authorized by the CMR. The Idaho Supreme Court upheld the constitutionality of the CMR pursuant to a facial challenge. Accordingly, this issue has already been decided. CMR 020.04. provides:

> **020. General Statements of Purpose and Policies for Conjunctive Management of Surface and Ground Water Resources (Rule 20).**
>
> **04. Delivery Calls.** These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, *these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.*

(emphasis added). CMR 040.01 provides:

> **040. Responses to Calls for Water Delivery Made by the Holders of Senior-Priority Surface or Ground Water Rights Against the Holders of Junior-Priority Ground Water Rights From Areas Having a Common Ground Water Supply in an Organized Water District (RULE 40).**
>
> **01. Responding to a Delivery Call.** When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:
>
> **a.** Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use *where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment*; or
>
> **b.** Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

(emphasis added). Phased-in mitigation in the form of replacement water is in lieu of curtailment. Accordingly, mitigation need not put a senior in better position than would otherwise occur under curtailment. The use of phased-in curtailment is therefore not contrary to law.

G. The Director did not abuse discretion by failing to apply the futile call doctrine with respect to the amount of time required for curtailment to produce increased spring flows.

This issue was substantially answered in the issues pertaining to full economic development. However, CMR 010.08 defines "Futile Call" as:

> A delivery call made by a holder of a senior-priority surface or ground water right that, for physical or hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions

> under junior- priority ground water rights or that would result in waste of the resource.

IDAPA 37.03.11.010.08. The Hearing Officer determined:

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

R. Vol. 16 at 3709.

The CMR acknowledge that relief from curtailment will not be immediate. CMR 020.04 "Delivery Calls" provides that the rules "may require mitigation or staged or phased in curtailment of junior priority use if diversion and use of water by the holder of the junior priority water right causes material injury . . . even though not immediately measurable . . . where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior priority water use was discontinued." IDAPA 37.03.11.020.04. The Ground water Users argue that the solution to reasonable use lies in reigning in the scope of the curtailment so that a significant portion of the curtailed water use will within a reasonable time accrue to the springs. *Opening Brief* at 47. The Director made a determination of "reasonableness." This Court acknowledges and the evidence supports that the lesser the distance between a curtailed ground water right and the target springs, the greater the return on curtailment and the less time it takes for the effects of curtailment to be realized. TR. at 931 (Harmon); TR. at 1414 (Dreher); Brendecke, R. Supp. Vol. 3 at 4455. Again, evidence was presented by experts for both parties that methodologies exist for more particularly analyzing which

wells more directly impact specific spring complexes. *See supra.* Those methods may well have reduced the scope of the curtailment to produce the same quantity of useable water to the Spring Users specific spring complexes, thereby making the Director's scope of curtailment "unreasonable." However, the burden was on the Ground Water Users to present the results of such an alternative. *AFRD # 2*, at 877, 154 P.3d at 449. In the context of the applicable standard of review, this Court can only affirm the Director's decision.

VI.
CONCLUSION

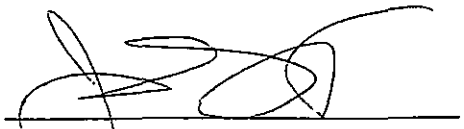
1. The case is **remanded** so that the Director may apply the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury determination as explained herein.

2. While the Court has ruled that the Director has abused his discretion and exceeded his authority by failing to hold a timely hearing on proposed mitigation plans and ordering replacement water without holding a timely hearing and failing to order curtailment after finding the mitigation plans inadequate, there is no practical remedy at this point in these proceedings.

3. In all other respects, the decision of the Director is **affirmed.**

IT IS SO ORDERED

Dated June 19, 2009



JOHN M. MELANSON
District Judge

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 22nd day of June, 2009, pursuant to Rule 77(d) I.R.C.P., I have filed this day and caused to be delivered a true and correct copy of the within and foregoing instrument: Order on Petition for Judicial Review of Agency Record to the parties listed below via US Mail postage prepaid:

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CLERK OF THE DISTRICT COURT

BY _____
Deputy Clerk

Notice of Orders
Certificate of Mailing
IRCP 77(d)