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DEPARTMENT OF  
WATER RESOURCES

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Attorneys for the City of Pocatello

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

In Re SRBA )  
 )  
Case No. 39676 ) **Subcase Nos. 29-00271 et al. (See Attachment A)**  
 )  
 ) **AFFIDAVIT OF JOSEPHINE P. BEEMAN IN**  
 ) **SUPPORT OF POCATELLO'S MOTION TO**  
 ) **ALTER OR AMEND**

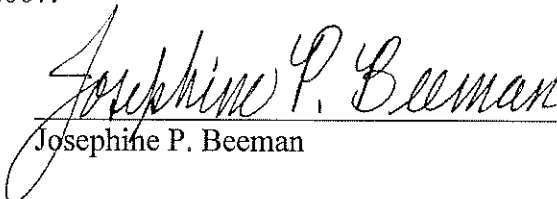
STATE OF IDAHO )  
 ) ss:  
COUNTY OF ADA )

I, Josephine P. Beeman, after being duly sworn, state that I am an attorney licensed to practice law in the State of Idaho. I am over the age of 18 years and state that the following is based on my personal knowledge.

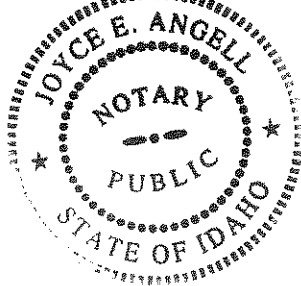
1. I am counsel for the City of Pocatello in this matter.
2. Attached hereto as Exhibit 1 is a true and correct copy of the June 12, 2007 *Order Dismissing Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction*, in Idaho Ground Water Appropriators, et al. v. Idaho Department of Water Resources, et al., Jerome County District Court Case No. CV 2007-526.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated this 13th day of December 2007.

  
Josephine P. Beeman

SUBSCRIBED AND SWORN to before me this 13th day of December 2007.



*Joyce E. Angell*  
Notary Public in and for the State of Idaho  
My Commission Expires: 07-29-2008

### CERTIFICATE OF SERVICE

On this 13<sup>th</sup> day of December 2007, I caused a true and correct copy of the foregoing document to be deposited in an official U.S. Post Office receptacle with proper First Class postage affixed, addressed to the following:

AMERICAN FALLS RESERVOIR DIST #2

Represented by:  
C THOMAS ARKOOSH  
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UNITED STATES OF AMERICA

Represented by:  
US DEPARTMENT OF JUSTICE  
ENVIRONMENT & NAT'L RESOURCES  
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STATE OF IDAHO

Represented by:  
NATURAL RESOURCES DIV CHIEF  
STATE OF IDAHO  
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MINIDOKA IRRIGATION DISTRICT

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A & B IRRIGATION DISTRICT  
BURLEY IRRIGATION DISTRICT

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DIRECTOR OF IDWR  
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MILNER IRRIGATION DISTRICT  
NORTH SIDE CANAL COMPANY  
TWIN FALLS CANAL COMPANY

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TWIN FALLS, ID 83303-0485  
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*Josephine P. Beeman*  
Josephine P. Beeman

Attachment A (30 subcases)

29-00271  
29-00272  
29-00273  
29-02274  
29-02338  
29-02401  
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29-04221  
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DISTRICT COURT  
FIFTH JUDICIAL DIST  
JEROME, IDAHO

2007 JUN 12 PM 3 58

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

DEPUTY CLERK

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

Plaintiffs

vs.

IDAHO DEPARTMENT OF  
WATER RESOURCES and DAVID  
TUTHILL, JR., IN HIS OFFICIAL  
CAPACITY AS DIRECTOR OF  
THE IDAHO DEPARTMENT OF  
WATER RESOURCES,

Defendants,

and

BLUE LAKES TROUT FARMS,  
INC.; CLEAR LAKES TROUT CO.,  
INC.; ANITA K. HARDY; RIM  
VIEW TROUT COMPANY, INC.;  
JOHN W. "BILL" JONES, JR. and  
DELORES JONES; CLEAR  
SPRINGS FOODS, INC.; RANGEN  
INC.; AMERICAN FALLS  
RESERVOIR DISTRICT NO. 2;  
A&B IRRIGATION DISTRICT;  
BURLEY IRRIGATION  
DISTRICT; MILNER  
IRRIGATION DISTRICT; NORTH  
SIDE CANAL CO.; and TWIN  
FALLS CANAL CO.,

Intervenors.

Case No. CV 2007-526

ORDER DISMISSING APPLICATION  
FOR TEMPORARY RESTRAINING  
ORDER, COMPLAINT FOR  
DECLARATORY RELIEF, WRIT OF  
PROHIBITION AND PRELIMINARY  
INJUNCTION

ORDER DISMISSING APPLICATION FOR TEMPORARY RESTRAINING ORDER, COMPLAINT FOR DECLARATORY  
RELIEF, WRIT OF PROHIBITION AND PRELIMINARY INJUNCTION

Page 1 of 3

Exhibit 1  
Affidavit of Josephine P. Beeman in Support  
of Pocatello's Motion to Alter or Amend  
December 13, 2007  
29-00271, et al.

I.

PROCEDURE

1. This matter came before the Court pursuant to an *Application for Temporary Restraining Order and Order to Show Cause and Complaint for Declaratory Relief, Writ of Prohibition, Temporary Restraining Order and Preliminary Injunction* filed May 7, 2007, through counsel, by the Idaho Ground Water Appropriators, *et al.* On May 31, 2007, the case was assigned to this Court based on the disqualification of the Honorable John Butler.
2. Motions to intervene were filed by Clear Springs Foods, Inc., Blue Lakes Trout Farm, Inc., *et al.*, Rangen Inc., John W. "Bill" Jones, Jr. and Delores Jones and American Falls Reservoir District #2, *et al.* ("Surface Water Coalition"). The motions to intervene were granted via a separate order issued June 1, 2007.
3. Motions to dismiss were filed by the Idaho Department of Water Resources and the various intervenors, alleging *inter alia* the Court's lack of jurisdiction for failure to exhaust administrative remedies.
4. A hearing was held on the matter on June 6, 2007, wherein the Court granted the motions to dismiss and dismissed the action without prejudice, and to avoid further delay, stated the basis for its decision on the record in open court.

II.

ORDER

THEREFORE, for the reasons stated on the record in open court, a copy of the transcript of the Court's oral ruling is attached hereto, the *Motion to Dismiss* is **granted** and the *Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction* is **dismissed without prejudice**.

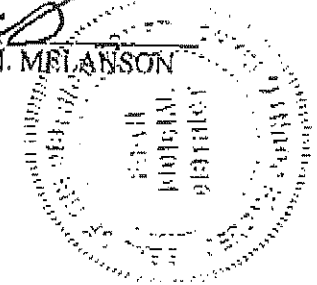
**RULE 54(b) CERTIFICATE**

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED.

Dated June 12, 2007.

  
HONORABLE JOHN M. MELANSON  
District Judge



Page 1

1 THE COURT: We're on record in Case Number CV  
2 2007-526, Idaho Ground Appropriators and others, versus  
3 Idaho Department of Water Resources. The parties are  
4 present with counsel -- or I should say that counsel for  
5 the parties are present, as are counsel for the  
6 intervenors. I am prepared to rule from the bench in this  
7 matter and I will do so at this time.

8 The doctrine of prior appropriation has been the  
9 law in Idaho for over 100 years. It is set forth in our  
10 State Constitution at Article 15 and in our statutes at  
11 Idaho Code Section 42-106, which was enacted in 1899.  
12 Prior appropriation is a just, although sometimes harsh,  
13 method of administering water rights here in the desert,  
14 where the demand for water often exceeds water available  
15 for supply. The doctrine is just because it acknowledges  
16 the reality that in times of scarcity, if everyone were  
17 allowed to share in the resource, no one would have enough  
18 for their needs, and so first in time - first in right is  
19 the rule. The doctrine is harsh, because when it is  
20 applied, junior appropriators may face economic hardship or  
21 even ruin.

22 I say these things in an introductory way so the  
23 parties and other people who may be interested will know  
24 that I know the possible consequences of my ruling today,  
25 and I do not take this decision or its consequence lightly,

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: right;">Page 2</p> <p>1 but it is a decision that I believe to be mandated by law.<br/>2 My decision today is based simply and solely upon the fact<br/>3 that the plaintiffs have not exhausted their administrative<br/>4 remedies.<br/>5 I do agree that there may be some colorable<br/>6 defenses, such as reasonable pumping levels, futile call<br/>7 and reasonableness of diversion. This, however, is not the<br/>8 proceeding in which those issues should be raised. In<br/>9 American Falls Reservoir District Number Two versus Idaho<br/>10 Department of Water Resources, 143 Idaho 862, in a case<br/>11 decided in March of this year, cited by the parties, the<br/>12 court dealt with strikingly similar circumstances: A<br/>13 declaratory judgment action brought while an administrative<br/>14 proceeding was pending. In American Falls No. 2 it was<br/>15 surface water users challenging the manner and process by<br/>16 which the Director responded to a delivery call against<br/>17 ground water pumpers. The surface water users contended<br/>18 that the Director's response was contrary to law and<br/>19 ultimately unconstitutional. Although both the surface<br/>20 water users and the ground water pumpers, including Idaho<br/>21 Ground Water Users Association, requested a hearing before<br/>22 the Director, prior to the hearing being conducted the<br/>23 surface water users filed an action for declaratory relief<br/>24 challenging, among other things, the constitutionality of<br/>25 the rules of conjunctive management: The very same rules</p> | <p style="text-align: right;">Page 1</p> <p>1 ground water pumpers appeared in defense of the Director's<br/>2 application of the rules, including an argument that the<br/>3 surface water users must first exhaust their administrative<br/>4 remedies before seeking judicial review. In its opening<br/>5 brief on appeal IGWA argued: Moreover, the legislature<br/>6 already has specified the process for resolving challenges<br/>7 to such unlawful agency action. The proper procedure is<br/>8 through judicial review, pursuant to the Administrative<br/>9 Procedures Act, Idaho Code Section 67-5270; not a<br/>10 collateral attack as the plaintiffs have undertaken here.<br/>11 The APA also contains entire sections on agency<br/>12 hearing procedures, evidence, and other related matters,<br/>13 e.g. Idaho Code Sections 67-5242, hearing procedure; and<br/>14 67-5271, evidence. The Department applies these as part of<br/>15 its rules. The district court's approach tosses out<br/>16 administrative law, end quote.<br/>17 That's from the affidavit of Mr. Arrington,<br/>18 Exhibit I to the IGWA opening brief, page six.<br/>19 Apparently the Supreme Court agreed with IGWA,<br/>20 holding that administrative remedies must be exhausted<br/>21 before even constitutional issues can be raised before the<br/>22 District Court, unless there is a facial challenge. The<br/>23 Supreme Court held, quote: Important policy considerations<br/>24 underlie the requirement for exhausting administrative<br/>25 remedies, such as providing the opportunity for mitigating</p> |
| <p style="text-align: right;">Page 3</p> <p>1 which govern the Director's response to this call.<br/>2 In American Falls No. 2 the court reaffirmed the<br/>3 long-standing-general requirement that a party not seek<br/>4 declaratory relief until administrative remedies have been<br/>5 exhausted unless that party is challenging the rule's<br/>6 facial constitutionality. The court relied on Idaho Code<br/>7 Section 67-5271 and the Regan versus Kootenai County Case,<br/>8 140 Idaho 721, a 2004 case.<br/>9 In the case now before this court, IGWA, I'll<br/>10 refer to it as both parties have referred to it -- Idaho<br/>11 Ground Water Appropriators Association by its acronym --<br/>12 Initially requested a hearing before the director. The<br/>13 hearing was placed on hold when the constitutional<br/>14 challenges to the rules of conjunctive management was<br/>15 raised in American Falls No. 2. Finally, because both<br/>16 cases involved application of the same rules, after the<br/>17 Supreme Court issued its ruling in American Falls No. 2,<br/>18 the Director issued a notice of potential curtailment on<br/>19 May 10, 2007, almost a month ago. Instead of re-noticing<br/>20 or requesting immediate hearing before the Director and<br/>21 arguing its claims and defenses, IGWA filed the instant<br/>22 action. As such, the Director has not developed a<br/>23 full-administrative record and ruling on the claims and<br/>24 defenses raised.<br/>25 Ironically, in American Falls No. 2, IGWA and the</p>                                                                   | <p style="text-align: right;">Page 5</p> <p>1 or curing errors without judicial intervention, deferring<br/>2 to the administrative processes established by the<br/>3 legislature and the administrative body and the sense of<br/>4 comity for the quasi-judicial functions of the<br/>5 administrative body. That's from American Falls No. 2,<br/>6 quoting White versus Bannock County Commissioners, 139<br/>7 Idaho 396, at 401 - 402.<br/>8 Frankly, this Court, despite the differences<br/>9 pointed out by the plaintiffs, has difficulty in<br/>10 meaningfully distinguishing American Falls No. 2 and the<br/>11 instant case. Although American Falls No. 2 dealt with a<br/>12 constitutional challenge, the underlying principles are the<br/>13 same, and the Supreme Court defined the scope of the<br/>14 exceptions to the exhaustion of administrative remedies<br/>15 requirement. The essence of what was at issue in American<br/>16 Falls No. 2 was the manner in which the Director responded<br/>17 to the delivery call. Although the action was argued and<br/>18 analyzed as a facial challenge, the Supreme Court held it<br/>19 was an as-applied challenge, and it held that an as-applied<br/>20 challenge did not provide an exception to the exhaustion of<br/>21 the administrative remedies requirement.<br/>22 The court reasoned, quote: To hold otherwise<br/>23 would mean that a party whose grievance presents issues of<br/>24 fact or misapplications of rules or policies could<br/>25 nonetheless bypass his administrative remedies and go</p>                         |

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|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: right;">Page 6</p> <p>1 straight to the courthouse by the simple expedient of<br/>2 raising a constitutional issue. Again, from American Falls<br/>3 No. 2, <i>Cling Foremost Insurance versus Public Service</i><br/>4 <i>Commission 985, S.W. 2d 793.</i><br/>5 Although IGWA has not framed the issues in terms<br/>6 of a constitutional challenge, it is nonetheless raising<br/>7 issues pertaining to the perceived misapplication of rules,<br/>8 and raising issues of fact and law, which according to the<br/>9 holding in <i>American Falls No. 2</i>, must first be ruled on by<br/>10 the administrative agency prior to seeking judicial review.<br/>11 The surface water users in <i>American Falls No. 2</i><br/>12 raised issues pertaining to the lawfulness of the<br/>13 Director's response to a delivery call. They simply<br/>14 asserted that the infirmities rose to the level of<br/>15 constitutional proportions because of the property rights<br/>16 at stake. Ultimately, the district court in that case<br/>17 applied a facial challenge analysis because the Director's<br/>18 actions, although alleged to be contrary to law, were<br/>19 consistent with the conjunctive management rules.<br/>20 Nonetheless, the Supreme Court rejected the<br/>21 so-called hybrid approach that is as applied in the facial<br/>22 challenge and held that administrative remedies must first<br/>23 be exhausted. The result of the holding is that whether a<br/>24 party raises legal or factual issues, or alleges that such<br/>25 issues rise to the level of an as-applied constitutional</p>                               | <p style="text-align: right;">Page 8</p> <p>1 not persuasive.<br/>2 As noted at the beginning of my comments, the<br/>3 prior appropriation doctrine sometimes leads to a harsh<br/>4 result, but it is just. If the court were to block this<br/>5 action now, every proposal curtailment would first be<br/>6 decided in the courts instead of where the legislature<br/>7 intended: At the Idaho Department of Water Resources. We<br/>8 would have judicial administration of water rights.<br/>9 Perhaps if the <i>American Falls Case No. 2</i> had not<br/>10 taken place and there was not a five-year curtailment plan<br/>11 already in place; and IGWA was being notified of the<br/>12 curtailment for the first time after the planting season<br/>13 had already commenced; and if the right to a<br/>14 pre-curialment hearing were plainly established; and if<br/>15 IGWA did not have the remedy of mandamus, or perhaps other<br/>16 remedies such as the judicial review mentioned, perhaps<br/>17 then their argument that justice requires an exception to<br/>18 exhaustion of administrative remedies would have more<br/>19 merit.<br/>20 The plaintiff's claim that the Director has<br/>21 exceeded his authority is also without merit. The fact is<br/>22 that we do not yet know what the Director will do. The<br/>23 question of the Director's authority must first be raised<br/>24 in the administrative proceeding. Idaho Code Section<br/>25 42-602 vests the Director with the authority to distribute</p>                                              |
| <p style="text-align: right;">Page 7</p> <p>1 challenge, administrative remedies must first be exhausted.<br/>2 IGWA has raised two exceptions to the exhaustion<br/>3 of administrative remedies doctrine that were mentioned,<br/>4 but not discussed by the Supreme Court in <i>American Falls</i><br/>5 <i>No. 2</i>. The first being: When the interest of justice so<br/>6 require; and the second being: When the agency is acting<br/>7 outside the scope of its authority. As I mentioned a<br/>8 moment ago, IGWA was a participant in the <i>American Falls</i><br/>9 <i>No. 2</i> case and even advocated dismissal of the case because<br/>10 surface water users had failed to exhaust administrative<br/>11 remedies. The Supreme Court affirmed IGWA's position.<br/>12 The court has difficulty finding the justice<br/>13 required for that exception to exhaustion of administrative<br/>14 remedies doctrine when IGWA has taken one position in one<br/>15 proceeding and then adopted the exact opposite position in<br/>16 a similar proceeding, involving similar issues.<br/>17 The court has considered the justice of the<br/>18 plaintiff's cause. The timing of the proposed curtailment<br/>19 should not have come as a surprise. This case has been<br/>20 going on since 2005, the curtailment was part of a<br/>21 five-year-phased-in curtailment, and it had only been put<br/>22 on hold as a result of the <i>American Falls No. 2</i> case.<br/>23 Here, the plaintiff's assertion that the interests of<br/>24 justice require the court to exercise authority over the<br/>25 Department before exhaustion administrative remedies, is</p> | <p style="text-align: right;">Page 9</p> <p>1 water from all natural sources within a water district in<br/>2 accordance with the prior appropriation doctrine. All the<br/>3 rights at issue have been reported or adjudicated and have<br/>4 been included within a water district.<br/>5 As far as the operation of the ground water<br/>6 management act, Idaho Code Section 42-237 (a), et seq., and<br/>7 Idaho Code Section 42-602 and 607, the court will direct<br/>8 IGWA's attention to its analysis in its own appellate brief<br/>9 in the <i>American Falls No. 2</i> case, wherein IGWA asserted<br/>10 that the two processes were independent of each other.<br/>11 Specifically, quote: The rules embody the broad concepts<br/>12 of the act within the context of the department's<br/>13 traditional contested case process; rather than the ground<br/>14 water board proceeding. The board process remains<br/>15 independently available under the act. It's in the<br/>16 affidavit of Mr. Arrington, Exhibit I, the IGWA opening<br/>17 brief, page 11.<br/>18 If the plaintiffs desire a hearing and if the<br/>19 Director fails to conduct that hearing, their remedies may<br/>20 include mandamus, possibly judicial review: Not a request<br/>21 that this court decide the issues that they believe should<br/>22 have been decided in the administrative proceeding.<br/>23 In summary, this action provides a text book case<br/>24 in support of the need for exhaustion of administrative<br/>25 remedies. To date the Director has not ruled on the</p> |

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1 underlying claims and defenses. But despite the fact that  
2 the same claims, issues and defenses are raised in at least  
3 three different jurisdictions, the exhaustion requirement  
4 avoids forum shopping, avoids deciding cases on a piecemeal  
5 basis, and avoids inconsistent rulings on the same issues;  
6 and, frankly, it avoids inconsistent arguments made by the  
7 same parties in different forums.

8 The court finds American Falls No. 2 to be  
9 directly on point in this matter. Accordingly, it is the  
10 decision of this court, and it is hereby ordered, that the  
11 defendant's motion to dismiss is granted without prejudice  
12 as to refiling after completion of the administrative  
13 proceedings, as required by Idaho Code Section 67-5271 in  
14 the American Falls Reservoir District case.

15 Because the underlying complaint has been  
16 dismissed, the plaintiffs cannot show that they are  
17 entitled to a temporary restraining order or a preliminary  
18 injunction in this case. The TRO is therefore dissolved  
19 and the court shall not issue a preliminary injunction in  
20 this matter.

21 That concludes the court's order in this case.

22 The court, of course, doesn't have any  
23 jurisdiction at this point to tell the Director what to do,  
24 but Mr. Rassler, I'm just going to suggest that the  
25 hearings on these matters of law should be conducted with

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1 dispatch. These folks have a right to a hearing, and  
2 unless that's done, we're just going to be back here. And  
3 if it happens that it really can't be done until later in  
4 the summer or in the fall, then certainly the Director  
5 would see to it that the matters are concluded  
6 expeditiously so we're not back here next spring, perhaps  
7 after the crops are planted again. As I said, I don't have  
8 jurisdiction to order that. I wouldn't presume to do so.  
9 I'm hoping that what I've said will be enough. The court  
10 will enter a written order in this matter and judgment will  
11 be certified as a final judgment so that appeal may  
12 proceed.

13 Is there anything further from the plaintiffs in  
14 this matter?  
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