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DEPARTMENT OF
WATER RESOURCES

Charles L. Honsinger [ISB No. 5240]
HONSINGER LAW, PLLC
PO Box 517
Boise, ID 83701
Office: (208) 863-6106
Fax: (208) 908-8065
honsingerlaw@gmail.com
Attorney for City of Meridian and City of Caldwell

Christopher H. Meyer [ISB No. 4461]
Michael P. Lawrence [ISB No. 7288]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
chrismeyer@givenspursley.com
mpl@givenspursley.com
Attorneys for City of Nampa and Suez Water Idaho Inc.

Cherese D. McLain [ISB No. 7911]
MSBT Law, Chtd.
950 W Bannock St, Ste 520
Boise, ID 83702-5716
Office: (208) 331-1800
Fax: (208) 331-1202
cdm@msbtlaw.com
Attorneys for City of Eagle

Richard T. Roats [ISB No. 4237]
Kuna City Attorney
City Hall
751 W 4th St
PO Box 13
Kuna, ID 83634
Office: (208) 387-7719
Fax: (208) 922-5989
rroats@kunaID.gov
Attorney for City of Kuna

Abigail R. Germaine [ISB No. 9231]
Boise City Attorney's Office
150 N Capitol Blvd
PO Box 500
Boise, ID 83701-0500
Office: (208) 608-7950
Fax: (208) 384-4454
agermaine@cityofboise.org
Attorneys for City of Boise

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMIT NOS. 63-34079 AND 63-34080 IN THE NAME OF CHRIS EMMERT

MUNICIPAL PROVIDERS' SUBMISSION OF ADDITIONAL AUTHORITY (CRYSTAL SPRINGS ORDER)

ADDITIONAL AUTHORITY

COMES NOW the City of Meridian and the City of Caldwell, by and through their attorney Honsinger Law, PLLC, the City of Nampa and Suez Water Idaho Inc., by and through their attorneys Givens Pursley LLP, the City of Eagle, by and through its attorneys MSBT Law, Chtd., the City of Boise, by and through its attorney Abigail R. Germaine, and the City of Kuna, by and through its attorney Richard T. Roats (collectively "Municipal Providers") and hereby submit *Municipal Providers' Submission of Additional Authority (Crystal Springs Order).*

The Order attached hereto as Exhibit A recently came to the attention of undersigned counsel. It was issued by the Director of the Idaho Department of Water Resources on July 8, 2005. Apparently no appeal or further administrative litigation occurred. Attention is drawn to Finding of Fact No. 98 on page 23.

This Order addresses a conjunctive management delivery call in which the Director considered the fact that the calling party's collection canal was unlined in declining to order additional mitigation. This bears on the question presented in this case: May the Protestant assert material injury on the basis that existing aquifer levels hydraulically support its unlined delivery canals and storage facility and that any diminution in that hydraulic support constitutes material injury?

The referenced paragraph cites the Conjunctive Management Rules, IDAPA 37.03.11.042.01.g. Although those procedural rules are not implicated in this proceeding, the cited rule addresses the general principles of whether "the holders of water rights are suffering material injury and using water efficiently and without waste." IDAPA 37.03.11.042.01. As the

rules recognize, these are basic principles of Idaho water law.[1]

Respectfully submitted this 26th day of September, 2017.

HONSINGER LAW, PLLC

By _____
Charles L. Honsinger

Attorneys for City of Meridian and City of Caldwell

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
Michael P. Lawrence

Attorneys for City of Nampa and Suez Water Idaho Inc.

CITY OF EAGLE

By _____
Cherese D. McLain

Attorney for City of Eagle

[1] "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 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." IDAPA 37.03.11.020.03.

CITY OF KUNA

By _____
Richard T. Roats

Attorney for City of Kuna

CITY OF BOISE

By _____
Abigail R. Germaine

Attorney for City of Boise

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of September, 2017, the foregoing was filed, served, and copied as follows:

DOCUMENT FILED:

IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, ID 83720-0098 Hand delivery or overnight mail: 322 East Front Street Boise, ID 83702	☐ ☒ ☐ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

SERVICE COPIES TO PARTIES:

John M. Marshall, Esq. JOHN MARSHAL LAW, PLLC 575 W Bannock St, Ste B Boise, ID 83702 Fax: (208) 906-8043 john@jmarshalllaw.com *(Chris Emmert, Applicant)*	☒ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail
Shelley M. Davis, Esq. BARKER, ROSHOLT & SIMPSON, LLP PO Box 2139 Boise, ID 83701-2139 Fax: (208) 344-6034 smd@idahowaters.com Hand delivery or overnight mail: 1010 W Jefferson, Ste 102 Boise, ID 83702 *(Boise Project Board of Control, Protestant)*	☒ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail
Charles L. Honsinger, Esq. HONSINGER LAW, PLLC PO Box 517 Boise, ID 83701 Facsimile: (208) 908-8065 honsingerlaw@gmail.com *(City of Meridian, Intervenor)*	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

Richard T. Roats, Esq.
City Attorney
CITY OF KUNA
PO Box 13
Kuna, ID 83634
Facsimile: (208) 922-5989
rroats@kunaID.gov
kunaattorney@icloud.com
(City of Kuna, Intervenor)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Cherese D. McLain, Esq.
MSBT LAW, CHTD.
950 W Bannock St, Ste 520
Boise, ID 83702
Facsimile: (208) 331-1202
cdm@msbtlaw.com
(City of Eagle, Intervenor)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Abigale R. Germaine, Esq.
Assistant City Attorney
City Attorney's Office
CITY OF BOISE
PO Box 500
Boise, ID 83701-0500
Facsimile: (208) 384-4454
agermaine@cityofboise.org
Hand delivery or overnight mail:
150 N Capitol Blvd
Boise, ID 83702
(City of Boise, Intervenor)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

COURTESY COPIES TO:

Shelley W. Keen Water Right Section Manager IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 Fax: (208) 287-6700 shelley.keen@idwr.idaho.gov Hand delivery or overnight mail: The Idaho Water Center 322 E Front St Boise, ID 83702 *(Hearing Officer)*	☒ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail
Kimi White IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 kimi.white@idwr.idaho.gov Hand delivery or overnight mail: 322 E Front St Boise, ID 83702 *(Paralegal)*	☒ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail
Kyle Radek, P.E. Assistant City Engineer, Engineering Division Public Works Department CITY OF MERIDIAN 33 E Broadway Ave, Ste 200 Meridian, ID 83642 Facsimile: (208) 898-9551 kradek@meridiancity.org *(City of Meridian, Intervenor)*	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail
Mark R. Hilty Hamilton, Michaelson & Hilty LLP 1303 12th Ave Rd Nampa ID 83686 Fax: (208) 467-3058 mhilty@nampalaw.com	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

Michael J. Fuss, P.E., MBA
Director
Public Works Department
City of Nampa
411 Third St S
Nampa, ID 83651-3721
Fax: (208) 465-2261
fussm@cityofnampa.us
(City of Nampa, Intervenor)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Nate W. Runyan, P.E.
Deputy Director
Public Works Department
City of Nampa
411 Third St S
Nampa, ID 83651-3721
Fax: (208) 465-2261
runyann@cityofnampa.us
(City of Nampa, Intervenor)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Gregory P. Wyatt
Vice President and General Manager
Suez Water Idaho Inc.
PO Box 190420
Boise, ID 83719-0420
Fax: (208) 362-3858
greg.wyatt@suez-na.com
Hand delivery or overnight mail:
8248 W Victory Rd
Boise, ID 83709
(Suez Water Idaho Inc., Intervenor)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Roger D. Dittus, P.G.
Hydro-Geologist
Suez Water Idaho Inc.
PO Box 190420
Boise, ID 83719-0420
roger.dittus@suez-na.com
Fax: (208) 362-3858
Hand delivery or overnight mail:
8248 W Victory Rd
Boise, ID 83709
(Suez Water Idaho Inc., Intervenor)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Stephan L. Burgos
Director
Public Works Department
CITY OF BOISE
PO Box 500
Boise, ID 83701-0500
Facsimile: (208) 433-5650
sburgos@cityofboise.org
Hand delivery or overnight mail:
150 N Capitol Blvd, City Hall #1
Boise, ID 83702
(City of Boise, Intervenor)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Brent Orton, P.E., MSC
Public Works Director, City Engineer
CITY OF CALDWELL
621 East Cleveland Blvd.
Caldwell, ID 83605
Facsimile: (208) 455-3012
borton@cityofcaldwell.org
(City of Caldwell, Intervenor)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Ed Squires
Hydro Logic, Inc.
1002 W Franklin St
Boise, ID 83702-5431
Fax: (208) 342-3100
ed@hydrologicinc.net
(Cities of Caldwell and Meridian, Intervenors)

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Terry M. Scanlan, P.E., P.G.
Christian R. Petrich, Ph.D., P.E., P.G.
Roxanne Brown
SPF Water Engineering, LLC
300 E Mallard Dr, Ste 350
Boise, ID 83706
Fax: (208) 383-4156
tscanlan@spfwater.com
cpetrich@spfwater.com
rbrown@spfwater.com

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Christopher H. Meyer

Exhibit A ORDER

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-04013B AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHTS NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARM)	))))))	**ORDER**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of two letters dated May 2, 2005 ("Letters"), from Larry Cope of Clear Springs Foods, Inc ("Clear Springs"). The Letters request water rights administration in Water District No. 130 pursuant to Idaho Code § 42-607 in order to effectuate the distribution of water to the water rights identified in the above caption that are held by Clear Springs for the diversion and use of water at its Snake River Farm and Crystal Springs Farm.

Based upon the Director's consideration of this matter, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

The Eastern Snake River Plain Aquifer and the Department's Ground Water Model

1. The Eastern Snake River Plain Aquifer ("ESPA") is defined as the aquifer underlying an area of the Eastern Snake River Plain that is about 170 miles long and 60 miles wide as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," U. S. Geological Survey ("USGS") Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply. *See* IDAPA 37.03.11.050.

2. The ESPA is predominately in fractured Quaternary basalt having an aggregate thickness that may, at some locations, exceed several thousand feet, decreasing to shallow depths in the Thousand Springs area. The ESPA fractured basalt is characterized by high hydraulic conductivities, typically 1,000 feet/day but ranging from 0.1 feet/day to 100,000 feet/day.

3. Based on averages for the time period from May of 1980 through April of 2002, the ESPA receives approximately 7.5 million acre-feet of recharge on an average annual basis from the following: incidental recharge associated with surface water irrigation on the plain (3.4

million acre-feet); precipitation (2.2 million acre-feet); underflow from tributary drainage basins (0.9 million acre-feet); and losses from the Snake River and tributaries (1.0 million acre-feet).

4. Based on averages for the time period from May of 1980 through April of 2002, the ESPA also discharges approximately 7.5 million acre-feet on an average annual basis through sources including complexes of springs in the Thousand Springs area, springs in and near American Falls Reservoir, and the discharge of nearly 2.0 million acre-feet annually in the form of depletions from ground water withdrawals.

5. From the pre-irrigation conditions of the 1860s until the 1950s, the amount of water diverted from the Snake River and its tributaries for gravity flood/furrow irrigation increased substantially, from about 8 million acre-feet, or less, in the early 1900s to about 9.5 million acre-feet in the early 1950s. USGS Professional Paper 1408-F, p. F14. Significant quantities of the surface water diverted were in excess of crop consumptive uses and provided incidental recharge to the ESPA above the average incidental recharge of 3.4 million acre-feet described in Finding 3 for the May 1980 through April 2002 time period. Ground water levels across the ESPA responded by rising at many locations. For example, the average rise in ground water levels near Jerome, Idaho, and near Fort Hall, Idaho, was 20 to 40 feet over several tens of years. The average rise in ground water levels west of American Falls was 60 to 70 feet. USGS Professional Paper 1408-A, p. A40. As a result, spring discharges in the Thousand Springs area correspondingly increased based on USGS data as shown on Attachment A.

6. Beginning in about the 1960s to 1970s time period through the most recent years, the total combined diversions of natural flow and storage releases above Milner Dam for irrigation using surface water supplies have declined from an average of nearly 9 million acre-feet annually to less than 8 million acre-feet annually, notwithstanding years of drought, because of conversions from gravity flood/furrow irrigation to sprinkler irrigation in surface water irrigation systems and other efficiencies implemented by surface water delivery entities. The measured decrease in cumulative surface water diversions above Milner Dam for irrigation reflects the fact that less water is generally needed in the present time to fully irrigate lands authorized for irrigation with a certain crop mix under certain climatic growing conditions than was needed in the 1960s to 1970s for the same lands, crop mix, and climatic growing conditions. With parallel appropriations of ground water, which dramatically increased beginning in about 1950, ground water levels across the ESPA have responded by declining at most locations where levels had previously risen, exacerbated by the worst consecutive period of drought years on record for the upper Snake River Basin. As a result, spring discharges in the Thousand Springs area have correspondingly declined based on USGS data as also shown on Attachment A.

7. The ground water in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and springs tributary to the Snake River is in the Thousand Springs area.

8. Hydraulically-connected ground water sources and surface water sources are sources that within which, ground water can become surface water, or surface water can become

ground water, and the amount that becomes one or the other is largely dependent on ground water elevations.

9. When water is pumped from a well in the ESPA, a conically-shaped zone that is drained of ground water, termed a cone of depression, is formed around the well. This causes surrounding ground water in the ESPA to flow to the cone of depression from all sides. These depletionary effects propagate away from the well, eventually reaching one or more hydraulically-connected reaches of the Snake River and its tributaries, including springs in the Thousand Springs area. When the depletionary effects reach a hydraulically-connected reach of the Snake River or the points of discharge for springs in the Thousand Springs area, reductions in flow begin to occur in the form of losses from the river, reductions in spring discharge, or reductions in reach gains to the river. The depletions to the Snake River and its tributaries increase over time, with seasonal variations corresponding to seasonal variations in ground water pumping, and then either recede over time, if ground water pumping from the well ceases, or reach a maximum over time beyond which no further significant depletions occur, if ground water pumping from the well continues from year to year. This latter condition is termed a steady-state condition.

10. Various factors determine the specific hydraulically-connected reach of the Snake River or spring complexes affected by the pumping of ground water from a well in the ESPA; the magnitude of the depletionary effects to a hydraulically-connected reach or spring complex; the time required for those depletionary effects to first be expressed as reductions in river flow or spring discharge; the time required for those depletionary effects to reach maximum amounts; and the time required for those depletionary effects to either recede, if ground water pumping from the well ceases, or reach steady-state conditions with continuing seasonal variations, if ground water pumping continues. Those factors include the proximity of the well to the various hydraulically-connected reaches or springs, the transmissivity of the aquifer (hydraulic conductivity multiplied by saturated thickness) between the well and the hydraulically-connected reach of the Snake River or springs, the riverbed hydraulic conductivity, the specific yield of the aquifer (ratio of the volume of water yielded from a portion of the aquifer to the volume of that portion of the aquifer), the period of time over which ground water is pumped from the well, and the amount of ground water pumped that is consumptively used.

11. The time required for depletionary effects in a hydraulically-connected reach of the Snake River or tributary springs to first be expressed, the time required for those depletionary effects to reach maximum amounts, and the time required for those depletionary effects to either recede, if ground water pumping from the well ceases, or reach steady-state conditions with continuing seasonal variations, if ground water pumping continues, can range from days to years or even decades, depending on the factors described in Finding No. 10. Generally, the closer a well in the ESPA is located to a hydraulically-connected reach of the Snake River or tributary springs, the larger will be the flow reductions in the hydraulically-connected reach or springs, as a percentage of the ground water depletions, and the shorter will be the time periods for depletionary effects to first be expressed, for those depletionary effects to reach maximum amounts, and for those depletionary effects to either recede or reach steady-state conditions with continuing seasonal variations. However, essentially all depletions of ground water from the

ESPA cause reductions in flows in the Snake River and spring discharges equal in quantity to the ground water depletions over time.

12. The Department uses a calibrated ground water model to determine the effects on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries from pumping a single well in the ESPA, from pumping selected groups of wells, and from surface water uses on lands above the ESPA.

13. In 2004, in collaboration with the Idaho Water Resources Research Institute ("IWRRI"), University of Idaho, U. S. Bureau of Reclamation ("USBR"), USGS, Idaho Power Company, and consultants representing various entities, including certain entities relying on the discharge of springs in the Thousand Springs area, the Department completed reformulation of the ground water model used by the Department to simulate effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries, including springs in the Thousand Springs area. This effort was funded in part by the Idaho Legislature and included significant data collection and model calibration intended to reduce uncertainty in the results from model simulations.

14. Below Milner Dam, the Snake River is incised and springs in the Thousand Springs area emanate from the canyon wall. The ground water model used by the Department prior to the reformulation of the model represented the Thousand Springs area as a single, hydraulically-connected, tributary reach of the Snake River. In the reformulated ground water model for the ESPA described in Finding 13, the Thousand Springs area was divided into six adjacent groupings of spring complexes, or spring reaches, based on the relative magnitude of spring discharge as follows:

a. Devil's Washbowl to the USGS stream gage located near Buhl, Idaho ("Buhl Gage") – includes springs having moderately large rates of discharge at intermittent locations;

b. Buhl Gage to Thousand Springs – includes springs having somewhat larger average rates of discharge per river mile than in the reach Devil's Washbowl to Buhl Gage;

c. Thousand Springs – includes springs having very large rates of discharge;

d. Thousand Springs to Malad Gorge – includes springs having moderate discharge;

e. Malad Gorge – includes springs having very large rates of discharge near the confluence of the Malad and Snake Rivers; and

f. Malad Gorge to Bancroft – includes springs having relatively small rates of discharge.

15. The segment that includes the springs providing the source of water from which Clear Springs diverts surface water for its Snake River Farm is the Buhl Gage to Thousand Springs spring reach. Based on measurements published by the USGS (USGS Maps 1-1947-A through 1-1947-E) of spring discharges in the Buhl Gage to Thousand Springs spring reach taken at various times when the discharges from springs in the Thousand Springs area were near the historical maximums and used to calibrate the ESPA ground water model, the maximum authorized amount of water diverted by Clear Springs for its Snake River Farm (equal to the total diversion rate of 117.67 cfs under the water rights for the Snake River Farm) accounted for 7 percent of the measured reach gains in the Buhl Gage to Thousand Springs spring reach.

16. The segment that includes the springs providing the source of water from which Clear Springs diverts surface water for its Crystal Springs Farm is the Devil's Washbowl to Buhl Gage spring reach. Based on measurements published by the USGS (USGS Maps 1-1947-A through 1-1947-E) of spring discharges in the Devil's Washbowl to Buhl Gage spring reach taken at various times when the discharges from springs in the Thousand Springs area were near the historical maximums and used to calibrate the ESPA ground water model, the maximum authorized amount of water diverted by Clear Springs for its Crystal Springs Farm (equal to the total decreed diversion rate of 335.1 cfs) accounted for 31 percent of the measured reach gains in the Devil's Washbowl to Buhl Gage spring reach.

17. The reformulated ground water model for the ESPA was calibrated to recorded ground water levels in the ESPA, spring discharge in the spring reaches described in Finding 14, and reach gains or losses to Snake River flows, determined from stream gages together with other stream flow measurements, for the period May 1, 1980 to April 30, 2002. The calibration targets, consisting of measured ground water levels, reach gains/losses, and discharges from springs, have inherent uncertainty resulting from limitations on the accuracy of the measurements. The uncertainty in results predicted by the ESPA ground water model cannot be less than the uncertainty of the calibration targets. The calibration targets having the maximum uncertainty are the reach gains or losses determined from stream gages, which although rated "good" by the USGS, have uncertainties of up to 10 percent.

18. The Director relied on results from the reformulated ground water model for the ESPA described in Findings 13, 14, and 17 for an order he issued on April 19, 2005 (amended on May 2, 2005) in response to a filing by the Surface Water Coalition[1], seeking the curtailment of ground water rights junior in priority to the surface water rights held by members of the Coalition, and two orders he issued on May 19, 2005, in response to filings by Rangen, Inc. and Blue Lakes Trout Farm, Inc., seeking the curtailment of ground water rights junior in priority to the surface water rights held by Rangen and Blue Lakes, respectively.

19. IWRRI is completing documentation of the development and calibration of the reformulated ground water model for the ESPA described in Findings 13, 14, and 17. During preparation of the documentation, IWRRI determined subsequent to the orders issued by the Director on May 19, 2005, that incorrect data entry had occurred during calibration of the ESPA

[1] A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

ground water model involving the calibration targets used for the river reaches above the Thousand Springs area. Return flows measured during model development were not integrated into calibration targets, and the return flows that were used during calibration for the river reach between the USGS gaging stations at Near Blackfoot and Neeley were the return flows between the USGS gaging stations at Blackfoot and Neeley. The data entry errors did not significantly affect results from simulations using the reformulated ground water model for the ESPA[2].

20. Discharges from springs in the segments or reaches described in Finding 14 have diminished primarily because of significant reductions in incidental recharge of the ESPA from surface water irrigation resulting from changes in surface water irrigation systems and application practices (conversion from application by gravity flood/furrow irrigation to application by sprinkler systems), changes in the place of use for surface water diverted under water rights held by or for the benefit of the North Side Canal Company, and the last five consecutive years of drought.

21. Spring discharges are also reduced as a result of ground water withdrawals from the ESPA for irrigation and other consumptive purposes, especially ground water that is diverted in relatively close proximity to the area of the springs. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from certain portions of the ESPA for irrigation and other consumptive purposes cause depletions in the flow of springs discharging in the spring reaches described in Finding 14. When superimposed on diminished spring discharges resulting from changes in surface water irrigation and drought, reductions in spring discharges caused by ground water depletions under relatively junior priority water rights can potentially cause injury to senior priority water rights dependent on spring sources.

22. The Department is implementing full conjunctive administration of rights to the use of hydraulically-connected surface and ground waters within the Eastern Snake River Plain consistent with Idaho law and available information. The results of simulations from the Department's ground water model are suitable for making factual determinations on which to base conjunctive administration of surface water rights diverted from the Snake River and its tributaries and ground water rights diverted from the ESPA.

23. The Department's ground water model represents the best available science for determining the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries. There currently is no other technical basis as reliable as the simulations from the Department's ground water model for the ESPA that can be used to determine the effects of ground water diversions and surface water uses on the ESPA and hydraulically-connected reaches of the Snake River and its tributaries.

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[2] The ground water model for the ESPA calibrated with the data entry errors is designated version 1.0. The recalibrated model corrected for data entry errors is designated version 1.1.

Creation and Operation of Water Districts No. 120 and No. 130

24. On November 19, 2001, the State of Idaho sought authorization from the Snake River Basin Adjudication ("SRBA") District Court for the interim administration of water rights by the Director in all or parts of the Department's Administrative Basins 35 and 41 overlying the ESPA in the American Falls area and all or parts of Basins 36 and 43 overlying the ESPA in the Thousand Springs area. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued two orders on February 19, 2002, creating Water District No. 120 and Water District No. 130, pursuant to the provisions of Idaho Code § 42-604.

25. On August 30, 2002, the State of Idaho filed a second motion with the SRBA District Court seeking authorization for the interim administration of water rights by the Director in the portion of the Department's Administrative Basin 37 overlying the ESPA in the Thousand Springs area. On November 19, 2002, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on January 8, 2003, revising the boundaries of Water District No. 130 to include the portion of Administrative Basin 37 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604.

26. On July 10, 2003, the State of Idaho filed a third motion with the SRBA District Court seeking authorization for the interim administration of water rights by the Director in the portion of the Department's Administrative Basin 29 overlying the ESPA in the American Falls area. On October 29, 2003, the SRBA District Court issued an order authorizing the interim administration by the Director. After notice and hearing, the Director issued an order on January 22, 2004, revising the boundaries of Water District No. 120 to include the portion of Administrative Basin 29 overlying the ESPA, pursuant to the provisions of Idaho Code § 42-604.

27. Water Districts No. 120 and No. 130 were created, and the respective boundaries revised, to provide for the administration of water rights, pursuant to chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights. As a result, the watermasters for Water Districts No. 120 and No. 130 were given the following duties to be performed in accordance with guidelines, direction, and supervision provided by the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of any stipulated agreement; and

d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

28. On April 15, 2005, the State of Idaho filed three motions with the SRBA District Court seeking authorization for the interim administration of water rights by the Director in the Department's Administrative Basin 25; Basins 31, 32, and 33; and Basin 45. If the SRBA District Court authorizes interim administration in these administrative basins, nearly all ground water rights authorizing diversion of ground water from the ESPA will be subject to administration through water districts, when combined with the ground water rights already in Water Districts No. 120 and No. 130. At the time of filing Director's Reports in the SRBA later this year for the relatively few remaining ground water rights authorizing diversions from the ESPA, additional motions will be filed by the State of Idaho seeking authorization for interim administration of those remaining rights. While authorization for interim administration of the remaining ground water rights is subject to determinations to be made by the SRBA District Court, the Director anticipates that water districts covering all of the ESPA will be in place for the irrigation season of 2006, and all ground water rights authorizing diversions from the ESPA will be subject to administration through water districts established pursuant to chapter 6, title 42, Idaho Code.

29. The general location and existing boundaries for Water Districts No. 120 and No. 130 as well as the location and existing boundaries for the American Falls Ground Water Management Area are shown on Attachment B. Boundaries for a proposed addition to Water District No. 120 as well as areas for potential future water districts (Water Districts No. 110 and No. 140) are also shown on Attachment B.

Conjunctive Management Rules

30. Idaho Code § 42-603 authorizes the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." Promulgation of such rules and regulations must be in accordance with the procedures of chapter 52, title 67, Idaho Code.

31. On October 7, 1994, the Director issued *Order Adopting Final Rules*; the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) ("Conjunctive Management Rules"), promulgated pursuant to chapter 52, title 67, Idaho Code, and Idaho Code § 42-603.

32. Pursuant to Idaho Code § 67-5291, the Conjunctive Management Rules were submitted to the 1st Regular Session of the 53rd Idaho Legislature (1995 session). During no legislative session, beginning with the 1st Regular Session of the 53rd Idaho Legislature, have the Conjunctive Management Rules been rejected, amended, or modified by the Idaho Legislature. Therefore, the Conjunctive Management Rules are final and effective.

33. The Conjunctive Management Rules "apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules

govern the distribution of water from ground water sources and areas having a common ground water supply." IDAPA 37.03.11.020.01.

34. The Conjunctive Management Rules "acknowledge all elements of the prior appropriation doctrine as established by Idaho law." IDAPA 37.03.11.020.02.

The Letters Submitted by Clear Springs Seeking Administration of Water Rights and Application of the Conjunctive Management Rules

35. On May 2, 2005, the Director received by email the two Letters from Larry Cope of Clear Springs Foods, Inc. requesting "water rights administration in Water District 130 pursuant to I.C. Section 42-607 in order to effectuate the delivery of Clear Springs Foods, Inc., a/k/a Clear Springs, water rights ..." at its Snake River Farm (water rights nos. 36-04013A, 36-04013B, and 36-07148) and at its Crystal Springs Farm (water rights nos. 36-07083 and 36-07568). Each of the letters also states that water provided "through proper administration of junior surface and ground water rights within Water District 130 will be put to beneficial use by Clear Springs."

36. The water rights held by Clear Springs for diversion and use at its Snake River Farm, including those that Clear Springs sought to have protected by the administration of junior priority water rights, are as follows pursuant to decrees issued by the SRBA District Court:

Water Right No.:	36-02703	36-02048	36-04013C	36-04013A	36-04013B	36-07148
Source:	Springs[3]	Springs[3]	Springs[3]	Springs[3]	Springs[3]	Springs[3]
Priority Date:	11/23/1933	04/11/1938	11/20/1940	09/15/1955	02/04/1964	01/31/1971
Beneficial Use:	Fish Propagation	Fish Propagation	Fish Propagation[4]	Fish Propagation	Fish Propagation	Fish Propagation[5]
Diversion Rate: (117.67 cfs total for fish propagation)	40.00 cfs	20.00 cfs	14.00 cfs	15.00 cfs	27.00 cfs	1.67 cfs
Period of Use:	Year round	Year round	Year round	Year round	Year round	Year round

37. One of the two letters described in Finding 35 pertaining to the Snake River Farm included measured diversions of available spring discharge for the years 1988 through 2004. The

[3] Tributary to Clear Lakes. Source is also known as Clear Springs.

[4] Water right also authorizes diversion and use of 0.04 cfs, not to exceed 13,000 gallons per day, for domestic use.

[5] Water right also authorizes the diversion and use of 0.04 cfs for domestic use.

history of measured diversions of available spring discharge for the Snake River Farm is shown on Attachment C.

38. The water rights held by Clear Springs for diversion and use at its Crystal Springs Farm that Clear Springs sought to have protected by the administration of junior priority water rights are as follows pursuant to decrees issued by the SRBA District Court:

Water Right No.:	36-07083	36-07568
Source:	Crystal Springs	Crystal Springs
Priority Date:	07/08/1969	09/06/1975
Beneficial Use:	Fish Propagation	Fish Propagation
Diversion Rate:	300.00 cfs	200.00 cfs
(Combined use limited to a total combined diversion rate of 335.10 cfs)		
Period of Use:	Year round	Year round

39. One of the two letters described in Finding 35 pertaining to the Crystal Springs Farm included measured diversions of available spring discharge for the years 1978 through 2004. The history of measured diversions of available spring discharge for the Crystal Springs Farm is shown on Attachment D.

40. Rule 10.04 of the Conjunctive Management Rules defines a "delivery call" as: "A request from the holder of a water right for administration of water rights under the prior appropriation doctrine." The Letters, described in Finding 35, seeking water rights administration pursuant to Idaho Code § 42-607 to effectuate the delivery of the Clear Springs water rights at its Snake River Farm and at its Crystal Springs Farm each come within the definition of a delivery call.

41. Water Districts No. 36A, No. 120, and No. 130 were created pursuant to Idaho Code § 42-604. Water District No. 36A includes water rights that are both senior in priority and junior in priority to Clear Springs' water rights and that are diverted from other sources that are hydraulically connected through the ESPA, to varying degrees, to the source for Clear Springs' water rights. Water rights diverted from these other sources, which are hydraulically connected through the ESPA to the source for Clear Springs' water rights, do not interfere with or impact Clear Springs' water rights.

42. Water District No. 120 contains water rights that are junior in priority to Clear Springs' water rights and divert from ground water that is hydraulically connected to the source for Clear Springs' water rights. Such water rights could potentially interfere with and potentially impact Clear Springs' water rights.

43. Water District No. 130 includes water rights that divert from the same surface water source as the water rights for Crystal Springs Farm and that are both senior in priority and junior in priority to the water rights for Crystal Springs Farm. Other water rights in Water District No. 130, both senior in priority and junior in priority to Clear Springs' rights for both the Snake River Farm and the Crystal Springs Farm, are diverted from other surface water sources that are hydraulically connected through the ESPA, to varying degrees, but do not interfere with or impact Clear Springs' water rights. Water District No. 130 also contains water rights that are junior in priority to Clear Springs' water rights and divert from ground water that is hydraulically connected to the source for Clear Springs' water rights. Such water rights could potentially interfere with and potentially impact Clear Springs' water rights.

44. Rule 40 of the Conjunctive Management Rules is titled "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 applies to the delivery calls made by Clear Springs for its Snake River and Crystal Springs farms against the holders of junior priority ground water rights in both Water District No. 120 and Water District No. 130.

45. Some of the junior priority ground water rights that could potentially interfere with and potentially impact Clear Springs' water rights are not in a water district created pursuant to the provisions of Idaho Code § 42-604 because a final decree has not been issued by the SRBA District Court or the requirements for interim administration of these rights pursuant to Idaho Code § 42-1417 have not been met.

46. Rule 30 of the Conjunctive Management Rules is titled "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 Within Areas of the State Not in Organized Water Districts or Within Water Districts Where Ground Water Regulation Has Not Been Included in the Function of Such Districts or Within Areas That Have Not Been Designated Ground Water Management Areas."

47. Rule 41 of the Conjunctive Management Rules is titled "Administration of Diversion and Use of Water Within a Ground Water Management Area."

48. The Letters, described in Finding 35, seeking water rights administration pursuant to Idaho Code § 42-607 to effectuate the delivery of the Clear Springs water rights at its Snake River Farm and at its Crystal Springs Farm do not meet the requirements set forth in Rule 30 of the Conjunctive Management Rules. Also, the Letters do not seek administration of junior priority ground water rights in the American Falls Ground Water Management Area as provided in Rule 41 of the Conjunctive Management Rules. Pursuant to Rule 41, such administration could not occur until the irrigation season of 2006, even if material injury to Clear Springs' rights was determined to be occurring as a result of diversion and use of ground water under junior priority rights in the American Falls Ground Water Management Area.

49. While Rule 40 of the Conjunctive Management Rules is applicable to the Letters described in Finding 35, neither Rule 40 nor any other provisions of the Conjunctive Management Rules are applicable to delivery calls or demands for water distribution by the holder of a senior priority water right against the holder of a junior priority surface water right.

Authorized Diversion Rate for Water Rights Nos. 36-04013A, 36-04013B, and 36-07148 (Snake River Farm) and for 36-07083 and 36-07568 (Crystal Springs Farm)

50. Springs discharging in the Thousand Springs area do not discharge at a constant rate or at a rate that progressively increases or decreases from year to year. While there are overall increases or decreases in the discharge from individual springs between years (inter-year variations), there are also pronounced within-year or intra-year variations in discharge.

51. Simplistically, overall variations between years in the discharge of springs in the Thousand Springs area result from differences between the amounts of ground water depletions and recharge to the ESPA above the springs, with delays in the response of spring discharge ranging at the extremes from days to decades depending on the proximity of ground water depletions and recharge and the other factors set forth in Finding 10. Factors affecting overall variations between years in the cumulative discharge from springs in the Thousand Springs area as well as from individual springs include but are not necessarily limited to: variations in surface water supplies available for irrigation above the ESPA, which affect cropping decisions and the amount of incidental recharge to the ESPA; changes in the amounts and timing of tributary underflow to the ESPA, which also reflect numerous variations upgradient from where tributary underflow contributes to the ESPA; inter-year variations in precipitation and temperature, which not only affect the amount of surface water used above the ESPA and recharge to the ESPA, but also affect the quantity of ground water withdrawals and depletions from the ESPA; and differences between years in the quantity of intentional or managed recharge to the ESPA.

52. Intra-year variations in the discharge from individual springs result from the factors described in Finding 51 but also from other factors including timing of: surface water application above the ESPA and associated incidental recharge; ground water withdrawals and depletions from the ESPA; and intentional or managed recharge to the ESPA.

53. While both the regional and local factors affecting inter-year and intra-year variations in spring discharge are generally understood, the interactions between these factors are complex and the specific effects of individual factors and various combinations of factors on the discharge from individual springs are not presently quantifiable.

54. Both inter-year and intra-year variations in the discharge from the springs that are the sources for water rights nos. 36-04013A, 36-04013B, and 36-07148 (Snake River Farm) and for 36-07083 and 36-07568 (Crystal Springs Farm) existed when appropriations for these rights were initiated (September 15, 1955; February 4, 1964; January 31, 1971; July 8, 1969; and September 6, 1975; respectively). 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. However, the factors that are known to cause both inter-year and intra-year variations clearly existed at the time the appropriations for these rights were initiated.

55. The rates of diversion authorized pursuant to water rights nos. 36-04013A, 36-04013B, and 36-07148 (Snake River Farm) and for 36-07083 and 36-07568 (Crystal Springs Farm) (15.00 cfs, 27.00 cfs, 1.67 cfs, 300.00 cfs, and 35.10 cfs[6], respectively) are not quantity entitlements that are guaranteed to be available to Clear Springs at all times. Rather, the authorized rates of diversion are the maximum rates at which water can be diverted under these rights, respectively, when such quantities of water are physically available and the rights are in priority. Clear Springs cannot call for the curtailment of junior priority water rights at all times that insufficient water is physically available to fill water rights nos. 36-04013A, 36-04013B, 36-07148, 36-07083, and 36-07568 at the authorized rates of diversion. Clear Springs is not entitled to water supplies at its Snake River Farm or its Crystal Springs Farm that are enhanced beyond the conditions that existed at the time such rights were established; i.e., Clear Springs cannot call for the curtailment of junior priority ground water rights simply because seasonally the discharge from springs is less than the authorized rates of diversion for Clear Springs' rights unless such seasonal variations are caused by depletions resulting from diversion and use of water under such junior priority rights.

56. Clear Springs can only call for the distribution of water to its rights for its Snake River Farm or its Crystal Springs Farm through the curtailment of junior priority ground water rights from the hydraulically-connected ESPA when such curtailment would result in a usable amount of water reaching the source for the Snake River Farm or the source for the Crystal Springs Farm in time of need, and depletions causing material injury as a result of diversion and use of ground water under such junior priority rights have not been adequately mitigated.

Analysis of Material Injury, Reasonableness of Diversions, and Effects of Junior Rights (Snake River Farm)

Factors Considered in Determining Material Injury To and Reasonableness of Surface Water Diversions Under Water Rights Nos. 36-04013A, 36-04013B, and 36-07148

57. The water rights held by Clear Springs for its Snake River Farm, described in Finding 36, authorize the combined or total diversion of 117.67 cfs for fish propagation purposes, with the first right for 40.00 cfs (no. 36-02703) having a priority date of November 23, 1933; the second right for 20.00 cfs (no. 36-02048) having a priority date of April 11, 1938; the third right for 14.00 cfs (no. 36-04013C) having a priority date of November 20, 1940; the fourth right for 15.00 cfs (no. 36-04013A) having a priority date of September 15, 1955; the fifth right for 27.00 cfs (no. 36-04013B) having a priority date of February 4, 1964; and the last right for 1.67 cfs (no. 36-07148) having a priority date of January 31, 1971.

[6] The authorized diversion rate for water right no. 36-07568 is 200.00 cfs but when combined with water right no. 36-07083, the combined authorized diversion rate is 335.10 cfs.

58. The Department's water right file for water rights nos. 36-04013A, 36-04013B, and 36-04013C includes an undated memorandum captioned "Snake River Trout Water Measurements" from Mike Fennen (affiliation unknown) to Bob Erkins and Dave Erickson of Thousand Springs Trout Farms, Inc. (the holder of water rights nos. 36-02703, 36-02048, 36-04013A, 36-04013B, 36-04013C, and 36-07148 prior to the rights being acquired by Clear Springs). The memorandum includes measurements made in July of 1972 showing total diversion of water to the Snake River Farm of 118.86 cfs. July of 1972 is subsequent to the latest priority of the rights held by Clear Springs for its Snake River Farm and demonstrates that the total amount of water authorized for diversion and use (117.67 cfs) under water rights nos. 36-02703, 36-02048, 36-04013A, 36-04013B, 36-04013C, and 36-07148 has been diverted and presumably applied to beneficial use at times when available. Additionally, the history of measured diversions included with the letter described in Finding 35 pertaining to the Snake River Farm showed that 116 cfs, which is only marginally less than the total amount authorized for diversion and use under the rights, was diverted and presumably applied to beneficial use at the Snake River Farm on November 1, 1989.

59. Attachment C shows the time history of measured diversions, included with the letter described in Finding 35 pertaining to the Snake River Farm, taken on ten-day intervals from 1988 through 1991 and weekly intervals since 1991 from the springs providing the source of water for the water rights held by Clear Springs for its Snake River Farm. The measured diversions show that discharges from the springs and the diversions to the Snake River Farm typically peak during the period of October through December, with the lowest flows typically occurring during the period of May through August.

60. The time history of spring discharge and diversions to the Snake River Farm depicted in Attachment C shows that spring discharge and diversions have declined. The seasonal maximum spring discharge and diversion in 2004 was 93.18 cfs at the time of the weekly measurement on October 20, 2004, which is 24.5 cfs less, or about 21 percent less, than the total authorized diversion under Clear Springs' water rights nos. 36-02703, 36-02048, 36-04013A, 36-04013B, 36-04013C, and 36-07148.

61. Based on the records of flow measurements included with the letter described in Finding 35 pertaining to the Snake River Farm, the quantity of water available at the source for water rights nos. 36-02703, 36-02048, and 36-04013C with the priority dates of November 23, 1933, April 11, 1938, and November 20, 1940, respectively, is currently sufficient to continuously fill these rights at the combined authorized diversion rate of 74.00 cfs. The quantity of water available at the source for water right no. 36-04013A with the priority date of September 15, 1955, taking into account the seasonal variations in spring flows that have existed since the date of appropriation for this right, is also currently sufficient to fill this right at the authorized diversion rate of 15.00 cfs when the discharges from springs providing the source of water for this right are at seasonal highs. *See* IDAPA 37.03.11.042.01.a.

62. Based on the records of flow measurements included with the letter described in Finding 35 pertaining to the Snake River Farm and taking into account the seasonal variations in

spring flows that have existed since the dates of appropriation for these rights, the quantity of water available at the source for water rights nos. 36-04013B and 36-07148 with the priority dates of February 4, 1964, and January 31, 1971, respectively, is currently insufficient to fill these rights even when the spring discharge providing the source for the rights is at seasonal highs. The quantity of water available at the source for water rights nos. 36-04013B and 36-07148 is expected to continue to be insufficient during 2005. *See* IDAPA 37.03.11.042.01.a.

63. The Clear Lake Ranch P.U.D. Master Association, Inc. holds a permit for water right no. 36-08329 having the priority date of June 2, 1987, and authorizing the diversion of surface water for domestic use (0.7 cfs) and commercial use (0.2 cfs) from the same source as for water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm. The priority date for water right no. 36-08329 is later than the priority dates for water rights nos. 36-04013B and 36-07148.

64. Based on the results from field inspections conducted on May 5, 2005, by Cindy Yenter, the watermaster for Water District No. 130, and Brian Patton, a registered professional civil engineer, Clear Springs has expended reasonable efforts to divert water for rights nos. 36-04013B and 36-07148 from the source for use at the Snake River Farm, except for the following. The western-most spring collection box that diverts spring discharge into the 54-inch diameter pipeline to the Snake River Farm was found to be in disrepair, and an estimated 2 cfs of collected spring discharge was escaping the box. *See* IDAPA 37.03.11.042.01.b.

65. During the field inspection of May 5, 2005, the watermaster for Water District No. 130 identified approximately 7 or 8 acres of irrigated grass and landscaping around the facilities at the Snake River Farm. The maximum amount of irrigation authorized under the water rights held by Clear Springs for the Snake River Farm is one acre, one-half acre under the domestic portion of water right no. 36-04013C and one-half acre under the domestic portion of water right no. 36-07148. Therefore, there is no water right authorizing the irrigation of approximately 6 or 7 acres of grass and landscaping around the facilities at the Snake River Farm.

66. Based on the Department's water rights data base and simulations using version 1.1 of the Department's ground water model for the ESPA described in Findings 13, 14, 17, and 19, the diversion and consumptive use of ground water under water rights having priority dates later than the priority date for water right no. 36-04013B (February 4, 1964) in Water District No. 120, and which at steady-state conditions reduce spring discharge in the Buhl Gage to Thousand Springs spring reach by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is the uncertainty in model simulations, *see* Finding 17), has insignificant effects on the quantity and timing of water available from springs discharging in the Buhl Gage to Thousand Springs spring reach, which includes the source from which Clear Springs diverts surface water for its Snake River Farm. However, the diversion and consumptive use of such rights in Water District No. 130, mainly from within the boundaries of the North Snake Ground Water District, does affect the quantity and timing of water available from springs discharging in the Buhl Gage to Thousand Springs spring reach based on simulations using the ground water model for the ESPA. *See* IDAPA 37.03.11.042.01.c.

67. Based on the records of flow measurements included with the letter described in Finding 35 pertaining to the Snake River Farm, as well as the field investigations on May 5, 2005, described in Finding 64, except for the unauthorized irrigation of approximately 6 or 7 acres described in Finding 65 Clear Springs is currently diverting and using surface water at the Snake River Farm within the authorized diversion rate for water rights nos. 36-02703, 36-02048, 36-0413C, 36-04013A, 36-04013B, and 36-07148. *See* IDAPA 37.03.11.042.01.e.

68. Based on the field investigations on May 5, 2005, described in Finding 64, the Clear Springs Snake River Farm facilities have adequate water measuring and recording devices. *See* IDAPA 37.03.11.042.01.f.

69. Based on the results from the field inspection on May 5, 2005, described in Finding 64, other than the collection box that is in disrepair Clear Springs is employing reasonable diversion, conveyance efficiency, and conservation practices at the Snake River Farm. Other than repairing the collection box, no other means for using the existing facilities and water supplies at the Snake River Farm were identified that Clear Springs should be required to implement given the decreed elements of water rights nos. 36-04013B and 36-07148. *See* IDAPA 37.03.11.042.01.g.

70. Based on the results from the field inspection on May 5, 2005, described in Finding 64, there are no alternate reasonable means of diversion or alternate points of diversion that Clear Springs should be required to implement at the Snake River Farm to provide water for rights nos. 36-04013B and 36-07148 during times the rights would not otherwise be satisfied given the decreed elements of water rights nos. 36-04013B and 36-07148. *See* IDAPA 37.03.11.042.01.h.

Effects of Curtailing Ground Water Diversions Under Rights Junior to Water Rights Nos. 36-04013B and 36-07148

71. Version 1.1 of the Department's ground water model for the ESPA, described in Findings 13, 14, 17 and 19, was used to simulate the effects of curtailing the diversion and use of ground water for the irrigation of 52,470 equivalent[7] acres on an ongoing basis under water rights within Water District No. 130 that (1) authorize the diversion and use of ground water for consumptive uses from the area of common ground water supply described in Finding 1, (2) have priority dates later than the priority date for water right no. 36-0413B (February 4, 1964), and (3) based on model simulations reduce spring discharge in the Buhl Gage to Thousand Springs

[7] For the ESPA ground water model, an algorithm is used to simulate the effects of supplemental ground water irrigation where surface water is deliverable for some portion of the irrigation of those lands. For each model cell, acreages simulated to be irrigated with both surface water and supplemental ground water are replaced with acreages simulated to be irrigated using all ground water such that the simulated consumptive use on the replacement acreage equals the consumptive use on the acreage with supplemental ground water irrigation. The equivalent acreage consists of the sum of acreages irrigated solely with ground water and the replacement acreages for acreages irrigated with both surface water and ground water.

spring reach by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is the uncertainty in model simulations, *see* Finding 17). The results of the simulation show that curtailing the diversion and use of ground water for the irrigation of these lands would increase the discharge of springs in the Buhl Gage to Thousand Springs spring reach, which includes the springs from which Clear Springs diverts surface water for its Snake River Farm, by an average of 38 cfs, varying from a seasonal low of about 14 cfs to a seasonal high of about 62 cfs, at steady state conditions.

72. Based on the simulations using the ESPA ground water model described in Finding 71 and assuming that 7 percent of any increase in reach gains in the Buhl Gage to Thousand Springs spring reach would accrue to the Snake River Farm diversions (*see* Finding 15), it is estimated that curtailing the diversion and use of ground water for the irrigation of 52,470 equivalent acres on an ongoing basis under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-0413B (February 4, 1964) would increase the discharge of springs providing the water supply for water right nos. 36-04013B and 36-07148 held by Clear Springs by an average of 2.7 cfs, varying from a seasonal low of about 1 cfs to a seasonal high of about 4.3 cfs, at steady state conditions. The amount of 4.3 cfs is about one-sixth of the shortage described in Finding 60.

73. Only ground water diverted and used for agricultural irrigation purposes was included in the modeled curtailment simulation described in Finding 71. Based on USGS data, and disregarding the priority dates of ground water rights from the ESPA, about 95 percent of the ground water diverted from the ESPA is used for irrigation. Uses pursuant to ground water rights from the ESPA for public, domestic, industrial, and livestock purposes constitute 2.6 percent, 1.2 percent, 0.7 percent, and 0.6 percent of the total ground water diversions from the ESPA, respectively. Since a significant portion of these other uses is nonconsumptive, the depletions to the ESPA from irrigation uses that contribute to reduced spring discharges in the Thousand Springs area, and other reaches of the Snake River that are hydraulically connected to the ESPA, are greater than 95 percent of the total depletions from all uses of ground water.

74. Using the Department's ground water model for the ESPA to simulate increases in reach gains and spring discharges resulting from the curtailment of the diversion and use of ground water solely for agricultural irrigation purposes provides reasonable quantification of the increases in reach gains and spring discharges resulting from the curtailment of the diversion and use of ground water for all purposes.

75. On May 19, 2005, the Director issued his order in response to a letter dated March 22, 2005, from Blue Lakes Trout Farm, Inc. seeking the administration of water rights in Water District No. 130 to supply Blue Lakes' prior rights. The order found that diversions of ground water for consumptive purposes under certain junior priority rights are causing material injury to water right no. 36-07427 (priority date of December 28, 1973) held by Blue Lakes and required replacement water be provided directly to Blue Lakes, phased involuntary curtailment of ground water rights by priority, or phased voluntary substitute curtailment, separately or in combination.

76. Through submittals on May 27, June 14, and June 17, 2005, the Idaho Ground Water Appropriators ("IGWA") on behalf of its members has documented actions that have been taken to provide substitute curtailment, although termed replacement water, for 2005 as required by the order of May 19, 2005, and a subsequent order dated June 7, 2005, issued in response to the IGWA submittal of May 27, 2005. The actions taken consist of acquisition and use of surface water for irrigation of certain lands in lieu of irrigation using ground water ("conversions") in the North Snake Ground Water District and voluntary curtailment of ground water irrigation of certain lands in the Magic Valley Ground Water District and the North Snake Ground Water District. These actions, or equivalent future actions, must be ongoing and based on simulations using the Department's ground water model for the ESPA, must result in cumulative increases to the average discharge of springs in the Devil's Washbowl to Buhl Gage spring reach at steady state conditions by at least 10 cfs, 20 cfs, 30 cfs, 40 cfs, and 51 cfs[8], respectively, for each year of the five-year period in which substitute curtailment must be implemented, or until there is no material injury to water right no. 36-07427 (priority date of December 28, 1973) held by Blue Lakes Trout.

77. Based on simulations using the Department's ground water model for the ESPA, the actions taken by the North Snake and Magic Valley ground water districts described in Finding 76 not only affect spring discharge in the Devil's Washbowl to Buhl Gage spring reach, which includes springs that provide the source of water for the water rights held by Blue Lakes Trout, but also affect spring discharge in the Buhl Gage to Thousand Springs spring reach, which includes the springs that provide the source of water for the water rights held by Clear Springs for its Snake River Farm. The Department's ground water model for the ESPA (version 1.1) was used to simulate the effects of the non-depletion of ground water on spring discharge in the Buhl Gage to Thousand Springs spring reach associated with conversions verified by the Department, including 18 percent incidental recharge from percolation, and documented voluntary curtailment described in Finding 76, excluding conversions and voluntary curtailment that based on model simulations contribute 10 percent or less of the non-depletion to the spring discharge in the Buhl Gage to Thousand Springs spring reach (10 percent is the uncertainty in model simulations, *see* Finding 17). Based on these model simulations, the actions taken by the North Snake and Magic Valley ground water districts in 2005, which must be ongoing as described in Finding 76, will increase spring discharge in the Buhl Gage to Thousand Springs spring reach by an average of 7.8 cfs at steady state conditions.

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[8] Reduction in spring discharge in the Devil's Washbowl to Buhl Gage spring reach from diversion and use of ground water under certain junior priority rights simulated using version 1.0 of the Department's ground water model for the ESPA. This quantity is subject to being amended to 48 cfs based on simulations using version 1.1 of the Department's ground water model for the ESPA.

Factors Considered in Determining Material Injury To and Reasonableness of Surface Water Diversions Under Water Rights Nos. 36-07083 and 36-07568

78. The water rights held by Clear Springs for its Crystal Springs Farm, described in Finding 38, authorize the combined or total diversion of 335.10 cfs for fish propagation purposes, with the first right for 300.00 cfs (no. 36-07083) having a priority date of July 8, 1969, and the second right for 200.00 cfs (no. 36-07568) having a priority date of September 6, 1975.

79. The Department's water right file for water right no. 36-07568 includes a letter from C. E. Brockway, P.E., dated December 1, 1977, listing three points of diversion to the Crystal Springs Farm and measuring devices. The letter includes measured diversions at the three points of diversions at various times during 1977 indicating a total diversion of water to the Crystal Springs Farm of 335.10 cfs. The year 1977 is subsequent to the latest priority of the two rights held by Clear Springs for its Crystal Springs Farm and demonstrates that the total amount of water authorized for diversion and use (335.10 cfs) under water rights nos. 36-07083 and 36-07568 has been diverted and presumably applied to beneficial use at times when available. Additionally, the history of measured diversions included with the letter described in Finding 35 pertaining to the Crystal Springs Farm showed that 335.10 cfs or more was diverted and presumably applied to beneficial use at the Crystal Springs Farm from 1984 through 1990 at times that spring discharges were at seasonal highs.

80. Attachment D shows the time history of measured diversions, included with the letter described in Finding 35 pertaining to the Crystal Springs Farm, taken on monthly intervals since 1978 from Crystal Springs, the source of water for the water rights held by Clear Springs for its Crystal Springs Farm. The measured diversions show that discharges from the springs and the diversions to the Crystal Springs Farm typically peak during October and November, with the lowest flows typically occurring during April and May.

81. The time history of spring discharge and diversions to the Crystal Springs Farm depicted in Attachment D shows that spring discharge and diversions have declined since peaking in 1987. The seasonal maximum spring discharge and diversion in 2004 was 259.81 cfs at the time of the monthly measurement on September 21, 2004, which is 75.3 cfs less, or about 22 percent less, than the total authorized diversion under Clear Springs' water rights nos. 36-07083 and 36-07568. *See* IDAPA 37.03.11.042.01.a

82. Based on the records of flow measurements included with the letter described in Finding 35 pertaining to the Crystal Springs Farm and taking into account the seasonal variations in spring flows that have existed since the dates of appropriation for these rights, the quantity of water diverted from the source using the existing diversion facilities for water rights nos. 36-07083 and 36-07568 with the priority dates of July 8, 1969, and September 6, 1975, respectively, is currently insufficient to fill these rights even when the spring discharge providing the source for the rights is at seasonal highs. The quantity of water available using the existing diversion

facilities for water rights nos. 36-07083 and 36-07568 is expected to continue to be insufficient during 2005.

83. The existing diversion facilities for water rights nos. 36-07083 and 36-07568, held by Clear Springs for its Crystal Springs Farm, include an unlined collection canal that extends approximately 1,200 feet north and west of the hatchery facilities across land presently owned by the State of Idaho. Clear Springs holds an easement dated November 28, 1969, on the State of Idaho's land for its collection canal.

84. The U. S. Fish & Wildlife Service ("USFWS") owns a steelhead hatchery known as the Magic Valley Hatchery that was constructed by the U. S. Army Corps of Engineers ("USCOE"). The Magic Valley Hatchery is located on the south side of the Snake River approximately 3,000 feet across from and west of the Crystal Springs Farm.

85. The diversion facilities for the Magic Valley Hatchery consist of a lined collection canal that extends north and west from a point that is laterally about 100 feet from the northwest end of the existing collection canal for the Crystal Springs Farm. The collection canal for the Magic Valley Hatchery is approximately 1,500 feet long and as with the collection canal for the Crystal Springs Farm described in Finding 76, the collection canal for the Magic Valley Hatchery is sited on land presently owned by the State of Idaho pursuant to an easement dated April 11, 1972.

86. Based on two letters to Colonel Robert B. Williams of the USCOE from Larry Cope dated June 3, 1985, and October 1, 1985, the eastern-most portion of the Magic Valley Hatchery collection canal, which is laterally within about 100 feet of the western-most portion of the Crystal Springs Farm collection canal, was excavated during the first half of June in 1985. The letter of October 1, 1985, included measurements of spring discharge collected by the Crystal Springs Farm collection canal taken on June 7 and June 10, 1985. The measurements indicated that excavation of the eastern-most portion of the collection canal for the Magic Valley Hatchery reduced spring discharge into the collection canal for the Crystal Springs Farm by 12 cfs.

87. As a result of the 12 cfs reduction in spring discharge to the Crystal Springs Farm collection canal following excavation of the eastern-most portion of the collection canal for the Magic Valley Hatchery, the USCOE placed a temporary pipe connecting the collection canals for both facilities so that water could be delivered from the collection canal for the Magic Valley Hatchery to the Crystal Springs Farm collection canal a few days following June 10, 1985, to replace spring discharge diverted by the Magic Valley Hatchery that otherwise would have been diverted by the Crystal Springs Farm.

88. Based on a letter from Lieutenant Colonel Terrence C. Salt of the USCOE to Larry Cope dated October 29, 1985, the USCOE agreed to construct a permanent control structure and pipeline between the collection canals for the Magic Valley Hatchery and Crystal Springs Farm capable of delivering 13 cfs of spring discharge collected by the Magic Valley Hatchery to the Crystal Springs Farm collection canal.

89. Attachment E shows the Crystal Springs Farm facilities and a portion of the Magic Valley Hatchery facilities along with the location of the spring discharge collection and conveyance facilities for each. A control structure that regulates the quantity of collected spring discharge that is conveyed through an inverted siphon across the river to the Magic Valley Hatchery is located approximately 450 feet along and from the eastern end of the collection canal for the Magic Valley Hatchery. Collected spring discharge that is not conveyed through the inverted siphon spills from the Magic Valley Hatchery collection canal through a pipe, the discharge end of which is located approximately 200 feet northwest of the control structure. The pipe discharges into a pre-existing spring discharge channel.

90. The USCOE remains the right holder of record for the three water rights held for fish propagation at the Magic Valley Hatchery. The three water rights held by the USCOE for the Magic Valley Hatchery are as follows pursuant to decrees issued by the SRBA District Court:

Water Right No.:	36-07033	36-07164	36-07653
Source:	Crystal Springs	Crystal Springs	Crystal Springs
Priority Date:	07/10/1968	03/05/1971	11/03/1976
Beneficial Use:	Fish Propagation	Fish Propagation	Fish Propagation
Diversion Rate:	50.00 cfs[9] 6.00 cfs[11] 39.00 cfs[13]	6.49 cfs[9]	25.00 cfs[10] 69.00 cfs[12]

91. The source for water rights nos. 36-07083 and 36-07568 held by Clear Springs for its Crystal Springs Farm and the source for water rights nos. 36-07033, 36-07164, and 36-07653 held by the USCOE for the Magic Valley Hatchery is decreed as "Crystal Springs." Except for smaller springs located from about 700 feet to 1,000 feet southeast of the eastern end of the collection canal for the Crystal Springs Farm, the main source for the rights held for both the Crystal Springs Farm and Magic Valley Hatchery is the same complex of springs spanning a distance of approximately one-half mile northwest of the Crystal Springs Farm.

92. The Department has previously determined that the source for water rights nos. 36-07083 and 36-07568 held by Clear Springs for its Crystal Springs Farm and the source for water rights nos. 36-07033, 36-07164, and 36-07653 held by the USCOE for the Magic Valley Hatchery is the same source. *See*, e.g., *Proposed Memorandum Decision and Order in the*

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[9] From July 1 through following April 30
[10] From July 1 through August 31
[11] From May 1 through May 31
[12] From September 1 through following April 30
[13] From June 1 through June 30

Matter of Applications for permit Nos. 36-8330 & 36-8374 (Crystal Springs) to Establish a Minimum Streamflow in the Name of the Idaho Water Resource Board, December 2, 1988 (Adopted as Final Order on December 23, 1988).

93. On May 5, 2005, Cindy Yenter, the watermaster for Water District No. 130, and Brian Patton, a registered professional civil engineer, conducted a field inspection of the diversion facilities and measurement devices utilized by Clear Springs at its Crystal Springs Farm. Clear Springs generally has sufficient measuring devices in place at its Crystal Springs Farm. *See* IDAPA 37.03.11.042.01.f.

94. During the field inspection on May 5, 2005, described in Finding 93, an estimated 75 cfs of collected spring discharge was being spilled to the Snake River from the collection canal for the Magic Valley Hatchery. Department staff reviewed the diversion records submitted by the Magic Valley Hatchery for the years 2003 and 2004 and although the Magic Valley Hatchery diversions in 2003 and 2004 were generally within the combined authorized rates of diversion for water rights nos. 36-07033, 36-07164, and 36-07653, approximately 30 cfs to 40 cfs was diverted from Crystal Springs between September 1 and April 30 by the Magic Valley Hatchery under water rights nos. 36-07164 and 36-07653 having priority dates of March 5, 1971, and November 3, 1976, respectively, both of which are junior in priority to the priority date of July 8, 1969, for water right no. 36-07083 and the latter of which is junior to the priority date of September 6, 1975, for water right no. 36-07568, both held by Clear Springs for the Crystal Springs Farm. Between April 30 and September 1 of 2003 and 2004, as much as an additional 44 cfs was available but spilled to the Snake River due to seasonal reductions in the authorized diversion rate for water rights nos. 36-07033, 36-07164, and 36-07653 held by the USCOE for the Magic Valley Hatchery.

95. No factors have been identified that would preclude Clear Springs from extending the collection canal for the Crystal Springs Farm generally westerly along the hillside below the collection canal for the Magic Valley Hatchery for a distance of about 800 feet, more or less, to capture additional discharge from Crystal Springs at the spill point from the collection canal for the Magic Valley Hatchery, which can be regulated using the existing control structure on the Magic Valley Hatchery collection canal in accordance with the rights held by the USCOE. Because a significant amount of water is available for diversion from Crystal Springs to the Crystal Springs Farm under water rights nos. 36-07083 and 36-07568, Clear Springs has not expended reasonable efforts or expense to divert water for rights nos. 36-07083 and 36-07568 from Crystal Springs for use at the Crystal Springs Farm. *See* IDAPA 37.03.11.042.01.a and IDAPA 37.03.11.042.01.b.

96. Based on the Department's water rights data base and simulations using version 1.1 of the Department's ground water model for the ESPA described in Findings 13, 14, 17 and 19, the diversion and consumptive use of ground water under water rights having priority dates later than the priority dates for water rights nos. 36-07083 (July 8, 1969) and 36-07568 (September 6, 1975) in Water District No. 120, and which at steady-state conditions reduce spring discharge in the Devil's Washbowl to Buhl Gage spring reach by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is

the uncertainty in model simulations, *see* Finding 17), has insignificant effects on the quantity and timing of water available from springs discharging in the Devil's Washbowl to Buhl Gage spring reach, which includes Crystal Springs. However, the diversion and consumptive use of such rights in Water District No. 130 does affect the quantity and timing of water available from springs discharging in the Devil's Washbowl to Buhl Gage spring reach based on simulations using the ground water model for the ESPA. *See* IDAPA 37.03.11.042.01.c.

97. Based on the records of flow measurements included with the letter described in Finding 35 pertaining to the Crystal Springs Farm, as well as the field investigations on May 5, 2005, described in Finding 86, Clear Springs is currently diverting and using surface water at the Crystal Springs Farm within the authorized diversion rate for water rights nos. 36-07083 and 36-07568. *See* IDAPA 37.03.11.042.01.e.

98. Based on the results from the field inspection on May 5, 2005, described in Finding 93, Clear Springs may not be employing reasonable diversion and conveyance efficiencies for the Crystal Springs Farm. In addition to extending the collection canal used to divert water from Crystal Springs, lining the collection canal to the Crystal Springs Farm would also increase the quantity of water at Crystal Springs Farm, although the amount of the increase has not been determined. Other than extending the collection canal and perhaps lining the canal, no other means for using the existing facilities and water supplies for the Crystal Springs Farm were identified that Clear Springs should be required to implement given the decreed elements of water rights nos. 36-07083 and 36-07568. *See* IDAPA 37.03.11.042.01.g.

99. Based on the results from the field inspection on May 5, 2005, described in Finding 93, other than extending the collection canal for the Crystal Springs Farm there are no alternate reasonable means of diversion or alternate points of diversion that Clear Springs should be required to implement at the Crystal Springs Farm to provide water for rights nos. 36-07083 and 36-07568 during times the rights would not otherwise be satisfied given the decreed elements of water rights nos. 36-07083 and 36-07568. *See* IDAPA 37.03.11.042.01.h.

Effects of Curtailing Ground Water Diversions Under Rights Junior to Water Rights Nos. 36-07083 and 36-07568

100. Version 1.1 of the Department's ground water model for the ESPA, described in Findings 13, 14, 17, and 19, was used to simulate the effects of curtailing the diversion and use of ground water for the irrigation of 80,650 equivalent[12] acres on an ongoing basis under water rights within Water District No. 130 that (1) authorize the diversion and use of ground water for consumptive uses from the area of common ground water supply described in Finding 1, (2) have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969), and (3) based on model simulations reduce spring discharge in the Devil's Washbowl to Buhl Gage spring reach by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is the uncertainty in model simulations, *see* Finding 17). The results of the simulation show that curtailing the diversion and use of ground water for the irrigation of these lands would increase the discharge of springs in the Devil's Washbowl to

Buhl Gage spring reach, which includes the springs from which Clear Springs diverts surface water for its Crystal Springs Farm, by an average of 69 cfs, varying from a seasonal low of about 51 cfs to a seasonal high of about 86 cfs, at steady state conditions.

101. Based on the simulations using the ESPA ground water model described in Finding 100 and assuming that 31 percent of any increase in reach gains in the Devil's Washbowl to Buhl Gage spring reach would accrue to the Crystal Springs Farm diversions (*see* Finding 16), it is estimated that curtailing the diversion and use of ground water for the irrigation of 80,650 equivalent acres on an ongoing basis under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969) would increase the discharge of springs providing the water supply for water right nos. 36-07083 and 36-07568 held by Clear Springs by an average of 21 cfs, varying from a seasonal low of about 16 cfs to a seasonal high of about 27 cfs, at steady state conditions. The amount of 27 cfs is about one-third of the shortage described in Finding 81.

102. Only ground water diverted and used for agricultural irrigation purposes was included in the modeled curtailment simulation described in Finding 100. Using the Department's ground water model for the ESPA to simulate increases in reach gains and spring discharges resulting from the curtailment of the diversion and use of ground water solely for agricultural irrigation purposes provides reasonable quantification of the increases in reach gains and spring discharges resulting from the curtailment of the diversion and use of ground water for all purposes. *See* Finding 73.

103. The Department's ground water model for the ESPA (version 1.1) was used to simulate the effects of the conversions verified by the Department, including 18 percent incidental recharge from percolation, and documented voluntary curtailment implemented by the North Snake and Magic Valley ground water districts described in Finding 76 in response to the order described in Finding 75. Based on these simulations, excluding conversions and voluntary curtailment that based on model simulations contribute 10 percent or less of the non-depletion to the spring discharge in the Devil's Washbowl to Buhl Gage spring reach (10 percent is the uncertainty in model simulations, *see* Finding 17), the actions taken by the North Snake and Magic Valley ground water districts in 2005, which must be ongoing as described in Finding 76, will increase spring discharge in the Devil's Washbowl to Buhl Gage spring reach, which includes the springs from which Clear Springs diverts surface water for its Crystal Springs Farm, by an average of 12.2 cfs at steady state conditions.

104. Assuming that 31 percent of any increase in reach gains in the Devil's Washbowl to Buhl Gage spring reach would accrue to the Crystal Springs Farm diversions (*see* Finding 16), it is estimated that the effects of the ongoing conversions and voluntary curtailment implemented by the North Snake and Magic Valley ground water districts for 2005 and described in Finding 76 will increase the discharge of springs providing the water supply for water right nos. 36-07083 and 36-07568 held by Clear Springs by an average of 3.8 cfs at steady state conditions.

105. Assuming that 31 percent of any increase in reach gains in the Devil's Washbowl to Buhl Gage spring reach would accrue to the Crystal Springs Farm diversions (*see* Finding 16),

it is estimated that the effects of the ongoing curtailment and substitute curtailment implemented in phases over five years in the North Snake and Magic Valley ground water districts as described in Finding 76 will increase the discharge of springs providing the water supply for water right nos. 36-07083 and 36-07568 held by Clear Springs by an average of about 15 cfs (31 percent of 48 cfs) at steady state conditions.

106. Matters expressed herein as a Finding of Fact that are later deemed to be a Conclusion of Law are hereby made as a Conclusion of Law.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

2. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

> The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to "promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department."

3. The issue of how to integrate the administration of surface and ground water rights diverting from a common water source in the Eastern Snake Plain area has been a continuing point of debate for more than two decades. To date, no Idaho court has directly and fully addressed the issue of how to integrate the administration of the surface and ground water rights that were historically administered as separate sources. The progress made in adjudicating the ground water rights in the Snake River Basin Adjudication and the development of the reformulated ground water model for the ESPA used by the Department to simulate the effects of ground water depletions on hydraulically-connected tributaries and reaches of the Snake River now allow the State to address this issue during this period of unprecedented drought.

4. Resolution of the conjunctive administration issue lies in the application of two well established principles of the prior appropriation doctrine: (1) the principle of "first in time is first in right" and (2) the principle of optimum use of Idaho's water. Both of these principles are subject to the requirement of reasonable use.

5. "Priority of appropriations shall give the better right as between those using the water" of the state. Art. XV, § 3, Idaho Const. "As between appropriators, the first in time is first in right." Idaho Code § 42-106.

6. "[W]hile the doctrine of 'first in time is first in right' is recognized [and applies to ground water rights], a reasonable exercise of this right shall not block full economic development of underground water resources." Idaho Code § 42-226.

7. Because it is the policy of this state to integrate the appropriation, use, and administration of ground water tributary to a stream with the use of surface water from the stream in such a way as to optimize the beneficial use of all of the water of this state, "[a]n 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 . . .." IDAPA 37.03.11.020.03; *see also Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 119 (1912).

8. It is the duty of a watermaster, acting under the supervision of the Director, to distribute water from the public water supplies within a water district among those holding rights to the use of the water in accordance with the prior appropriation doctrine as implemented in Idaho law, including applicable rules promulgated pursuant to the Idaho Administrative Procedure Act. *See* Idaho Code § 42-607.

9. The Director created Water Districts No. 130 and No. 120 on February 19, 2002, and extended the boundaries of Water Districts No. 130 and No. 120 on January 8, 2003, and January 22, 2004, respectively, to provide for the administration of ground water rights in the area overlying the ESPA in the Thousand Springs area and the American Falls area, pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights.

10. The Director has appointed watermasters for Water Districts No. 120 and No. 130 to perform the statutory duties of a watermaster in accordance with guidelines, direction, and supervision provided by the Director. The Director has given specific directions to the watermasters for Water Districts No. 120 and No. 130 to curtail illegal diversions, measure and report diversions, and curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

11. In accordance with chapter 52, title 67, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water effective October 7, 1994. IDAPA 37.03.11. The Conjunctive Management Rules prescribe procedures for responding to a

delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. IDAPA 37.03.11.001.

12. Rule 10 of the Conjunctive Management Rules, IDAPA 37.03.11.010, contains the following pertinent definitions:

> **01. Area Having a Common Ground Water Supply.** A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.
>
> **03. Conjunctive Management.** Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply.
>
> **04. Delivery Call.** A request from the holder of a water right for administration of water rights under the prior appropriation doctrine.
>
> **07. Full Economic Development Of Underground Water Resources.** The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42.
>
> **08. Futile Call.** A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and 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 water resource.
>
> **14. Material Injury.** 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.
>
> **16. Person.** Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character.
>
> **17. Petitioner.** Person who asks the Department to initiate a contested case or to otherwise take action that will result in the issuance of an order or rule.
>
> **19. Reasonably Anticipated Average Rate Of Future Natural Recharge.** The estimated average annual volume of water recharged to an area having a common ground water supply from precipitation, underflow from tributary sources, and stream losses and also water incidentally recharged to an area having a common ground water supply as a result of the diversion and use of water for irrigation and other purposes. The estimate will be based on available data regarding conditions of diversion and use of water existing at the time the estimate is made and may vary as these conditions and available information change.

20. Respondent. Persons against whom complaints or petitions are filed or about whom investigations are initiated.

13. As used herein, the term "injury" means "material injury" as defined by Rule 10.14 of the Conjunctive Management Rules.

14. The diversion and use of ground water under existing rights results in an average annual depletion of ground water from the ESPA of nearly 2.0 million acre-feet and does not exceed the "Reasonably Anticipated Average Rate of Future Natural Recharge," consistent with Rule 10.07 of the Conjunctive Management Rules.

15. Rule 20 of the Conjunctive Management Rules contains the following pertinent statements of purpose and policies for conjunctive management of surface and ground water resources:

01. Distribution of Water Among the Holders of Senior and Junior-Priority Rights. The rules apply to all situations in the State where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply.

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

03. Reasonable 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 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.

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.

05. Exercise Of Water Rights. These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-priority water

right who requests priority delivery and the holder of a junior-priority water right against whom the call is made.

11. Domestic and Stock Watering Ground Water Rights Exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury.

16. Rule 40 of the Conjunctive Management Rules sets forth the following procedures to be followed for 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:

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 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 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:

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.

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.

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority.

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by section 42-606, Idaho Code.

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated.

03. Reasonable Exercise of Rights. In determining whether diversion and use of water under rights will be regulated under Rules 40.01.a., or 40.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

04. Actions of the Watermaster under a Mitigation Plan. Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan.

17. In accordance with Rule 40 of the Conjunctive Management Rules, curtailment of junior priority ground water rights may only occur if the use of water under senior priority rights is consistent with Rule 20.03 of the Conjunctive Management Rules and injury is determined to be caused by the exercise of the junior priority rights. Factors that will be considered in determining whether junior priority ground water rights are causing injury to the senior priority water rights held by Clear Springs are set forth in Rule 42 of the Conjunctive Management Rules as follows:

01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

a. The amount of water available in the source from which the water right is diverted.

b. The effort or expense of the holder of the water right to divert water from the source.

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 and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.

e. The amount of water being diverted and used compared to the water rights.

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

02. Delivery Call For Curtailment of Pumping. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

18. The Letters received on May 2, 2005, by the Director from Larry Cope of Clear Springs Foods, Inc. requesting "water rights administration in Water District 130 pursuant to I.C. Section 42-607 in order to effectuate the delivery of Clear Springs Foods, Inc., a/k/a Clear Springs, water rights ..." at its Snake River Farm (water rights nos. 36-04013A, 36-04013B, and 36-07148) and at its Crystal Springs Farm (water rights nos. 36-07083 and 36-07568) are delivery calls as defined by Rule 10.04 of the Conjunctive Management Rules against junior priority ground water rights and a demand for the administration of surface water rights pursuant to Idaho Code § 42-607.

19. Rule 40 of the Conjunctive Management Rules applies to the delivery calls made by Clear Springs against the holders of junior priority ground water rights, but not surface water rights, in Water District No. 130. There are no surface water rights within Water District No. 120, and there are no surface water rights within Water District No. 36A that authorize diversion of water from the same sources as the water rights held by Clear Springs for its Snake River and Crystal Springs farms.

20. There is one surface water right in Water District No. 130 that authorizes the diversion and use of water from the same spring source as water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm and that has a later priority date than the rights held by Clear Springs. Water right no. 36-08329 is held by Clear Lake Ranch P.U.D. Master Association, authorizes the diversion of 0.7 cfs for domestic purposes and 02.cfs for commercial purposes, and has a priority date of June 2, 1987. Water rights nos. 36-04013B and 36-07148 held by Clear Springs have the earlier priority dates of February 4, 1964, and January 31, 1971, respectively.

21. There are two surface water rights in Water District No. 130 that authorize the diversion and use of water from the same spring source as water rights nos. 36-07083 and 36-07568 held by Clear Springs for its Crystal Springs Farm and that have later priority dates than one or both of the rights held by Clear Springs. Water rights nos. 36-07164 and 36-07653 are held by the USCOE, authorize the diversion of up to 6.49 cfs and up to 69 cfs, respectively, for fish propagation, and have priority dates of March 5, 1971, and November 3, 1976, respectively. Water rights nos. 36-07083 and 36-07568 held by Clear Springs have the earlier priority dates of July 8, 1969, and September 6, 1975, respectively.

22. Rules 40 and 42 of the Conjunctive Management Rules require the Director to make determinations regarding "material injury" and the "reasonableness of water diversions" in responding to a delivery call against junior priority ground water rights in Water District No. 130.

23. The reductions in the quantity of water discharging from springs in the Thousand Springs area attributable to depletions to the ESPA from the diversion and use of ground water in Water District No. 130 do not automatically constitute material injury to surface water rights diverting from springs or dependent on sources formed by springs even when the diversion and use of ground water occur under water rights that are junior in priority to such surface water rights. Whether reductions in the quantity of water discharging from springs caused by the diversion and use of ground water under junior priority rights in Water District No. 130 constitute material injury is dependent on the factors enumerated in Rule 42 of the Conjunctive Management Rules.

24. The records of spring discharge diverted to the Snake River Farm included with the pertinent letter described in Finding 35 show that the quantity of water available at the source for water rights nos. 36-02703, 36-02048, and 36-04013C, with the priority dates of November 23, 1933, April 11, 1938, and November 20, 1940, respectively, is currently sufficient to continuously fill these rights at the combined authorized diversion rate of 74.00 cfs. Similarly, the quantity of water available at the source for water right no. 36-04013A with the priority date

of September 15, 1955, taking into account the seasonal variations in spring flows that have existed since the date of appropriation for this right, is also currently sufficient to fill this right at the authorized diversion rate of 15.00 cfs when the discharges from springs providing the source of water for this right are at seasonal highs. Therefore, there is no material injury to water rights nos. 36-02703, 36-02048, 36-04013C, or 36-04013A.

25. Based on the records of spring discharge diverted to the Snake River Farm included with the pertinent letter described in Finding 35, the quantity of water available at the source for water rights nos. 36-04013B and 36-07148 with the priority dates of February 4, 1964, and January 31, 1971, respectively, was 24.5 cfs less than the combined authorized diversion rate for these rights of 28.67 cfs at the seasonal maximum spring discharge in 2004, which is expected to be similar in 2005.

26. Because of the estimated 2 cfs of collected spring discharge observed to be escaping the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm, which was found to be in disrepair during the field inspections conducted on May 5, 2005, Clear Springs has not gone to reasonable effort or expense to divert water from the source for water right no. 36-04013B as required by Rule 42.01.b. of the Conjunctive Management Rules. *See* IDAPA 37.03.11.042.01.b.

27. Because of the approximately 6 or 7 irrigated acres of grass and landscaping around the facilities at the Snake River Farm observed during the field inspections conducted on May 5, 2005, in excess of the 1 acre authorized under water rights held for the Snake River Farm, Clear Springs is not diverting and using water consistent with the water rights as required by Rule 42.01.e. of the Conjunctive Management Rules. *See* IDAPA 37.03.11.042.e.

28. Based on simulations using the Department's reformulated and recalibrated ground water model, curtailing the diversion and use of ground water on an ongoing basis under rights for agricultural irrigation that (1) are in the area of common ground water supply described in Finding 1 and Water District No. 130, (2) have priority dates later than the priority date for water right no. 36-04013B (February 4, 1964) held by Clear Springs for its Snake River Farm, and (3) reduce spring discharge in the Buhl Gage to Thousand Springs spring reach by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is the uncertainty in model simulations, see Finding 17), would increase the discharge of springs in the Buhl Gage to Thousand Springs spring reach, which includes the springs from which Clear Springs diverts surface water to the Snake River Farm, by a total average amount of 38 cfs at steady state conditions.

29. Assuming that 7 percent of any increase in reach gains in the Buhl Gage to Thousand Springs spring reach would accrue to the Snake River Farm diversions (*see* Finding 15), it is estimated that curtailing the diversion and use of ground water on an ongoing basis under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-0413B (February 4, 1964) would increase the discharge of springs providing the water supply for water right nos. 36-04013B and 36-07148 held by Clear Springs by an average of 2.7 cfs, varying from a seasonal low of about 1 cfs to a seasonal high of about

4.3 cfs, at steady state conditions. The amount of 4.3 cfs is about one-sixth of the shortage described in Finding 60.

30. Notwithstanding the disrepair of the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm, the out-of-priority diversion of up to 0.9 cfs by the Clear Lake Ranch P.U.D. Master Association under water right no. 36-08329, and the unauthorized irrigation of 6 to 7 acres of grass and landscaping at the Snake River Farm, when superimposed on the effects of changes in surface water irrigation, described in Finding 6, and drought, the diversion and consumptive use of ground water under water rights junior in priority to water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm are reducing the quantity of water available to water rights nos. 36-04013B and 36-07148, thereby causing material injury.

31. The material injury to water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm caused by the diversion and consumptive use of ground water under junior priority water rights in Water District No. 130 is both delayed and long range.

32. Conditioned on repair of the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm acceptable to the Director, the Director should order the curtailment of junior priority ground water rights causing material injury to water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm phased-in over a five-year period to lessen the economic impact of immediate and complete curtailment pursuant to IDAPA 37.03.11.040.01.a, offset by verified substitute curtailment (conversions and voluntary curtailment) provided through the ground water district(s) or irrigation district through which mitigation can be provided. Involuntary curtailment and substitute curtailment together should be implemented in 2005, 2006, 2007, 2008, and 2009, such that based on simulations using the Department's ground water model for the ESPA, phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach at steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively.

33. The Director should order ongoing curtailment of junior priority ground water rights causing material injury to water rights nos. 36-04013B and 36-07148, offset by verified substitute curtailment, until there is no longer material injury. Material injury will cease when the total amount of water available for beneficial use by Clear Springs at its Snake River Farm under rights no. 36-02703, no. 36-02048, no. 36-04013C, no. 36-04013A, no. 36-04013B, and no. 36-07148 at the seasonal maximum spring discharge reaches 117.67 cfs.

34. Based on the records of spring discharge diverted to the Crystal Springs Farm included with the pertinent letter described in Finding 35, the quantity of water available at the source for water rights nos. 36-07083 and 36-07568 having priority dates of July 8, 1969, and September 6, 1975, respectively, was 75.3 cfs less than the combined authorized diversion rate for these rights of 335.1 cfs at the seasonal maximum spring discharge in 2004, which is expected to be similar in 2005.

35. Because no factors have been identified that would preclude Clear Springs from extending the collection canal for the Crystal Springs Farm generally westerly along the hillside below the collection canal for the Magic Valley Hatchery for a distance of about 800 feet, more or less, to capture an estimated additional 30 cfs to 74 cfs of seasonally-dependent and varying spring discharge from the source for water rights nos. 36-07083 and 36-07568, Clear Springs has not gone to reasonable effort or expense to divert water from the source, used reasonable diversion and conveyance practices, or used reasonable alternate points of diversion for water rights nos. 36-07083 and 36-07568 as required by Rules 42.01.b., 42.01.g., and 42.01.h. of the Conjunctive Management Rules. *See* IDAPA 37.03.11.042.01.b, .g, and .h.

36. Based on simulations using the Department's reformulated and recalibrated ground water model, curtailing the diversion and use of ground water on an ongoing basis under rights for agricultural irrigation that (1) are in the area of common ground water supply described in Finding 1 and Water District No. 130, (2) have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969) held by Clear Springs for its Crystal Springs Farm, and (3) reduce spring discharge in the Devil's Washbowl to Buhl Gage spring reach by more than 10 percent of the amount of depletion to the ESPA resulting from those ground water diversions (10 percent is the uncertainty in model simulations, see Finding 17), would increase the discharge of springs in the Devil's Washbowl to Buhl Gage spring reach, which includes the springs from which Clear Springs diverts surface water to the Crystal Springs Farm, by a total average amount of 69 cfs at steady state conditions.

37. Assuming that 31 percent of any increase in reach gains in the Devil's Washbowl to Buhl Gage spring reach would accrue to the Crystal Springs Farm diversions (*see* Finding 16), it is estimated that curtailing the diversion and use of ground water on an ongoing basis under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969) would increase the discharge of springs providing the water supply for water right nos. 36-07083 and 36-07568 held by Clear Springs by an average of 21 cfs, varying from a seasonal low of about 16 cfs to a seasonal high of about 27 cfs, at steady state conditions. The amount of 27 cfs is about one-third of the shortage described in Finding 81.

38. Assuming that 31 percent of any increase in reach gains in the Devil's Washbowl to Buhl Gage spring reach would accrue to the Crystal Springs Farm diversions (*see* Finding 16), it is estimated that the effects of the ongoing curtailment and substitute curtailment implemented in phases over five years in the North Snake and Magic Valley ground water districts as required by the order issued by the Director on May 19, 2005, providing for the administration of certain junior priority ground water rights to supply the prior rights of Blue Lakes Trout as described in Findings 75 and 76, will increase the discharge of springs providing the water supply for water rights nos. 36-07083 and 36-07568 held by Clear Springs by an average of about 15 cfs (31 percent of 48 cfs) at steady state conditions, which is 12 cfs less than what is estimated would result from curtailing the diversion and use of ground water on an ongoing basis under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969).

39. Employing reasonable effort or expense to divert water from the source and using reasonable diversion practices and alternate points of diversion for water rights nos. 36-07083 and 36-07568, by extending and improving the collection canal for the Crystal Springs Farm to capture and convey additional seasonally-dependent spring discharge from the source for water rights nos. 36-07083 and 36-07568, as required by Rules 42.01.b., 42.01.g., and 42.01.h. of the Conjunctive Management Rules, would immediately provide more water to Crystal Springs Farm, varying from at least about 30 cfs to 74 cfs, than would be provided from curtailing the diversion and use of ground water on an ongoing basis under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969).

40. The Director should not order additional curtailment of the diversion and use of ground water under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969) held by Clear Springs for its Crystal Springs Farm unless Clear Springs extends and improves the collection canal for the Crystal Springs Farm to capture and convey the additional seasonally-dependent spring discharge that exists at the source and under the priority dates for water rights nos. 36-07083 and 36-07568 and material injury is occurring to water rights nos. 36-07083 and 36-07568 from the diversion and use of such junior priority ground water rights, or unless Clear Springs demonstrates to the satisfaction of the Director that extending and improving the collection canal for the Crystal Springs Farm is infeasible.

ORDER

In response to the water delivery calls made by Clear Springs Foods, Inc. for its Snake River and Crystal Springs Farms, and for the reasons stated in the foregoing Findings of Fact and Conclusions of Law, the Director orders as follows:

IT IS HEREBY ORDERED that by July 22, 2005, Clear Springs must present evidence acceptable to the Director of a legal basis to continue irrigation of the grass and landscaping at its Snake River Farm facilities. If an acceptable legal basis to continue irrigation is not provided by July 22, 2005, then beginning on July 25, 2005, the Director will instruct the watermaster for Water District No. 130 to curtail the irrigation of grass and landscaping at the Snake River Farm on all but one acre, which is authorized collectively under water rights nos. 36-04013C and 36-07148.

IT IS FURTHER ORDERED that the watermaster for Water District No. 130 is instructed to provide a copy of this order to the Clear Lake P.U.D. Master Association and provide notice that the Association shall have until June 1, 2006, to obtain use of water pursuant to a water right having a priority date earlier than the priority date for water right no. 36-04013C (February 4, 1964) held by Clear Springs for its Snake River Farm, and cease its out-of-priority diversions under water right no. 36-08329. If the Association fails to obtain use of such water right by June 1, 2006, and the water supply available at the source for water rights held by Clear Springs for diversion and use at its Snake River Farm is less than the total amount of 117.67 cfs,

the watermaster shall immediately curtail diversions by the Association under water right no. 36-08329 as necessary to distribute water to Clear Springs' prior rights.

IT IS FURTHER ORDERED that when repair of the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm is made to the satisfaction of the Director, ground water diversions under certain rights for consumptive uses later in priority than February 4, 1964, determined by the Director to cause material injury to water rights nos. 36-04013B and 36-07148 held by Clear Springs for its Snake River Farm, are subject to ongoing curtailment, until further order of the Director, as follows:

(1) Ground water rights for consumptive uses subject to curtailment include rights for agricultural, commercial, industrial, municipal, or other consumptive uses, excluding ground water rights used for de minimis domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for de minimis stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(12), pursuant to IDAPA 37.03.11.020.11.

(2) Involuntary curtailment will be phased-in over a five-year period, offset by substitute curtailment (conversions and voluntary curtailment) provided through the ground water district(s) or irrigation district through which mitigation can be provided and verified by the Department. Involuntary curtailment and substitute curtailment together must be implemented in 2005, 2006, 2007, 2008, and 2009, such that based on simulations using the Department's ground water model for the ESPA, phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach, which includes the springs that provide the source of water for the water rights held by Clear Springs for its Snake River Farm, at steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively.

(3) The actions taken by the Idaho Ground Water Appropriators in 2005 on behalf of its members, consisting of acquisition and use of surface water for irrigation of certain lands in lieu of irrigation using ground water ("conversions") in the North Snake Ground Water District and voluntary curtailment of ground water irrigation of certain lands in the Magic Valley Ground Water District, and thus far approved by the Director as ongoing, are recognized as increasing spring discharge in the Devil's Washbowl to Buhl Gage spring reach by an average of 7.8 cfs at steady state conditions based on simulations using the Department's ground water model for the ESPA. Once Clear Springs has completed repair of the western-most spring collection box for the 54-inch diameter pipeline to the Snake River Farm, additional ongoing voluntary curtailment within the North Snake and Magic Valley ground water districts must be identified to increase the simulated spring

discharge in the Devil's Washbowl to Buhl Gage spring reach to at least 8 cfs, or a corresponding amount of involuntary curtailment in 2005 by priority date will be ordered by the Director.

(4) Unless approved mitigation or substitute curtailment is provided on behalf of the holder of an affected water right for irrigation by an irrigation district, the holder of a ground water right for irrigation that is not a member of a ground water district when such district is providing approved substitute curtailment considered to be for "mitigation purposes" under provision (3) above, shall be deemed a nonmember participant for mitigation purposes pursuant to H.B. No. 848 (Act *Relating to the Administration of Ground Water Rights within the Eastern Snake River Plain*, ch. 352, 2004 *Idaho Sess. Laws 1052*) and shall be required to pay the ground water district nearest the lands to which the water right is appurtenant for mitigation purposes pursuant to Idaho Code § 42-5259.

(5) If at any time the mitigation or substitute curtailment is not provided as required herein, the water rights subject to curtailment as provided herein shall be immediately curtailed by the watermaster for Water District No. 130, based on the priorities of the rights, to the extent mitigation or substitute curtailment has not been provided.

(6) The holder of a ground water right subject to curtailment as provided herein where the purpose of use is commercial, domestic, industrial, municipal, or stockwater, who is not a member of a ground water district when such district is providing approved substitute curtailment, may participate in such mitigation purposes as a nonmember participant in the ground water district for mitigation purposes and pay the ground water district nearest the place of use for the water right an equitable share of the costs for mitigation. In any event, diversions of ground water under water rights for commercial, domestic, industrial, municipal, or stockwater, shall not be subject to curtailment in 2005, and the holders of such rights shall have until June 1, 2006, to obtain water rights that have priority dates earlier than February 4, 1964, subject to the provisions of Idaho Code § 42-222 or § 42-222A when the place of use is within a county where a declaration of a drought emergency exists on the date of the temporary transfer. Holders of ground water rights for domestic or municipal purposes having priority dates later than February 4, 1964, may also be able to exercise their constitutional preference as provided in Article XV, § 3 of the Idaho Constitution. The time period in which to obtain water rights that have priority dates earlier than February 4, 1964, shall be in lieu of a phased-in period for curtailment.

IT IS FURTHER ORDERED that no additional curtailment of the diversion and use of ground water under water rights within Water District No. 130 that have priority dates later than the priority date for water right no. 36-07083 (July 8, 1969) held by Clear Springs for its Crystal

Springs Farm will be ordered, beyond what is already required pursuant to this order and the Director's order of May 19, 2005, issued in response to the delivery call made by Blue Lakes Trout Farm, Inc., unless Clear Springs extends and improves the collection canal for the Crystal Springs Farm to capture and convey the additional seasonally-dependent spring discharge that exists at the source and under the priority dates for water rights nos. 36-07083 and 36-07568 and material injury is occurring to water rights nos. 36-07083 and 36-07568 from the diversion and use of such junior priority ground water rights, or unless Clear Springs demonstrates to the satisfaction of the Director that extending and improving the collection canal for the Crystal Springs Farm is infeasible.

IT IS FURTHER ORDERED that pursuant to Idaho Code § 67-5247 this Order is made effective upon issuance due to the immediate danger to the public welfare posed by the lack of certainty existing among holders of water rights for the diversion and use of ground water for irrigation from the Eastern Snake Plain Aquifer as to whether water will be available under the priorities of their respective rights during the 2005 irrigation season.

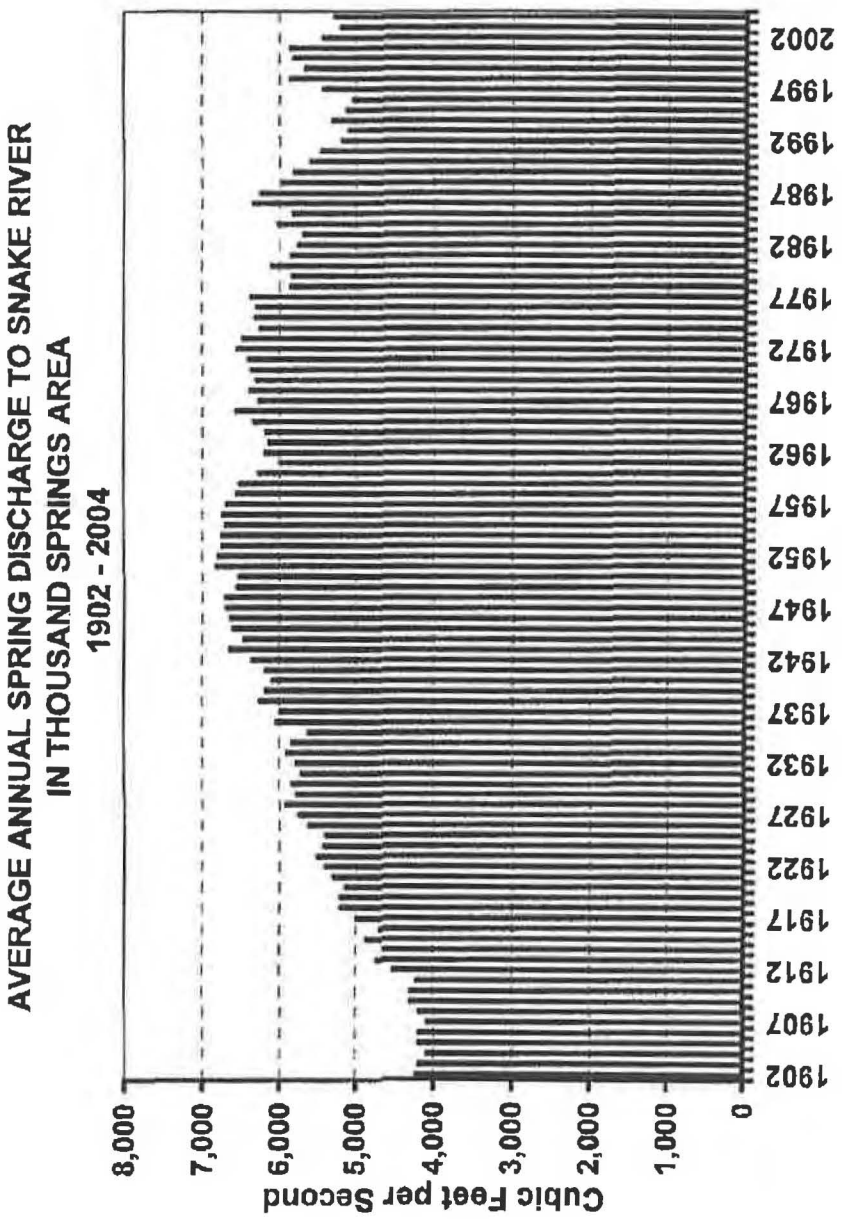
IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER 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 receipt of written notice of the order, or receipt of actual notice, a written petition stating 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).

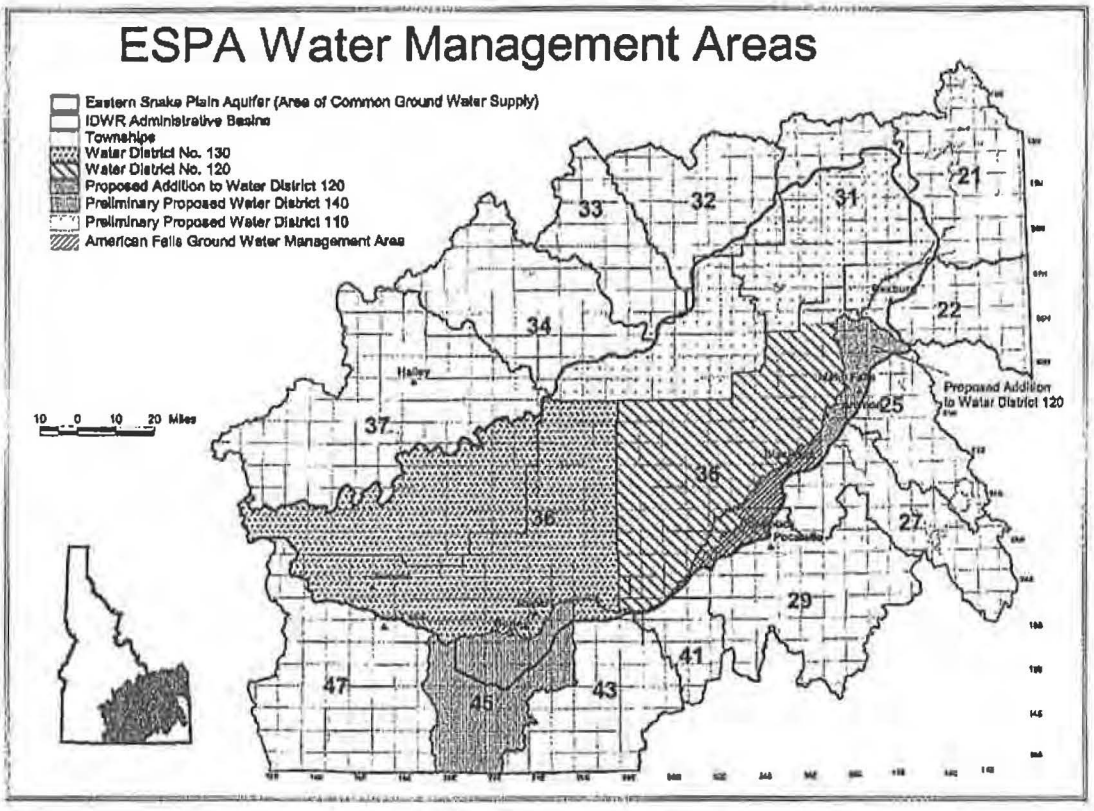
DATED this 8 th day of July 2005.

KARL J. DREHER
Director

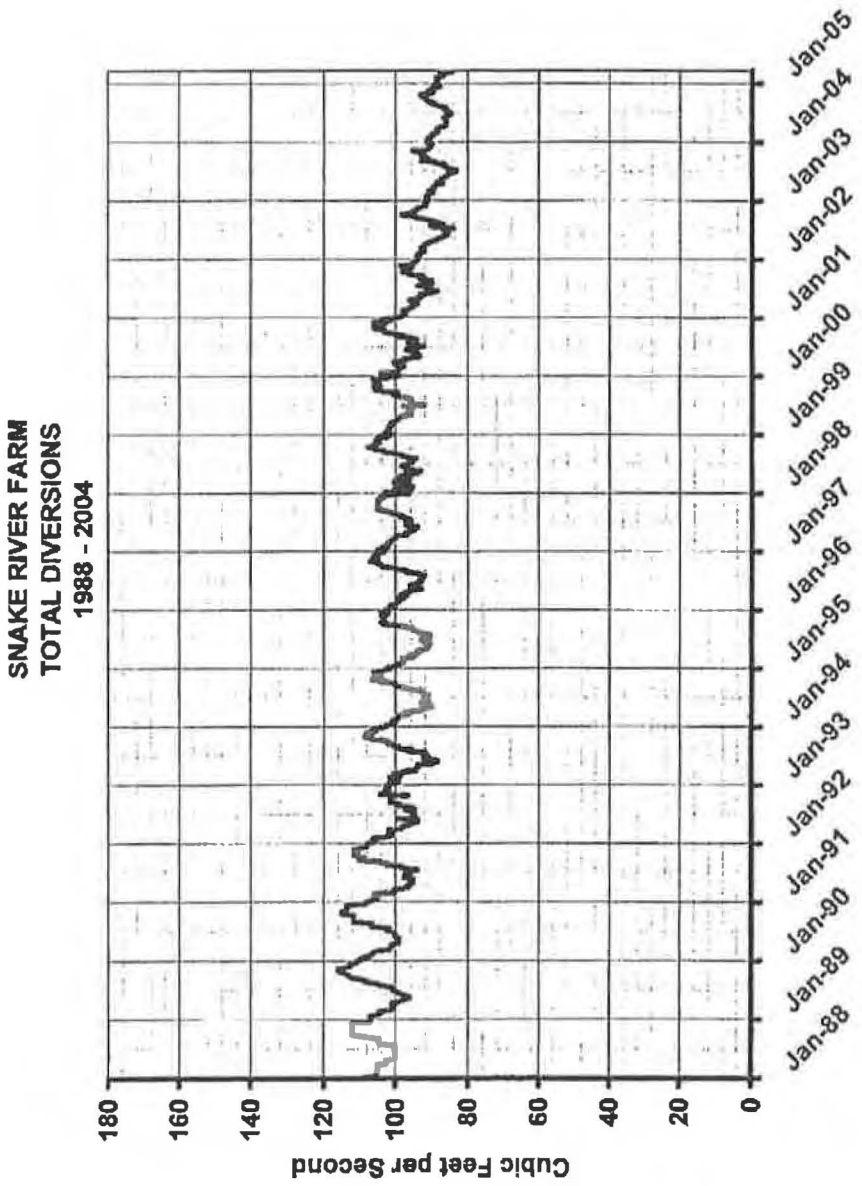
ATTACHMENT A



Order of July 8, 2005, in the Matter of Distribution of Water
Page 40

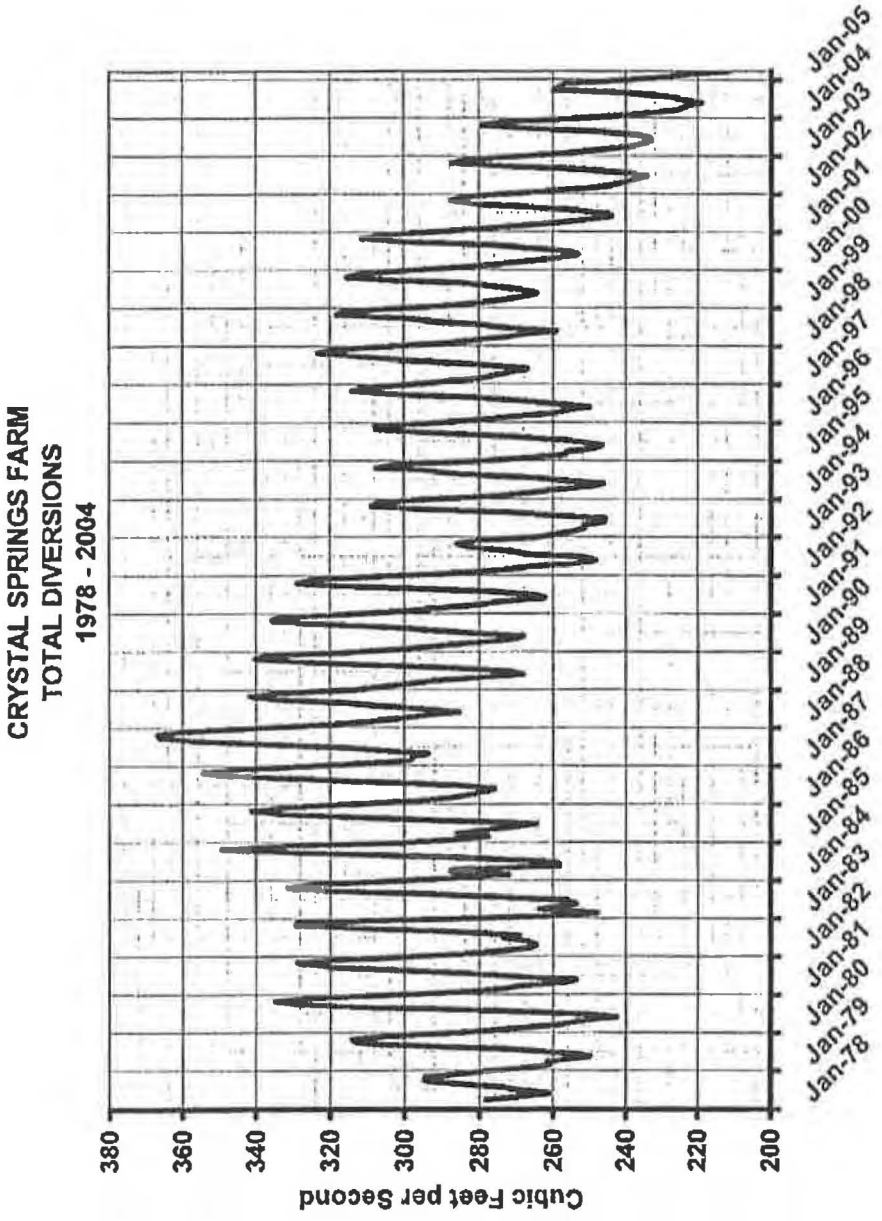

ESPA Water Management Areas
Eastern Snake Plain Aquifer (Area of Common Ground Water Supply)
IDWR Administrative Basins
Townships
Water District No. 130
Water District No. 120
Proposed Addition to Water District 120
Preliminary Proposed Water District 140
Preliminary Proposed Water District 110
American Falls Ground Water Management Area
10 0 10 20 Miles
Proposed Addition to Water District 120
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ATTACHMENT C



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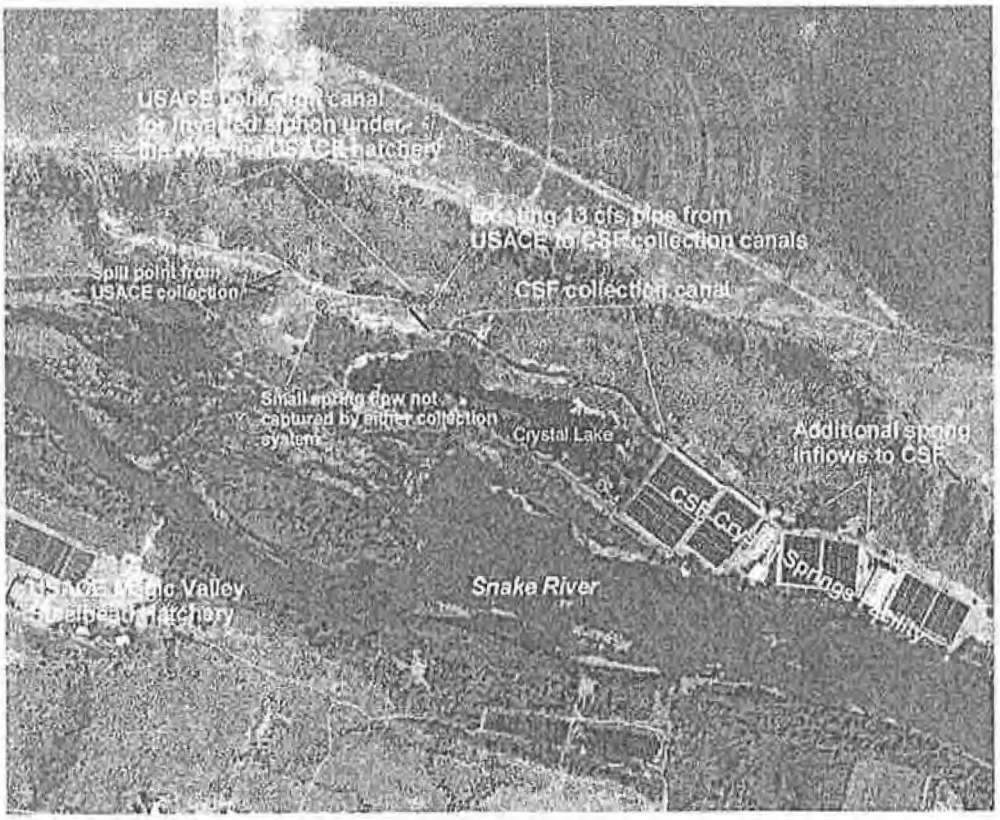
ATTACHMENT D



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ATTACHMENT E

Spring Discharge Collection and Conveyance Facilities
Crystal Springs Farm and Magic Valley Hatchery



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of July, 2005, the above and foregoing document was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

LARRY COPE CLEAR SPRINGS FODDS, INC. PO BOX 712 BUHL ID 83303-1237 (208) 543-5608	(x) U.S. Mail, Postage Prepaid (x) Facsimile ( ) E-mail
JOHN SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 (208) 344-6034 jks@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
NORTH SNAKE GWD 152 E MAIN ST JEROME ID 83338 (208) 388-1300	(x) U.S. Mail, Postage Prepaid ( ) Facsimile
MAGIC VALLEY GWD 809 E 1000 N RUPERT ID 83350-9537	(x) U.S. Mail, Postage Prepaid ( ) Facsimile
MIKE CREAMER JEFF FEREDAY GIVENS PURSLEY PO BOX 2720 BOISE ID 83701-2720 (208) 388-1300 mcc@givenspursley.com cf@givenspursley.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
CINDY YENTER WATERMASTER - WD 130 IDWR – SOUTHERN REGION 1341 FILLMORE ST STE 200 TWIN FALLS ID 83301-3380 (208) 736-3037 cindy.yenter@idwr.idaho.gov	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail

FRANK ERWIN
WATERMASTER
WATER DIST 36
2628 S 975 E
HAGERMAN ID 83332

(x) U.S. Mail, Postage Prepaid

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources