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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR SPRINGS FOODS, INC., Petitioner, vs. **GARY SPACKMAN**, in his capacity as Director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES,** Respondents.	CASE NO. CV 2008-444 **BLUE LAKES TROUT FARM, INC.'S AND CLEAR SPRINGS FOODS, INC.'S BRIEF IN SUPPORT OF JOINT PETITION FOR REHEARING**
IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-0413A, 36-04013B, AND 36-07148. **(Clear Springs Delivery Call)** **IN THE MATER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210, AND 36-07427.** **(Blue Lakes Delivery Call)**	

COME NOW, Petitioners BLUE LAKES TROUT FARM, INC. ("Blue Lakes") and CLEAR SPRINGS FOODS, INC. ("Clear Springs) (hereinafter collectively referred to as "Spring Users"), by and through their counsel of record, and hereby submits this *Brief in Support of Joint Petition for Rehearing* pursuant to I.R.C.P. 84(r) and I.A.R. 42.

STATEMENT OF THE CASE

The Court issued its *Order on Petition for Judicial Review* ("*Order*") on June 19, 2009. The Court, among other rulings, remanded the Director's July 11, 2008 Final Order in part on the issue of "seasonal variation".

ISSUES ON REHEARING

The Spring Users *Joint Petition for Rehearing* seeks rehearing on the following issues:

1. Whether the evidence and findings in the record establish that Blue Lakes' water right 36-7210 and Clear Springs' water right 36-4013A are injured by junior ground water diversions.

2. The necessity and scope of the Court's remand relating to the Director's consideration of the "seasonal variations", given the substantial and uncontroverted evidence in the record and the findings by the Hearing Officer establishing that Blue Lakes' water right 36-7210 and Clear Springs' water right 36-4013A are materially injured by junior ground water diversions

3. Whether Idaho law requires a hearing to be held prior to regulation of junior priority ground water rights in an organized water district that are causing material injury to senior surface water rights and do not have an approved mitigation plan in place.

4. Given the Court's findings that the Director abused his discretion by failing to hold timely hearings on mitigation plans and by failing to order curtailment after finding

mitigation plans to be inadequate, whether it is necessary for the Court to remand the case to the Director with instructions on procedures that will provide for the timely administration and enforcement of mitigation plans.

STANDARD OF REVIEW

The right to petition for rehearing is set forth in I.R.C.P. 84(r) and I.A.R. 42. In accordance with these rules, the Spring Users filed a *Joint Petition for Rehearing* with the Clerk of the Court within twenty-one (21) days after the filing date of the Court's *Order*. This brief is filed pursuant to that rule and the Court's August 20, 2009 *Amended Scheduling Order on Petitions for Rehearing*.

I. The Evidence and Findings in the Record Establish that Blue Lakes' Water Right 36-7210 and Clear Springs' Water Right 36-4013A are Materially Injured by Junior Ground Water Diversions.

The Spring Users sought judicial review of the Director's findings that Blue Lakes' water right 36-7210 (45 cfs, November 17, 1971 priority) and Clear Springs' water right 36-4013A (15 cfs, September 15, 1955 priority) are not materially injured by junior ground water diversions. *See Order* at 14-15. The Spring Users have demonstrated that the Director's findings are contrary to substantial evidence in the record and the Hearing Officer's findings, and should be set aside. *See* Blue Lakes' *Opening Brief*, at 3-5, 6-17; Clear Springs *Opening Brief*, at 8-9, 12-13, 25-27; *Spring Users Joint Reply Brief*, at 11-17.

There is no evidence to support the Director's findings that these water rights are not injured by junior ground water diversions. The Spring Users seek an order affirming the Hearing Officer's finding that these water rights are materially injured by junior ground water diversions, and requiring the Director to administer junior ground water rights in accordance with such

finding as required by I.C. §42-607 and the *Rules for Conjunctive Management of Surface and Ground Water Resources* IDAPA 37.03.11 *et. seq.* ("CMR").

The Court did not address the Spring Users' assertions that the evidence and findings in the record establish that these water rights are materially injured by junior ground water diversions. The Spring Users seek rehearing so that the Court may address this important issue before this case is either appealed or remanded to the Director for further proceedings. This issue is important, in part, because the failure to find material injury to water rights 36-7210 and 36-4013A on the evidence in this record raises serious concerns about the material injury standard and its implications for administration of water rights in Idaho.

A. The Hearing Officer Correctly Applied the Injury Standard and Found that Junior Ground Water Rights Injure Water Rights 36-7210 and 36-4013A.

The Director found that junior ground water diversions injure Blue Lakes' water right 36-7427 (52.23 cfs, December 28, 1973 priority) and Clear Springs' water rights 36-4013B (27 cfs, February 4, 1964 priority) and 36-07148 (1.67 cfs, January 31, 1971 priority), because these rights are never filled during their periods of use. *Order* at 4-5. The Director found that water rights 36-7210 and 36-4013A are not materially injured because they are filled during a few months of their periods of use during "seasonal high" spring flows that occur when ground water users are not pumping water from the aquifer. The Director's rationale for this finding is that the number and/or quality of the water measurements at the times these rights were appropriated is insufficient to demonstrate that they were filled continuously throughout the periods of use. R. Vol. 16 at 3954-3955, ¶¶ 16-18. Apparently, to fill what he perceived to be a gap in the historic data, the Director inferred the possibility that these rights may not have been continuously filled during their periods of use from the presumed existence of "seasonal variations" in spring flows at the times of appropriation. This is the source of all the litigation in this case over "seasonal

variations." Hearing Officer Schroeder correctly rejected the Director's "all-or-nothing" material injury analysis:

> [T]he fact that a water right is filled at a seasonal high period does not lead to the conclusion that there is no material injury for the remainder of the year when there is less water flowing than the decreed right. . . . If ground water pumping ***contributes to the decline in water*** that would be applied to a beneficial use, there is material injury.

R. Vol. 16 at 3846 (emphasis added).

The Hearing Officer summarized the "declines in spring flows and the consequent right to curtailment."

> 1. There has been a decline in the spring flows in the Thousand Springs area from the time of and before the adjudication of the Spring Users water rights which has reduced the water available to their facilities well below the adjudicated amounts. . . .
> 2. ***Ground water pumping is a contributing factor to the decline*** in spring flows. . . .
> 3. . . . The Spring Users are entitled to curtailment to the extent that the junior ground water users ***interfere with*** the water the Spring Users would otherwise have under their rights.

R. Vol. 16 at 3695-3697 (emphasis added).

The Hearing Officer considered the evidence and found that the Spring Users' water rights 36-7210 and 36-4013A are injured by junior ground water diversions:

> In this case the evidence indicates that the Blue Lakes 1971 right and the Clear Springs 1955 right were filled throughout the year at the decreed level at the times of appropriation. In the recent past they have been filled for only a portion of the years, ranging from a high of twelve months for Blue Lakes in 1977 and seven months in 1995 to lows of two months in 2004, three months in 2005, and three months in 2006. Clear Springs' 1955 right was filled year round from 1988 through 2001 and filled for six months in 2004, two months in 2005, and four months in 2006. ***A portion of the declines is attributable to ground water pumping. Consequently, there should be a finding of injury to those water rights.***

R. Vol. 16 at 3846-47 (emphasis added).

The Hearing Officer's finding is premised on declines in water supply caused by junior ground water diversions, not a showing that the Spring Users' received a "full supply" at the time of appropriation, or that their rights are never filled at the times of their water delivery calls. Similarly, in testimony quoted in the Court's *Order*, the former Director explained that reduced spring flow constitutes injury to the extent that the reduction is caused by junior ground water diversions, and that this injury can be quantified by using the ESPA model to simulate "what would happen if you curtailed those junior priority" rights. *Order* at 20.

The Hearing Officer's injury analysis is consistent with the CMR and Idaho law. Under Idaho law, injury occurs when a junior diversion "interferes with" the exercise of a senior right by taking water that the senior could beneficially use as provided in the senior's right Contrary to the Director's analysis, interference is not an all-or-nothing proposition which requires a showing that the senior right was always filled throughout the period of use at the time of appropriation, or that the senior right is never filled at the time of a water delivery call.

The water distribution statute, I.C. §42-607, requires the watermaster to curtail junior rights "when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others." CMR 10.04 defines material injury as: "***Hindrance 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 forth in Rule 42." The Ground Water Act provides for curtailment of junior ground water rights that "***affect***, contrary to the declared policy of this act, ***the present or future use of any prior surface or ground water right***." I.C. § 42-237a.g.

The CMR definition of injury reflects the injury standard articulated by the Idaho Supreme Court:

> The first appropriator of water for a useful or beneficial purpose has the prior right thereto, and the right once vested, will be protected and upheld, unless abandoned. [*Citations omitted.*] ***Any interference*** with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the part injured to damages, and an injunction would issue perpetually restraining any ***such interference***.

Bower v. Moorman, 27 Idaho 162, 175-176, 147 P. 496, 500 (1915) (emphasis added).

> "'It is probably of no moment whether water reaches a certain point by percolation through the soil, by a subterranean channel, or by an obvious surface channel. If by any of these natural methods it reaches the point, and is there appropriated in accordance with law, the appropriator has a property in it which cannot be divested by the wrongful diversion by another, nor can there be any ***substantial diminution***.'" . . . So long as the water from the springs and swamps, flowing in its natural channels, ***would reach Spring Creek in usable quantities***, plaintiffs are entitled to enjoin defendant's interference therewith.

Martiny v. Wells, 91 Idaho 215, at 218-219, 419 P.2d 470 (1966), quoting *Ogilvy Irrigating & Land Co. v. Insinger*, 19 Colo.App., 380, 75 P. 598, at 799 (1904) (*emphasis added*).

> Any time the water, if unobstructed, would reach [the senior's] land, he was entitled to have it flow uninterrupted. *I.C. §§ 42-103, 42-106*; *Beecher v. Cassia Creek Irr. Co., 66 Idaho 1,154 P.2d 507*; *Jones v. McIntire, 60 Idaho 338, 91 P.2d 373*; *Bachman v. Reynolds Irr. Dist., 56 Idaho 507, 55 P.2d 1314*; *Short v. Praisewater, 35 Idaho 691, 208 P. 844*. The evidence is conclusive that the dam as constructed by defendant would, and in 1959 did, ***interfere with and infringe upon*** Bullers' prior right.

Ward v. Kidd, 87 Idaho 216, 226, 392 P.2d 183, 189 (1964) (emphasis added).

The evidence conclusively establishes that junior ground water rights hinder, impact, affect, diminish, and interfere with the present and future use of water rights 36-7210 and 36-4013A. *See* Blue Lakes' *Opening Brief*, at 3-5, 6-17; Clear Springs *Opening Brief*, at 8-9, 12-13, 25-27; *Spring Users Joint Reply Brief*, at 11-17. In summary, Spring flows have declined

substantially since the times of appropriation; i.e., there was substantially more water available to supply the Spring Users' water rights at those times. *Order* at 11. The record conclusively establishes this fact, whether or not flows were sufficient at the time of appropriation to fill water rights 36-7210 and 36-4013A continuously throughout the periods of use. The causes of spring flow declines include ground water diversions and reductions in aquifer recharge. *Id.* Each of these factors is cumulative. Each factor independently affects aquifer levels in the Eastern Snake Plain Aquifer ("ESPA") and resulting spring discharges. Eliminating or reducing one factor does not affect the impact on spring flows caused by other factors. Curtailing a junior ground water diversion restores only that portion of the spring flow decline that it caused by the junior's out-of-priority depletion.

In response to the Director's inference that seasonal variations may have caused spring flows to be insufficient to fill water rights 36-7210 and 36-4013A at the times of appropriation, the Spring Users identified IDWR, USGS and other measurements in the agency record showing that spring flows at the times of appropriation and for many years thereafter were sufficient to fill the rights year round, until flows declined to the point in the 1990s and 2000s when the rights were no longer filled during substantial portions of the period of use. *See, e.g.*, Blue Lakes - Ex. 18 (USGS measurements of Alpheus Creek), Ex. 205; Clear Springs - Exs. 128A, 156, 158, *see also*, R. Vol. 3 at 526. However, showing that water rights 36-7210 and 36-4013A were continuously filled at the times of appropriation is not necessary to establish injury as and when junior ground water diversions reduce the supplies of water available for beneficial use under these senior rights.

Clearly, junior ground water rights are subject to administration only for the senior spring flow right reductions they cause. However, this does not mean that junior rights are subject to

administration only at times when the senior historically received a "full supply," or when a senior right is never filled during the period of use. Junior rights are subject to administration to abate the depletion and injury they cause to the senior's water right regardless of whether administration would deliver the entire quantity of the senior's right. This is readily evident in the administration that has been ordered by the Director in this case to address the material injury the Director found to the Spring Users' later priority rights. In sum, the Director provided no basis or articulated reason to apply a different standard to an injury analysis for Blue Lakes' 1971 and Clear Springs' 1955 water rights. The Court should therefore affirm the Hearing Officer's injury finding for these water rights.

II. Remand is not Necessary to Establish that Water Rights 36-7210 and 36-4013A are Materially Injured by Junior Ground Water Diversions – the Only Fact Finding Necessary on Remand is Quantification of Spring Flow Depletions by Junior Ground Water Rights to Define Mitigation Obligations.

Remand to an agency is not necessary when further findings of fact would not affect the outcome of a case. *Bonner General Hosp. v. Bonner County*, 133 Idaho 7, 11, 981 P.2d 242, 246 (1999); *see also*, 2 Am. Jur.2d Admin. Law § 575 (a remand due to an administrative agency's inadequate findings of fact is unnecessary if the subsidiary facts are obvious or easily inferred from the record and the general fact findings). In *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 160 P.3d 438 (2007), the District Court and the Idaho Supreme Court set aside a licensing board's order in which the board ignored a hearing officer's "factual finding, instead relying solely on its 'specialized knowledge and experience' to reach the opposite conclusion," without providing an explanation for its contrary finding. 144 Idaho at 285, 160 P.3d at 442. The Court found that "further proceedings are unnecessary based on the evidence presented before the hearing officer." 160 P.3d at 443 (citing *Bonner General Hosp.*, *supra*). The same reasoning applies in this case.

This Court rejected the Director's basis for disregarding the Hearing Officer's finding of injury and replacing it with his contrary finding that the Spring Users' rights are not injured (i.e. the Director's failure to accord presumptive weight to the Spring Users' partial decrees, his placing the burden on the Spring Users to prove the water supply at the time of appropriation, and his construing the lack of regular or continuous flow data against the Spring Users). The Director dismissed or completely disregarded all the evidence of material injury discussed above and in prior briefing to this Court, to the Director and to the Hearing Officer.

The Director's material injury analysis is fatally flawed. The Director's Final Order identified no evidence in the record and provided no explanation to support his contrary finding. Such an unsupported decision is contrary to Idaho law. *See Woodfield v. Board of Prof. Discipline*, 127 Idaho 738, 747 (Ct. App. 1995) ("this Court 'will scrutinize the Board's findings of fact more critically if they contradict the [hearing officer's] conclusions than if they accord with the [hearing officer's] findings.' . . . Accordingly, we determine that it is consistent with the Board's statutory obligation to render a reasoned decision to require the Board to identify facts, as well as inferences drawn from the facts upon the application of its expertise and judgment, which underlie its decision."); *see also*, *Ater*, 160 P.3d at 442. Contrary to the rule in *Woodfield*, here the Director identified no facts to support his reversal of Hearing Officer Schroeder's injury finding for Blue Lakes' 1971 water right and Clear Springs' 1955 water right.

As previously discussed, the evidence conclusively establishes that Blue Lakes' water right 36-7210 and Clear Springs' water right 36-4013A are materially injured by junior ground water diversions. Aquifer levels and spring flows are substantially lower today than they were at the times of the Spring Users' appropriations. Junior ground water rights continually draw down the aquifer each year and thereby deplete spring flows throughout the period of use, particularly

during the ground water users' irrigation season when the lowest annual spring flows occur. Whatever spring flows existed at the time of appropriation, they are diminished by hydraulically connected out-of-priority junior ground water diversions, thereby causing injury to the Spring Users' senior rights when those rights are not filled. Nothing in the record, and nothing that could be added to it, could alter this conclusion. Remanding the matter to the Director for further proceedings to determine whether these water rights are materially injured by junior ground water rights is therefore unnecessary.

The Court sees an examination of seasonal variations at the time of appropriation as necessary to ensure that junior rights are not administered to deliver water the senior is not receiving due to causes other than ground water diversions. *Id.* at 18-22. The Court appears to mistakenly believe that, without such an examination, it is possible that juniors could be either curtailed or required to provide replacement water for reductions in flow caused by other factors. Curtailment provides no more and no less water to the senior than the junior takes by his out of priority diversion. As the Hearing Officer observed, the Director's idea that curtailment of a junior right could increase spring flows beyond what existed at the time of appropriation "is not sound." "Curtailment of juniors would not put more water in the system than existed prior to the junior's appropriation." R. Vol. 16 at 3707.

To address its concern, the Court states that:

> [T]he 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.

Order at 22.

The record demonstrates that such an inquiry is neither necessary nor achievable. As discussed above, in testimony quoted in the Court's *Order*, the Director explained that reduced spring flow and resulting injury caused by junior ground water diversions can be quantified by using the ESPA model to simulate "what would happen if you curtailed those junior priority" rights. *Order* at 20. The Director calculates mitigation or replacement water obligations to be equivalent to spring flow reductions caused by junior ground water diversions. Assuming the Director's calculations are correct, mitigation is tailored so that juniors are not required to mitigate for spring flow reductions caused by other factors (i.e. reductions in natural and artificial recharge to the aquifer).

In his 2005 Orders responding to the Spring Users' water delivery calls, the Director found that:

> ***There are no known measurements, nor any other means, for reasonably determining the intra-year variations in the discharges from the springs comprising the source for these water rights on the dates of appropriation*** for these water rights."

R. Vol. 1 at 55, ¶ 49; R. Vol. 3 at 498-499, ¶ 54 (emphasis added).

No party took exception to this finding, and it was adopted without modification in the Director's 2008 Final Order. R. Vol. 16 at 3951, ¶ 2. Consequently, the agency has already decided that it cannot undertake the analysis recommended by the Court on remand. Effective, timely administration of junior ground water rights will be greatly hampered if, in response to water delivery calls, the Director must attempt to reconstruct daily or monthly water flows at the time of a senior's appropriation in order to determine if the senior is injured.

It necessarily follows that the scope of administration includes hydraulically-connected ground water rights that are junior to 36-7210 (11/17/1971 priority) and 36-0413A (9/15/1955 priority). Based on his erroneous finding that these rights are not injured, the Director

improperly limited the scope of administration to ground water rights that are junior to Blue Lakes' later priority right 36-7427 (12/28/73) and Clear Springs' later priority right 36-4013B (2/4/64). Remand is unnecessary to draw this conclusion.

The only factual issue for remand is for the Director to determine the effects of curtailing ground water diversions that are junior to water rights 36-7210 and 36-0413A, as the Director did upon a finding of material injury to the Spring Users' later priority water rights. The Director's first step in this analysis is to prepare lists of hydraulically-connected ground water rights that are junior to water rights 36-7210 and 36-0413A.[1] R. Vol. 1 at 61, ¶ 76; R. Vol. 3 at 502-03, ¶ 71. The Director's second step is to use the ESPA model to simulate the increases in reach gains and spring discharges resulting from the curtailment of junior priority rights on the list. R. Vol. 1 at 61, ¶ 77; R. Vol. 3 at 503, ¶ 72. This analysis quantifies the extent of the spring flow depletions and injury caused by junior ground water rights, and provides the basis for mitigation obligations. R. Vol. 1 at 72-73; R. Vol. 3 at 523-24. Although the parties have challenged certain of the Director's determinations in this procedure (e.g. 10% "trim-line" and apportionment of reach depletions/gains to spring sources), no party has challenged the Director's procedure whereby, after a material injury determination, he develops a list of junior water rights subject to administration and then quantifies the depletion/injury caused by those water rights to define mitigation obligations.

The Court's conclusion that the Director must determine seasonal variability of a senior's water supply at the time of appropriation as part of a material injury analysis leaves the Spring Users in their current position under the Director's Orders, and unnecessarily complicates and delays water right administration even further. Furthermore, requiring such an analysis is

[1] Subject to a "trim-line" or other margin of error based limitation in effect at the time.

contrary to I.C. § 42-607, which was "intended to make the authority of the watermaster more certain, his duties less difficult and his decisions less controversial." *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 27, 752 P.2d 625 (App. 1988).

Regardless of what the analysis is labeled, the purpose and effect of examining the senior's water supply at the time of appropriation is to determine the quantity of water the senior is entitled to receive for purposes of administration. As the Court notes, "this in effect became a re-adjudication of the quantity element of the right." *Order* at 24. For water rights, the rubber hits the road when a senior makes a water delivery call. If a decree is truly "conclusive as to the nature and extent of all water rights in the adjudicated water system" as provided by I.C. § 42-1420, then the Director simply has no business re-examining the senior's water supply or beneficial use at the time of appropriation to determine how much water the senior is entitled to receive under its decreed water right.

III. Idaho's Water Distribution Statutes and CMRs Do Not Require a Hearing Prior to Administration of Junior Priority Ground Water Rights.

The Court thoroughly examined the relevant statutes and rules governing conjunctive administration and correctly found that the regulations do not require the Director to hold a hearing before issuing an order of curtailment in an organized water district. *See Order* at 43-46. The water distribution statute, Idaho Code § 42-607, plainly requires the watermaster to "administer adjudicated or licensed rights in times of shortage in order to supply senior water users". *Id.* at 44. Rule 40 similarly requires the Director to "either order curtailment of the junior water rights or allow out-of-priority diversions pursuant to an approved mitigation plan". *Id.* at 46. Unlike Rules 30 and 41, which provide for contested case procedures and a hearing prior to administration, Rule 40 follows the statutory system of administration followed in

organized water districts. The Spring Users agree with this analysis and submit that it follows the plain language of the statute and rule.

Given the above analysis, the Court should reconsider or clarify the following statement in the *Order*:

> 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.

Order at 49.

The above sentence suggests that the Director should hold a hearing "before" he carries out a curtailment order in an organized water district. The Spring Users submit the law requires no such hearing. As set forth in the Rules, if injuring junior ground water right holders do not have an "approved mitigation plan" in place prior to the irrigation season, then a curtailment order must be implemented without delay to protect injured senior water rights.

While the Court notes that "a due process argument can be made" with respect to curtailment of water rights in an organized water district, requiring a "hearing" to be held in an organized water district before allowing the watermaster to carry out a curtailment order would threaten to halt water right administration altogether. Water right holders in an established water district have the benefit of adjudicated or licensed rights. Any affected junior right holder who disagrees with an undecreed senior water right, or a new appropriation, has the right to participate in an adjudication or permit/license proceeding. In this case, all affected ground water users in Water District 130 were provided with an opportunity to protest Blue Lakes' and Clear Springs' applications for permit when they were filed with IDWR. None did. Accordingly, ground water users have been provided with two opportunities to receive "due process" and challenge the senior surface water rights in this case.

Once Blue Lakes' and Clear Springs' water rights were decreed, and the Department created Water District 130, the Spring Users had an expectation that their rights would be protected from interfering junior rights within the organized water district. *See Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972) (senior water users are "entitled to presume that the watermaster is delivering water to them in compliance with the governing decree."). Stated another way, senior water right holders should not be submitted to "mini-adjudications" or countless "contested cases" every time they request administration within the water district. Yet, that is the inevitable result if a "hearing" is required "before" the watermaster is allowed to carry out a curtailment order.

Rule 40 makes it clear that junior "surface" water rights are subject to immediate curtailment to protect senior rights. *See* CMR 40.02.a. ("The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion ***and shall shut the headgates of the holders of junior-priority surface water rights*** as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source.") (Emphasis added). The same is required of junior "ground" water rights. *See* CMR 40.02.b. ("The watermaster ***shall regulate the diversion and use of ground water*** in accordance with the rights thereto, approved mitigation plans ***and orders issued by the Director***.") (Emphasis added). In other words, if the Director issues a curtailment order and no mitigation plan has been approved, injuring junior ground water rights are subject to immediate "regulation" or curtailment in order to protect senior surface water rights. Just as there is no basis to provide a hearing before curtailing a junior "surface" water right holder within an organized water district, the same applies for junior "ground" water rights found to be injuring senior surface water rights.

That the law requires no hearing before implementing the administrative action follows the constitution's law of prior appropriation. IDAHO CONST. Art XV, § 3. The Idaho Supreme Court addressed the subject in *Nettleton v. Higginson*, 98 Idaho 87 (1977). In that case, the appellant, an owner of an unadjudicated "beneficial use" water right claim located in the Upper Reynolds Creek Water District, sued the Department and challenged Idaho Code § 42-607 as unconstitutional. 98 Idaho at 89. The appellant claimed, among other things, that the statute violated his right to due process. *See id.*

In its discussion, the Idaho Supreme Court agreed that "individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state." 98 Idaho at 90. However, the Court rejected the "due process" challenge because the appellant only held an "unproven right". *Id.* In addition, and relevant for purposes of this case, the Court rejected the "due process" challenge for other reasons:

> But even if the appellant has sufficiently substantiated the existence of this claimed property interest so as to invoke the protections of the Due Process Clause, there are other reasons for rejection of this constitutional challenge . . . The governmental function in enacting not only I.C. § 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources. ***As to the private interests affected, it is obvious that in times of water shortage someone is not going to receive water.*** Under the appropriation system the right of priority is based on the date of one's appropriation, i.e. first in time is first in right.
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> * * *
>
> ***The requirement of procedural due process is satisfied by the statutory scheme of Title 42 of the Idaho Code.*** Our holding is supported by a comparison of the state's duty as mandated by Article 15, § 1 of the Idaho Constitution with the appellant's ability, under I.C. § 42-1405, to at any time verify his "constitutional use right," thereby reaping the protective benefit of I.C. § 42-607 himself. ***Granted that when action is taken pursuant to I.C. § 42-607 there is no notice or hearing prior to the shutting off of the unadjudicated water rights***, but as the United States Supreme Court noted in *Fuentes v. Shevin*, *supra*, there are extraordinary situations when postponement of notice and a hearing is justified. It is justified when:

> "First * * * the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 U.S. at 91, 92 S.Ct. at 2000.
>
> ***We find the above three requirements to be met in the present case and find no procedural violation in the actions of the watermaster pursuant to I.C. § 42-607.***

98 Idaho at 90-92 (emphasis added).

Just as there is no "notice and hearing" prior to "shutting off" unadjudicated water rights in a water district, the same procedure applies to junior priority adjudicated and licensed water rights when necessary to fill senior rights in times of shortage. *See* I.C. § 42-607; *Nettleton*, 98 Idaho at 93 ("In times of shortage one holding an unadjudicated water right stands in the position similar to he who holds the 'recorded' water right of the lowest priority date."). This is consistent with the Supreme Court's holding and reasoning set forth in *AFRD #2 v. IDWR*, 143 Idaho 862 (2007), wherein the Court stated:

> We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion that the drafters intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right. Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.

143 Idaho at 874.

Pursuant to the Supreme Court's holding in *Nettleton*, there is no violation of "due process" when the watermaster performs his duty and curtails junior rights without a hearing. This ensures "timely delivery" of water to the senior. After all, any delay in administration, caused by the holding of an administrative hearing or otherwise, would impermissibly shift the burden to the senior and perpetuate the injury caused by interfering juniors. As unfortunately

experienced in this case, the process itself has become the decision for the Spring Users wherein junior ground water right holders have continued to receive their full water rights throughout.

The example of surface water administration in Water District 130 plainly illustrates the above premise. On June 7, 2002, Clear Springs submitted a "water delivery call" requesting distribution of water to Clear Springs' 200 cfs water right no. 36-02708 for use at the Snake River Farm facility located adjacent to Clear Lake. R. Vol. 10 at 2071. On June 13, 2002, the Director issued instructions to the Water District 130 watermaster for the curtailment of water diversions by Clear Lakes Trout Company ("Clear Lakes," not involved in this proceeding) in order to supply Clear Springs with a constant flow of 200 cfs. *Id.* at 2073-76. As soon as the watermaster confirms Clear Spring's need for water, the instructions direct her to provide 14-day notice to give Clear Lakes' an opportunity to remove trout before the curtailment. *Id.* at 2073, ¶ 5. After 14 days, the instructions direct the watermaster to "adjust the adjustable weir as necessary to distribute water to the rights in order of priority." *Id.*, ¶ 6.

Clear Lakes filed a lawsuit with this Court seeking, in part, a preliminary injunction pursuant to I.R.C.P. 65(e)(2) to prevent the Director from curtailing its diversion of water during the pendency of the proceeding, thereby forcing Clear Lakes to remove or destroy substantial quantities of fish. This Court, Justice Roger Burdick presiding, denied Clear Lakes' motion for preliminary injunction, finding, in part, no material injury to Clear Lakes because "the injury resulting from reduced water supply is the same for Clear Lakes or Clear Springs because both would suffer from an inability to run their respective hatcheries to full design capacity." *Attachment A* (*Order Granting Intervention; and Denying Motion for Preliminary injunction* at 3, Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV-02-00377).

The same reasoning applies here with respect to a potential argument that curtailing junior ground water users without a hearing deprives them of valuable property without due process. As found in *Nettleton* and as practiced in Water District 130, administration of junior rights, surface or ground water, does not require a hearing before curtailment. Therefore, the Court should reconsider or clarify its statement that a hearing is required "before" a watermaster implements a Director's curtailment order in an organized water district. As held by the Idaho Supreme Court, due process does not require a hearing to be held in an organized water district before junior surface or ground water rights are curtailed in times of shortage. Moreover, even assuming that a hearing is required, it is clear that the Ground Water Users have received due process and the opportunity to present all their defenses to the Spring Users' call in the hearing held before the Hearing Officer from November 28 through December 13, 2007. *Order* at 6.

IV. The Court Should Identify Procedures for IDWR to Provide for Timely Administration of Water Rights and Enforcement of Mitigation Plans.

The Spring Users urge the Court to identify procedures to ensure timely administration and enforcement of mitigation plans. Given the Court's finding that the Director abused his discretion by failing to hold timely hearings on mitigation plans and by failing to order curtailment after finding mitigation plans to be inadequate, it is necessary for the Court to remand the case to the Director with instructions on procedures to provide for protection of senior water rights and proper administration.

The Springs Users detailed the long and delayed history of the Director's failed "replacement water plan" process in their opening briefs. *See Blue Lakes' Opening Brief* at 25-31; *Clear Springs' Opening Brief* at 39-42. As the record in this case demonstrates, the Director has failed to use the procedures under the CMRs and has failed to hold timely hearings on mitigation plans in advance of the irrigation season. Moreover, the failure to establish and

enforce procedures to ensure mitigation plans are submitted in a timely manner so that they can be reviewed and either approved or denied prior to commencement or resumption of ground water pumping has been a recurring problem leading to the inevitable continued injury of the Spring Users' senior surface water rights. Since the Director has failed to require filing and approval of mitigation plans before junior ground water users begin to pump from the aquifer, IGWA has been content to file their plans during and throughout the irrigation season, after the commencement of the out-of-priority pumping. Once the irrigation season starts history has proven there is no likelihood of curtailment, even if a plan is deemed inadequate.

Consequently, the Spring Users' senior surface water rights suffer the continued injury through the lack of timely administration. If the Director is to carry out his duty to conjunctively administer water rights, he must be guided by clear procedures to ensure timely administration. At a minimum, the Court should instruct the Director to require ground water users to file mitigation plans and for IDWR to hold hearings on those plans prior to the irrigation season, or before junior ground water rights are authorized to pump water from the aquifer. This is consistent with Idaho law and the CMRs and follows the Idaho Supreme Court's dictate that the Director provide a "timely response" in administration. *See AFRD #2*, 143 Idaho at 874. By holding the required hearings on any mitigation plans prior to the irrigation season it will prevent injury to the senior and ensure the Director does not authorize out-of-priority ground water diversions to begin if curtailment is ordered.

CONCLUSION

The evidence and findings by Hearing Officer Schroeder plainly establish that Blue Lakes' water right 36-7210 and Clear Springs' water right 36-4013A are materially injured by junior ground water diversions. The Director wrongly reversed the Hearing Officer without

identifying any facts or articulated reasons for doing so. The Court should affirm the Hearing Officer's findings accordingly. *See Ater*, 144 Idaho at 442, *Woodfield*, 128 Idaho at 746-47. Moreover, given the evidence in the record, no remand is necessary on the "seasonal variation" issue. As recognized by the Director, the agency has "no known measurements, nor any other means, for reasonably determining" the seasonal variations at the time of appropriation. R. Vol. 1 at 55, ¶ 49; R. Vol. 3 at 498-99, ¶ 54. Consequently, a remand on this matter is unnecessary and would only stand to further delay administration in this case.

Next, Idaho law is clear that no hearing is required before administration of junior water rights in an organized water district. If junior priority ground water users are injuring senior surface water rights, they must curtail if they do not have an approved and effectively operating mitigation plan.

Finally, the Court should identify mitigation plan submission, review and approval procedures for IDWR to follow so that the filing and hearings on mitigation plans are held prior to the commencement or resumption of out-of-priority ground water diversions.

DATED this 21st day of August 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of August, 2009, I served true and correct copies of the *Blue Lakes Trout Farm, Inc.'s and Clear Springs Foods, Inc.'s Brief in Support of Joint Petition for Rehearing* upon the following by the method indicated:

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