



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

September 21, 2012

Barry T Williams
1277 Mink Creek Rd.
Arbon, ID 83212

Re: Your correspondence Dated August 15, 2012 - Bannock Creek

Dear Mr. Williams,

Your correspondence dated August 15, 2012 addressed to the Director of the Idaho Department of Water Resources ("Department" or "IDWR") was received by the Department on August 20, 2012. IDWR received a number of similar letters between August 22 and September 19, 2012 from other individuals, including Nelda Williams, Jason and Dejanet Williams, Justin Williams, Kevin North, Trevor Williams and Travis Williams. I have met with the Director and other IDWR staff regarding these letters, the general concern expressed in the letters, and some of the specific objections raised by your letter. The Director asked that I respond to you directly. I also spoke with you via telephone on this date to arrange a site visit of your property and water rights along Bannock Creek. You agreed to meet with me on September 22, 2012.

Your letter states that it "is not a request for conjunctive management but a call for delivery of water for rights 29-13764 and 29-13528 from (ground water) rights 29-2458A, 29-7931A, 29-13708, 29-13949, 29-13950, 29-13951, 29-13952, 29-13984 and 29-13985." Your letter also provides "objections" regarding pumping of ground water from wells under the above referenced ground water rights. Finally, your correspondence provides a summary of prior communications with the Department between 1992 and 2006. I wish to address your concerns in the order in which they were presented in your letter.

Call for Delivery of Water

Your letter states that you are not requesting conjunctive management of surface and ground water sources, but that you are calling for delivery of several surface water rights and asserting that those surface water rights are injured by junior ground water rights. Idaho law does not distinguish between a request for conjunctive management of surface and ground water resources and a call for delivery of surface water rights being injured by junior ground water rights. They are one in the same. A delivery call is defined under the Rules for Conjunctive Management of Surface and Ground Water Resources ("CMRs") as "a request from the holder of a water right for administration of water right under the prior appropriate doctrine." IDAPA 37.03.11.010.04. IDWR interprets your letter to represent a delivery call that must be addressed pursuant to the CMRs. (IDAPA 37.03.11).

On January 3, 2005, IDWR responded to your correspondence dated October 25, 2004 regarding delivery of your surface water rights 29-13528 and 29-10990 against junior priority ground water rights 29-2458A and 29-7931A. Although the Department's response noted that

“surface water and ground water rights in the Bannock Creek drainage have not yet been included in a water district, ...the procedures for seeking conjunctive administration of the ground water and surface water in the Bannock Creek Drainage are written in Rule 30 of IDWR’s Conjunctive Management Rules (“CMRs”).” Further, IDWR’s January 3, 2005 letter (see attached copy) advised that “Rule 30 requires you to file a petition for conjunctive administration with IDWR”, and that “the petition should be filed in the form of a pleading described in IDWR’s Rules of Procedure.” IDWR’s January 3, 2005 letter further outlined the information that must be included in the petition in accordance with Rule 30.

IDWR hereby provides you notice that your letter dated August 15, 2012 is viewed by the Department as a petition for a delivery call pursuant to Rule 30 of the Conjunctive Management Rules. The petition has not been submitted in the form of a pleading described in IDWR’s Rules of Procedure (see attached copy of applicable Rules). Further, your petition has the following deficiencies:

- Fails to describe your water diversion and delivery system as required by Rule 30.01.a of the CMRs;
- Lacks names and addresses of the holders of ground water rights (respondents) who are alleged to be causing material injury to your rights as required by Rule 30.01.b of the CMRs;
- Lacks any measurements, data or study results that may be available to you to support a claim of material injury as required by Rule 30.01.c; and
- Does not describe any area having a common ground water supply within which you desire junior priority ground water diversion and use to be regulated.

IDWR will not take further action on your petition until you have addressed the above referenced deficiencies.

Review of Objections Stated in Your Letter

- A. Objection to pumping of well with right 29-13708 as it has been abandoned for over forty years until this year.

A partial decree for this right was issued by the Snake River Basin Adjudication (SRBA) District Court on March 22, 2004. The partial decree was issued for 163 acres of irrigation with a diversion rate of 1.37 cfs and a priority date of February 15, 1962. The right was originally licensed as right no. 29-2457. A water right transfer was filed in 2005 that split the right into rights 29-13708 and 29-13709. Right 29-13708 was reduced to 1.30 cfs for irrigation of 154.7 acres within the S1/2SW of Section 25 and the N1/2NW and SWNW of Section 36, Township 11 South (T11S) and Range 33 East (R33E).

Most of the water right place of use appeared to be irrigated per review of 2011 and 2009 aerial imagery. The imagery shows approximately 20 acres irrigated in these two years within the SENW of Section 36. The SENW of Section 36 is not included with the water right place of use description but the aerial imagery indicates that other acres authorized by 29-13708 in the S1/2SW of Section 25 were not irrigated in these two years. As a result, the total irrigated acres under 29-13708 in 2009 and 2011 was likely less than the total authorized 154.7 acres. IDWR will conduct a site investigation of the place of use with the right owner to verify the actual current place of use.

- B. Objection to pumping of well with right 29-2458A as it was abandoned from 1974 until 1992.

A partial decree was issued by the SRBA Court for this right on March 22, 2004. Aerial imagery on file at IDWR shows that most or portions of the place of use authorized by the right (155 acres in the NW1/4 of Section 12, T11S, R33E) have been irrigated in 2011, 2009, 2006 and 2004. IDWR staff visited the well in 2001 and found the well being used.

IDWR correspondence to you dated August 30, 2001 (copy attached) advised you of your opportunity to object to the Department's recommendation of this right in the SRBA. Specifically, IDWR advised you that you could challenge the validity of the SRBA water right claim and IDWR's recommendation to the court with respect to the forfeiture issue. The Department has no record that you filed any objections with either the Department or the SRBA Court.

- C. Objection to pumping of well with right 29-7931A. Ward's moved their pumping from a well a mile west to this well near the head of Bannock Creek in 1994. This well dried up an additional mile of our meadows. I also object to the additional water being pumped by the addition of a center pivot.

Right 29-7931A is a water right permit that was filed in May, 1990 and approved in January, 1991 for irrigation of 627 acres using a well located in the NWNWSW of Section 36, T11S, R33E. Review of this permit file and water right 29-7291 indicates that the well located in the NWNWSW of Section 36 was included as a point of diversion for water right 29-7291 which has a priority date of October 22, 1975. The permit originally approved for right 29-7921 was for a total of 1,760 acres of irrigation, including the lands that are now authorized by permit 29-7931A. An IDWR field exam conducted for right 29-7291 in 1987 found only 326.5 irrigated acres using just one well located in the NWSW of Section 35, T11S, R33E. The field examiner in 1987 noted that the well in the NWNWSW of Section 36 had been drilled but had no pump or motor installed. As a result, the well was not included as a point of diversion on right 29-7291 and the lands now authorized by permit 29-7931A were also not included on right 29-7921. In October, 1994, the permit holder requested an extension of time in which to submit proof of beneficial use for permit 29-7931A due to delays associated with crop losses at other locations and because they owned a different well located a mile to the west (NWSW Section 35) in which the casing had collapsed in January, 1993. The permit holder stated that the well in the NWNWSW of Section 36 was used to temporarily provide water for the lands normally irrigated by the collapsed well a mile to the west in Section 35. IDWR records show that a new well was completed in the NWSW of Section 35 in July, 1993 to replace the old well at the same location under right 29-7291.

In summary, the well located in the NWNWSW of Section 36 was not moved from a mile west but was drilled by or prior to 1987 for irrigation of lands under right 29-7291, some of which were not developed but instead included under application for permit 29-7931A in 1990. A field exam was completed for permit 29-7931A in October of 2000. The field examiner confirmed use of the well in the NWNWSW of Section 36 for irrigation of 411 acres in the SW1/4 and W1/2SE of Section 36, and the NE1/4 and the N1/2SE of Section 35, T11S, R33E. However, the examiner also noted that the diesel

motor and pump that had been used for the well in Section 35 was being used for the well in the NWNWSW of Section 36 while the well in Section 35 was being repaired. IDWR will make a site visit and further investigate the diversion systems and use associated with these two wells.

Aerial imagery on file at IDWR from 2011 does not show any center pivot within the place of use authorized by permit 29-7931A, but much of the place of use appeared to be irrigated with either hand lines or wheel lines. IDWR staff will make a site inspection of the well and irrigated acres as soon as possible.

- D. Objection to the pumping of wells with rights 29-13949, 29-13950, 29-13951, 29-13952, 29-13984 and 29-13985 as they are adding to the depletion of Bannock Creek and on and under our meadows. The well west of the Arbon Highway was not pumped for twenty years. Objection also to the additional water these wells are pumping as more center pivots are added.

Partial decrees were issued by the SRBA Court for all of the rights identified in this objection in either December, 2003 or May, 2004. These are valid ground water rights in which the authorized places of use were irrigated with five center pivots in 2011. Aerial imagery on file at IDWR shows that three of the pivots were installed between 2006 and 2011, and two were installed by or prior to 2004. The land authorized to be irrigated by rights 29-13949 and 29-13951 did not appear to be irrigated in 2004 or 2006, but were irrigated in 2009 and 2011. The land under rights 29-13950, 29-13952 and 29-13985 was not irrigated in 2004, 2006 or 2009, but was irrigated in 2011.

Although you may dispute that some of the lands were not irrigated for some period of time, all of these rights are valid water rights, they have been decreed by the SRBA court, and they have been used within five years of the decreed dates or resumed prior to this year.

Review of 2011 aerial imagery shows that certain pivot corners not included within the place of use descriptions under the above referenced water rights may have been irrigated without proper authorization. IDWR will conduct a site investigation of these pivot corners.

Your objections regarding prior periods of non-use for many of the above referenced ground water rights were not raised during the SRBA. The rights have been partially decreed by the SRBA court and the rights have been beneficially used since the issuance of the partial decrees. The Department will not further investigate objections concerning past non-use of these ground water rights but will investigate several water right place of use questions as noted herein.

Your objections regarding injury to your surface water rights 29-13764 and 29-13528 by use of the above referenced ground water rights may be pursued by filing a delivery call in accordance with Rule 30 of the CMR's as previously discussed in this letter.

Your objections regarding injury to meadows from ground water pumping cannot be addressed by IDWR or the CMRs unless you hold valid water rights for irrigation of the meadows in question. Your letter dated August 15, 2012 and all other related letters from other

Barry Williams Response

9/21/2012, p. 5

interested parties concerned about injury to meadows lack specificity as to the location of the meadows and any water rights that are appurtenant to the meadows, except water right 29-13764.

Water District Creation


Your letter of August 15, 2012 raises a question about the creation of a water district for the Bannock Creek drainage. You correctly note that you had put in a call for delivery of your water on October 25, 2004 (right 29-13528 from Bannock Creek and right 29-10990 from Rattlesnake Creek). You also correctly note that IDWR responded to your October 25, 2004 request by explaining that Bannock Creek was not in a water district. However, IDWR also explained to you that because the Bannock Creek drainage is not included in a water district, you may proceed to make a delivery call in accordance with Rule 30 of the CMRs. Instead of submitting a delivery call pursuant to Rule 30, you petitioned IDWR on December 16, 2006 to create a water district. IDWR responded to this request on March 6, 2007 by explaining that creation of a district for the Bannock Creek drainage was not a Department priority at that time due to other water district creation commitments. IDWR has not further acted on your request for a water district given limited staff resources and other Department priorities, including organization of a new water district on the Snake River between Milner and Swan Falls dams, continued expansion of water districts in the Upper Salmon River basin, and ongoing organization of a water measurement district in the Upper Big Wood River area. IDWR does not have immediate plans to create a water district for the Bannock Creek drainage. Again, IDWR emphasizes that a water district is not required in order to make a delivery call under Rule 30 of the CMRs.

Burden of Proof

Your letter also states that the CMR's were established in 1994 but the "rules put all the burden on the senior surface water right holders." Although a senior surface water holder does have responsibility to initiate a delivery call and provide certain information as required by either Rule 30 or Rule 40 of the CMR's, the ultimate burden of proof concerning injury to senior surface water rights is borne by the holders of the junior priority right holders who are alleged to be causing the injury. The Idaho Supreme Court has found that the CMR's are constitutionally valid as written, Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res., 143 Idaho 862, 878, 154 P.3d 433, 449 (2007).

Please contact me directly at 208-287-4959 if you have questions concerning this matter.

Sincerely,



Tim Luke

Chief, Water Compliance Bureau

Encl: *Service List*

IDWR Correspondence to Barry Williams dated January 3, 2005

IDWR Correspondence to Barry Williams dated August 30, 2001

IDWR Conjunctive Management Rules

IDWR Rules of Procedure for Filing a Pleading IDAPA 37.01.01.230-301

C: Gary Spackman, IDWR Director
Garrick Baxter, Deputy Attorney General at IDWR
IDWR Eastern Region

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September 2012, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho. Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.

Documents served:

IDWR Correspondence to Barry Williams dated September 21, 2012
IDWR Correspondence to Barry Williams dated January 3, 2005
IDWR Correspondence to Barry Williams dated August 30, 2001
IDWR Conjunctive Management Rules
IDWR Rules of Procedure for Filing a Pleading IDAPA 37.01.01.230-301



Sarah Garceau
Technical Records Specialist
Idaho Department of Water Resources

BARRY T WILLIAMS
1277 MINK CREEK RD
ARBON ID 83212

TRAVIS T AND HEATHER P WILLIAMS
1173 SOUTH 1700 EAST
GOODING ID 83330

TREVOR WILLIAMS
PO BOX 603
LYMAN WY 82937

KEVIN NORTH
1354 NEWPORT
ARBON ID 83212

JUSTIN E WILLIAMS
1302 COW CAMP RD
BANCROFT ID 83217

JASON AND DEJANET WILLIAMS
1269 MINK CREEK RD
ARBON ID 83212

NELDA M WILLIAMS
1554 W BOWEN LN
ARBON ID 83212

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State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

January 3, 2005

BARRY T WILLIAMS
1277 MINK CREEK RD
ARBON ID 83212

Re: Your request for conjunctive management of surface water and ground water

Dear Mr. Williams:

This letter responds to your written letter, dated October 25, 2004, about depletions in Bannock Creek flows allegedly caused by ground water pumping near Bannock Creek.

You assert a direct hydraulic relationship between the ground water and surface water in the Bannock Creek drainage, and that pumping of ground water by Bill Curry causes Bannock Creek to dry up for between 1 ½ and 2 ½ miles. You also assert that the reduction of water flowing in Bannock Creek has reduced or eliminated surface water available to satisfy water right nos. 29-13528 and 29-10990.

Following your explanation of the facts, you state the following:

I have complained verbally to the Idaho Department of Water Resources and the Tribe for twelve years. I was told that once the adjudication process got to this stage, something could be done. There is no better testimony than seeing this situation in person. I have talked to Elise Teton with Tribal Water Resources about visiting this area. I would like for someone from the IDWR to attend.

I have talked to both well owners in the past but the wells are not going to be shut off until you enforce the law.

Your letter refers to a future meeting with "Elise Teton with Tribal Water Resources." If you want to arrange a meeting to discuss conjunctive management of water in the Bannock Creek drainage, a representative of the Idaho Department of Water Resources (IDWR) could attend. A tour of the area might be appropriate.

In addition to suggesting a future meeting, your letter refers to enforcement of the law and shutting off wells. IDWR is authorized to conjunctively administer the ground water and surface water in the Bannock Creek Drainage under IDWR's Conjunctive Management Rules. The ground water rights in the Bannock Creek Drainage are being decreed in the Snake River Basin Adjudication. Nonetheless, surface water and ground water rights in the Bannock Creek

Drainage have not yet been included in a water district. As a result, the procedures for seeking conjunctive administration of the ground water and surface water in the Bannock Creek Drainage are written in Rule 30 of IDWR's Conjunctive Management Rules. Rule 30 requires that you file a petition for conjunctive administration with IDWR. The petition should be in the form of a pleading described in IDWR's Rules of Procedure. The petition should contain the following:

- a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water.
- b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records.
- c. All information, measurements, data or study results available to the petitioner to support the claim of material injury.
- d. A description of the area having a common ground water supply within which petitioner desires junior priority ground water diversion and use to be regulated.

At the time you file the petition with IDWR, you must also "serve the petition upon all known respondents" as required by IDWR's Rules of Procedure.

The petition may seek the creation of a water district or the enlargement of an existing water district presently responsible for delivering surface water flowing in Bannock Creek. When the petition is filed, IDWR may also initiate the process to include the water rights in a water district.

The filing of a petition for conjunctive administration creates a contested case before IDWR. IDWR will schedule a prehearing conference and ultimately a hearing to determine whether conjunctive administration is appropriate. As the petitioner, you will bear the burden of proof for establishing that the ground water and the surface water are hydraulically connected, that the ground water and surface water are a source of common water supply, that diversion by ground water right holders is diminishing surface water supplies, and that the depletion in surface water flows caused by diversion under junior priority ground water rights materially injures your senior water right.

Barry Williams
January 3, 2005
Page 3

I've enclosed a copy of the Conjunctive Management Rules for your reference. You may also access the Conjunctive Management Rules (IDAPA 37.03.11) and IDWR's Rules of Procedure (IDAPA 37.01.01) on the internet at:

<http://www2.state.id.us/adm/adminrules/rules/idapa37/37index.htm>.

If you have further questions about this letter, please call me at (208) 287-4943 or Ron Carlson in Idaho Falls at (208) 525-7161.

Sincerely,



Gary Spackman

Enclosure

cc. Eastern Region

7/14/06 - Williams requested a second copy of this letter & the enclosure. 7/17/06 Completed - dg.

KARL
RECEIVED

OCT 28 2004

DEPARTMENT OF
WATER RESOURCES

Barry T. Williams
1277 Mink Creek Rd
Arbon, Idaho 83212

October 25, 2004

Karl J. Dreher
Idaho Department Of Water Resources
P. O. Box 83720
Boise, Idaho 83720-0098

Dear Mr. Dreher:

Subject: Delivery of water for water right 29-13528 and 29-10990 from rights 29-2458A and 29-7931A

Right 29-13528 is a stockwater right on Bannock Creek with a priority date of 7-1-1900. This right is on meadow land through which Bannock Creek flows for two and one half miles. Water right number 29-2458 is a well originally owned by Frank L. Johnson with a priority date of 1-19-1962. This well was pumped until about 1975, during which time it dried up Bannock Creek for one and one half miles through the North end of right 29-13528. The well was then abandoned until the spring of 1992. During this time, Bannock Creek flowed more than a sufficient stream of water; about 2 CFS at it's low.

Bill Curry is the current owner of right 29-2458A, a portion of right 29-02458. Bill started pumping this well the spring of 1992 and dried up Bannock Creek through the same one and one half miles. As a result, Fort Hall Irrigation took the water of rights 29-10990, 29-00476 and 29-00477 which have priority dates of 4-1-1892, 4-1-1892 and 4-1-1897 respectively. I talked to Bill but the well continued to pump. Except for about one month each spring, prior to pumping the well, this stretch of Bannock Creek has been dry since. The creek is dry downstream for about one mile until an abandoned artesian well flows in. If not for the artesian well, Bannock Creek would be dry for twelve miles to where West Fork Creek enters.

Water right 29-7931A has a priority date of 3-15-1990 and began pumping a large amount of water in about 1994. By 1996 this well dried the remaining one mile of Bannock Creek included in right 29-13528. By 1998 the well had dried Bannock Creek to its source.

I am sixty one years old and during my lifetime Bannock Creek has never been dry through this two and one half miles of meadow land except when one or both of these wells have been pumping. Five hundred three acres of these meadows are classified as wet lands. The wells have dried up the springs and ponds and lowered the water table over seven feet. These were wet meadows and without the influence of the wells, the water raised each October until the ponds were full and the swales would have standing water.

Water right 29-10990 is delivered according to the Bannock Creek Decree of 1907 and is in jeopardy because of Bannock Creek being dry. The water in Bannock Creek belongs to the Tribe and should be delivered.

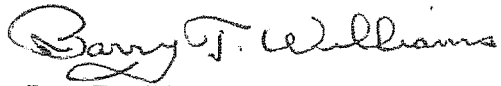
This situation is not due to the drought. I have two springs to the East of Bannock Creek that are fed from a different source and they have varied little in their flow. I have observed this land and creek my entire life and have observed the rapid decline in water each time a well is started. No amount of moisture is going to rectify this situation as long as the wells are pumping each summer. This has been an accumulative situation getting considerably worse each year.

I have complained verbally to the Idaho Department of Water Resources and the Tribe for twelve years. I was told that once the adjudication process got to this stage, something could be done. There is no better testimony than seeing this situation in person. I have talked to Elise Teton with Tribal Water Resources about visiting this area. I would like for someone from the IDWR to attend.

*0.02 cfs - stockwater - Bannock Cr.
4.2 cfs - spring - Bannock Cr.*

I have talked to both well owners in the past but the wells are not going to be shut off until you enforce the law.

Yours truly,

A handwritten signature in cursive script that reads "Barry T. Williams". The signature is written in black ink and is positioned above the printed name.

Barry T. Williams



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Suite A, Idaho Falls, Idaho 83402-1718 - (208) 525-7161- Fax (208) 525-7177

EASTERN REGION

August 30, 2001

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

Barry Williams
1277 Mink Creek Road
Arbon, Idaho 83212

Re: Wells

Dear Mr. Williams:

Enclosed are copies of the water right and claim records for the two wells we looked at Saturday.

29-2458 and 29-7291 are pre-adjudication licenses, and claims 29-2458A and 29-7291 have been filed on these. Permit 29-7931A is a post-adjudication permit, so no adjudication claim is required.

As we discussed on the phone the other day, there are two options for you to address your concerns with these wells. The validity of the claims can be challenged in an objection to the adjudication recommendations, once the directors report is issued. This is likely to be in about a year. The objection process is where you would raise your concerns about possible forfeiture. These claims haven't been investigated yet, so I can't tell you what the recommendations might look like. The protest period for the permit is passed, so there isn't really a way to dispute the validity of that right.

The other option is to seek relief from well interference under "conjunctive management." This is still an evolving process, probably the best way to approach it would be in a letter to the regional manager Ron Carlson. Any kind of ground water right would be subject to conjunctive management.

Please give me a call if you have questions.

Sincerely,

Bryce A. Contor
Senior Water Resource Agent

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**IDAPA 37
TITLE 03
CHAPTER 11**

**37.03.11 - RULES FOR CONJUNCTIVE MANAGEMENT OF SURFACE
AND GROUND WATER RESOURCES**

000. LEGAL AUTHORITY (RULE 0).

These rules are promulgated pursuant to Chapter 52, Title 67, Idaho Code, the Idaho Administrative Procedure Act, and Section 42-603, Idaho Code, which provides that 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. These rules are also issued pursuant to Section 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department. (10-7-94)

001. TITLE AND SCOPE (RULE 1).

These rules may be cited as "Rules for Conjunctive Management of Surface and Ground Water Resources." The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply. It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently. (10-7-94)

002. WRITTEN INTERPRETATIONS (RULE 2).

In accordance with Section 67-5201(19)(b)(iv), Idaho Code, the Department of Water Resources does not have written statements that pertain to the interpretation of the rules of this chapter, or to the documentation of compliance with the rules of this chapter. (10-7-94)

003. ADMINISTRATIVE APPEALS (RULE 3).

Appeals may be taken pursuant to Section 42-1701A, Idaho Code, and the department's Rules of Procedure, IDAPA 37.01.01. (10-7-94)

004. SEVERABILITY (RULE 4).

The rules governing this chapter are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance is declared invalid, that invalidity does not affect the validity of any remaining portion of this chapter. (10-7-94)

005. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 5).

Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law. (10-7-94)

006. -- 009. (RESERVED)

010. DEFINITIONS (RULE 10).

For the purposes of these rules, the following terms will be used as defined below. (10-7-94)

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. (Section 42-237a.g., Idaho Code) (10-7-94)

02. Artificial Ground Water Recharge. A deliberate and purposeful activity or project that is performed in accordance with Section 42-234(2), Idaho Code, and that diverts, distributes, injects, stores or spreads water to areas from which such water will enter into and recharge a ground water source in an area having a common ground water supply. (10-7-94)

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. (10-7-94)
- 04. Delivery Call.** A request from the holder of a water right for administration of water rights under the prior appropriation doctrine. (10-7-94)
- 05. Department.** The Department of Water Resources created by Section 42-1701, Idaho Code. (10-7-94)
- 06. Director.** The Director of the Department of Water Resources appointed as provided by Section 42-1801, Idaho Code, or an employee, hearing officer or other appointee of the Department who has been delegated to act for the Director as provided by Section 42-1701, Idaho Code. (10-7-94)
- 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. (10-7-94)
- 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. (10-7-94)
- 09. Ground Water Management Area.** Any ground water basin or designated part thereof as designated by the Director pursuant to Section 42-233(b), Idaho Code. (10-7-94)
- 10. Ground Water.** Water under the surface of the ground whatever may be the geological structure in which it is standing or moving as provided in Section 42-230(a), Idaho Code. (10-7-94)
- 11. Holder of a Water Right.** The legal or beneficial owner or user pursuant to lease or contract of a right to divert or to protect in place surface or ground water of the state for a beneficial use or purpose. (10-7-94)
- 12. Idaho Law.** The constitution, statutes, administrative rules and case law of Idaho. (10-7-94)
- 13. Junior-Priority.** A water right priority date later in time than the priority date of other water rights being considered. (10-7-94)
- 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. (10-7-94)
- 15. Mitigation Plan.** A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply. (10-7-94)
- 16. Person.** Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character. (10-7-94)
- 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. (10-7-94)
- 18. Reasonable Ground Water Pumping Level.** A level established by the Director pursuant to Sections 42-226, and 42-237a.g., Idaho Code, either generally for an area or aquifer or for individual water rights on a case-by-case basis, for the purpose of protecting the holders of senior-priority ground water rights against unreasonable lowering of ground water levels caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law. (10-7-94)

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. (10-7-94)

20. Respondent. Persons against whom complaints or petitions are filed or about whom investigations are initiated. (10-7-94)

21. Senior-Priority. A water right priority date earlier in time than the priority dates of other water rights being considered. (10-7-94)

22. Surface Water. Rivers, streams, lakes and springs when flowing in their natural channels as provided in Sections 42-101 and 42-103, Idaho Code. (10-7-94)

23. Water District. An instrumentality of the state of Idaho created by the Director as provided in Section 42-604, Idaho Code, for the purpose of performing the essential governmental function of distribution of water among appropriators under Idaho law. (10-7-94)

24. Watermaster. A person elected and appointed as provided in Section 42-605, and Section 42-801, Idaho Code, to distribute water within a water district. (10-7-94)

25. Water Right. The legal right to divert and use or to protect in place the public waters of the state of Idaho where such right is evidenced by a decree, a permit or license issued by the Department, a beneficial or constitutional use right or a right based on federal law. (10-7-94)

011. -- 019. (RESERVED)

020. GENERAL STATEMENTS OF PURPOSE AND POLICIES FOR CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER RESOURCES (RULE 20).

01. Distribution of Water Among the Holders of Senior and Junior-Priority Rights. These 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. (10-7-94)

02. Prior Appropriation Doctrine. These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law. (10-7-94)

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. (10-7-94)

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. (10-7-94)

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. (10-7-94)

06. Areas Having a Common Ground Water Supply. These rules provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in incorporating the water rights within such areas into existing water districts or creating new districts as provided in Section 42-237a.g., and Section 42-604, Idaho Code, or designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code. (10-7-94)

07. Sequence of Actions for Responding to Delivery Calls. Rule 30 provides procedures for responding to delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district or designated a ground water management area. Rule 40 provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created. Rule 41 provides procedures for responding to delivery calls within areas that have been designated as ground water management areas. Rule 50 designates specific known areas having a common ground water supply within the state. (10-7-94)

08. Reasonably Anticipated Average Rate of Future Natural Recharge. These rules provide for administration of the use of ground water resources to achieve the goal that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge. (Section 42-237a.g., Idaho Code) (10-7-94)

09. Saving of Defenses. Nothing in these rules shall affect or in any way limit any person's entitlement to assert any defense or claim based upon fact or law in any contested case or other proceeding. (10-7-94)

10. Wells as Alternate or Changed Points of Diversion for Water Rights from a Surface Water Source. Nothing in these rules shall prohibit any holder of a water right from a surface water source from seeking, pursuant to Idaho law, to change the point of diversion of the water to an inter-connected area having a common ground water supply. (10-7-94)

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. (10-7-94)

021. -- 029. (RESERVED)

030. 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 FUNCTIONS OF SUCH DISTRICTS OR WITHIN AREAS THAT HAVE NOT BEEN DESIGNATED GROUND WATER MANAGEMENT AREAS (RULE 30).

01. Delivery Call (Petition). When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at least, the following in addition to the information required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 230: (10-7-94)

a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water. (10-7-94)

b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records. (10-7-94)

c. All information, measurements, data or study results available to the petitioner to support the claim of material injury. (10-7-94)

d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated. (10-7-94)

02. Contested Case. The Department will consider the matter as a petition for contested case under the Department's Rules of Procedure, IDAPA 37.01.01. The petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 203. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter. (10-7-94)

03. Informal Resolution. The Department may initially consider the contested case for informal resolution under the provisions of Section 67-5241, Idaho Code, if doing so will expedite the case without prejudicing the interests of any party. (10-7-94)

04. Petition for Modification of an Existing Water District. In the event the petition proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, and the water rights have been adjudicated, the Department may consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure. (10-7-94)

05. Petition for Creation of a New Water District. In the event the petition proposes regulation of ground water rights from a ground water source or conjunctively with surface water rights within an area having a common ground water supply which is not in an existing water district, and the water rights have been adjudicated, the Department may consider such to be a petition for creation of a new water district and notice of proposed creation of a water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

06. Petition for Designation of a Ground Water Management Area. In the event the petition proposes regulation of ground water rights from an area having a common ground water supply within which the water rights have not been adjudicated, the Department may consider such to be a petition for designation of a ground water management area pursuant to Section 42-233(b), Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

07. Order. Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district; (10-7-94)

d. Incorporate an area having a common ground water supply into an organized water district following the procedures of Section 42-604, Idaho Code, provided that the ground water rights that would be incorporated into the water district have been adjudicated relative to the rights already encompassed within the district; (10-7-94)

e. Create a new water district following the procedures of Section 42-604, Idaho Code, provided that

the water rights to be included in the new water district have been adjudicated; (10-7-94)

f. Determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and respondents and initiate such adjudication pursuant to Section 42-1406, Idaho Code; (10-7-94)

g. By summary order as provided in Section 42-237 a.g., Idaho Code, prohibit or limit the withdrawal of water from any well during any period it is determined that water to fill any water right is not there available without causing ground water levels to be drawn below the reasonable ground water pumping level, or would affect the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. The Director will take into consideration the existence of any approved mitigation plan before issuing any order prohibiting or limiting withdrawal of water from any well; or (10-7-94)

h. Designate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights. (10-7-94)

08. Orders for Interim Administration. For the purposes of Rule Subsections 030.07.d. and 030.07.e., an outstanding order for interim administration of water rights issued by the court pursuant to Section 42-1417, Idaho Code, in a general adjudication proceeding shall be considered as an adjudication of the water rights involved. (10-7-94)

09. Administration Pursuant to Rule 40. Upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40. (10-7-94)

10. Administration Pursuant to Rule 41. Upon the designation of a ground water management area, the diversion and use of water within such area shall be administered in accordance with the priorities of the various water rights as provided in Rule 41. (10-7-94)

031. DETERMINING AREAS HAVING A COMMON GROUND WATER SUPPLY (RULE 31).

01. Director to Consider Information. The Director will consider all available data and information that describes the relationship between ground water and surface water in making a finding of an area of common ground water supply. (10-7-94)

02. Kinds of Information. The information considered may include, but is not limited to, any or all of the following: (10-7-94)

a. Water level measurements, studies, reports, computer simulations, pumping tests, hydrographs of stream flow and ground water levels and other such data; and (10-7-94)

b. The testimony and opinion of expert witnesses at a hearing on a petition for expansion of a water district or organization of a new water district or designation of a ground water management area. (10-7-94)

03. Criteria for Findings. A ground water source will be determined to be an area having a common ground water supply if: (10-7-94)

a. The ground water source supplies water to or receives water from a surface water source; or (10-7-94)

b. Diversion and use of water from the ground water source will cause water to move from the surface

water source to the ground water source. (10-7-94)

c. Diversion and use of water from the ground water source has an impact upon the ground water supply available to other persons who divert and use water from the same ground water source. (10-7-94)

04. Reasonably Anticipated Average Rate of Future Natural Recharge. The Director will estimate the reasonably anticipated average rate of future natural recharge for an area having a common ground water supply. Such estimates will be made and updated periodically as new data and information are available and conditions of diversion and use change. (10-7-94)

05. Findings. The findings of the Director shall be included in the Order issued pursuant to Rule Subsection 030.07. (10-7-94)

032. -- 039. (RESERVED)

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

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall: (10-7-94)

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or (10-7-94)

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. (10-7-94)

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: (10-7-94)

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. (10-7-94)

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. (10-7-94)

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. (10-7-94)

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. (10-7-94)

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. (10-7-94)

03. Reasonable Exercise of Rights. In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.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. (10-7-94)

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. (10-7-94)

05. Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective. Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights. (10-7-94)

06. Collection of Assessments Within Water District. Where a mitigation plan has been approved, the watermaster of the water district shall include the costs of administration of the plan within the proposed annual operation budget of the district; and, upon approval by the water users at the annual water district meeting, the water district shall provide for the collection of assessment of ground water users as provided by the plan, collect the assessments and expend funds for the operation of the plan; and the watermaster shall maintain records of the volumes of water or other compensation made available by the plan and the disposition of such water or other compensation. (10-7-94)

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

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority ground water right against holders of junior-priority ground water rights in a designated ground water management area alleging that the ground water supply is insufficient to meet the demands of water rights within all or portions of the ground water management area and requesting the Director to order water right holders, on a time priority basis, to cease or reduce withdrawal of water, the Director shall proceed as follows: (10-7-94)

a. The petitioner shall be required to submit all information available to petitioner on which the claim is based that the water supply is insufficient. (10-7-94)

b. The Director shall conduct a fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area. (10-7-94)

02. Order. Following the hearing, the Director may take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Find that the water supply of the ground water management area is insufficient to meet the

demands of water rights within all or portions of the ground water management area and order water right holders on a time priority basis to cease or reduce withdrawal of water, provided that the Director shall consider the expected benefits of an approved mitigation plan in making such finding. (10-7-94)

d. Require the installation of measuring devices and the reporting of water diversions pursuant to Section 42-701, Idaho Code. (10-7-94)

03. Date and Effect of Order. Any order to cease or reduce withdrawal of water will be issued prior to September 1 and shall be effective for the growing season during the year following the date the order is given and until such order is revoked or modified by further order of the Director. (10-7-94)

04. Preparation of Water Right Priority Schedule. For the purposes of the Order provided in Rule Subsections 041.02 and 041.03, the Director will utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule. (10-7-94)

042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).

01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following: (10-7-94)

a. The amount of water available in the source from which the water right is diverted. (10-7-94)

b. The effort or expense of the holder of the water right to divert water from the source. (10-7-94)

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. (10-7-94)

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. (10-7-94)

e. The amount of water being diverted and used compared to the water rights. (10-7-94)

f. The existence of water measuring and recording devices. (10-7-94)

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. (10-7-94)

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. (10-7-94)

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. (10-7-94)

043. MITIGATION PLANS (RULE 43).

01. Submission of Mitigation Plans. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

- a.** The name and mailing address of the person or persons submitting the plan. (10-7-94)
- b.** Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)
- c.** A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)

d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

02. Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or

time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

044. -- 049. (RESERVED)

050. AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY (RULE 50).

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. (10-7-94)

a. The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River. (10-7-94)

b. The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply. (10-7-94)

c. The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer will be estimated in any order issued pursuant to Rule 30. (10-7-94)

d. The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area. (10-7-94)

051. -- 999. (RESERVED)

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All pleadings requesting a right, license, award or authority from the agency are called “applications” or “claims” or “appeals.” All pleadings must be submitted on Department approved forms if available. Applications or claims or appeals not submitted on Department approved forms should: (7-1-93)

01. **Facts.** Fully state the facts upon which they are based. (7-1-93)

02. **Refer to Provisions.** Refer to the particular provisions of statute, rule, order, or other controlling law upon which they are based. (7-1-93)

03. **Other.** State the right, license, award, or authority sought. (7-1-93)

221. -- 229. (RESERVED)

230. PETITIONS -- DEFINED -- FORM AND CONTENTS (RULE 230).

01. **Pleadings Defined.** All pleadings requesting the following are called “petitions:” (7-1-93)

a. Modification, amendment or stay of existing orders or rules; (7-1-93)

b. Clarification, declaration or construction of the law administered by the agency or of a party’s rights or obligations under law administered by the agency; (7-1-93)

c. The initiation of a contested case not an application, claim or complaint or otherwise taking action that will lead to the issuance of an order or a rule; (7-1-93)

d. Rehearing; or (7-1-93)

e. Intervention. (7-1-93)

02. **Petitions.** Petitions should: (7-1-93)

a. Fully state the facts upon which they are based; (7-1-93)

b. Refer to the particular provisions of statute, rule, order or other controlling law upon which they are based; (7-1-93)

c. State the relief desired; and (7-1-93)

d. State the name of the person petitioned against (the respondent), if any. (7-1-93)

231. -- 239. (RESERVED)

240. COMPLAINTS -- DEFINED -- FORM AND CONTENTS (RULE 240).

01. **Complaints - Defined.** All pleadings charging other person(s) with acts or omissions under law administered by the agency are called “complaints.” (7-1-93)

02. **Form and Contents.** Complaints must: (7-1-93)

a. Be in writing; (7-1-93)

b. Fully state the acts or things done or omitted to be done by the persons complained against by reciting the facts constituting the acts or omissions and the dates when they occurred; (7-1-93)

c. Refer to statutes, rules, orders or other controlling law involved; (7-1-93)

d. State the relief desired; (7-1-93)

- e. State the name of the person complained against (the respondent). (7-1-93)

241. -- 249. (RESERVED)

250. PROTESTS -- DEFINED -- FORM AND CONTENTS (RULE 250).

01. Protests - Defined. All pleadings opposing an application or claim or appeal as a matter of right are called "protests." (7-1-93)

02. Form and Contents. Protests should: (7-1-93)

a. Fully state the facts upon which they are based, including the protestant's claim of right to oppose the application or claim; (7-1-93)

b. Refer to the particular provisions of statute, rule, order or other controlling law upon which they are based; and (7-1-93)

c. State any proposed limitation (or the denial) of any right, license, award or authority sought in the application. (7-1-93)

251. -- 259. (RESERVED)

260. MOTIONS -- DEFINED -- FORM AND CONTENTS -- TIME FOR FILING (RULE 260).

01. Motions - Defined. All other pleadings requesting the agency to take any other action in a contested case, except consent agreements or pleadings specifically answering other pleadings, are called "motions." (7-1-93)

02. Form and Contents. Motions should: (7-1-93)

a. Fully state the facts upon which they are based; (7-1-93)

b. Refer to the particular provision of statute, rule, order, notice, or other controlling law upon which they are based; and (7-1-93)

c. State the relief sought. (7-1-93)

03. Other. If the moving party desires oral argument or hearing on the motion, it must state so in the motion. Any motion to dismiss, strike or limit an application or claim or appeal, complaint, petition, or protest must be filed before the answer is due or be included in the answer, if the movant is obligated to file an answer. If a motion is directed to an answer, it must be filed within fourteen (14) days after service of the answer. Other motions may be filed at any time upon compliance with Rule 604. (7-1-93)

261. -- 269. (RESERVED)

270. ANSWERS -- DEFINED -- FORM AND CONTENTS -- TIME FOR FILING (RULE 270).

All pleadings responding to the allegations or requests of applications or claims or appeals, complaints, petitions, or motions are called "answers." (4-5-00)

01. Answers to Pleadings Other than Motions. Answers to applications, claims, appeals, complaints, or petitions when required to be filed by provision of statute, rule, or order must be filed and served on all parties of record within twenty-one (21) days after service of the pleading being answered, unless order or notice modifies the time within which answer may be made, or a motion to dismiss is made within twenty-one (21) days. When an answer is not timely filed under this rule, the presiding officer may issue a notice of default against the respondent pursuant to Rule 700. Answers to applications or claims, complaints, or petitions, must admit or deny each material allegation of the applications or claims, complaint, or petition. Any material allegation not specifically admitted shall

be considered to be denied. Matters alleged by cross-complaint or affirmative defense must be separately stated and numbered. This rule does not prevent a party from filing a responsive pleading in instances not required under these rules. (4-5-00)

02. Answers to Motions. Answers to motions may be filed by persons or parties who are the object of a motion or by parties opposing a motion within fourteen (14) days of the filing of the motion. The time to file an answer to a motion may be enlarged or shortened by the presiding officer upon a showing of good cause by a party. The presiding officer may act upon a prehearing motion under Rule 565. (4-5-00)

271. -- 279. (RESERVED)

280. CONSENT AGREEMENTS -- DEFINED -- FORM AND CONTENTS (RULE 280).

Agreements between the agency or agency staff and another person(s) in which one (1) or more person(s) agree to engage in certain conduct mandated by statute, rule, order, case decision, or other provision of law, or to refrain from engaging in certain conduct prohibited by statute, rule, order, case decision, or other provision of law, are called "consent agreements." Consent agreements are intended to require compliance with existing law. (7-1-93)

01. Requirements. Consent agreements must: (7-1-93)

a. Recite the parties to the agreement; and (7-1-93)

b. Fully state the conduct proscribed or prescribed by the consent agreement. (7-1-93)

02. Additional. In addition, consent agreements may: (7-1-93)

a. Recite the consequences of failure to abide by the consent agreement; (7-1-93)

b. Provide for payment of civil or administrative penalties authorized by law; (7-1-93)

c. Provide for loss of rights, licenses, awards or authority; (7-1-93)

d. Provide for other consequences as agreed to by the parties; and (7-1-93)

e. Provide that the parties waive all further procedural rights (including hearing, consultation with counsel, etc.) with regard to enforcement of the consent agreement. (7-1-93)

281. -- 299. (RESERVED)

300. FILING DOCUMENTS WITH THE AGENCY -- NUMBER OF COPIES -- FACSIMILE TRANSMISSION (FAX) -- ELECTRONICALLY SIGNED DOCUMENTS (RULE 300).

An original and necessary copies (if any are required by the agency) of all documents intended to be part of an agency record must be filed with the officer designated by the agency to receive filing in the case. Pleadings and other documents not exceeding ten (10) pages in length requiring urgent or immediate action may be filed by facsimile transmission (FAX). Whenever any document is filed by FAX, the original must be mailed by United States mail or physically delivered to the agency the next working day. A document required to be accompanied by a filing fee shall not be filed with the agency until the fee is received. There shall be no limit as to the number of pages of a facsimile copy which was not transmitted directly to the agency by the facsimile machine process. The Department will accept electronic signatures and electronically signed communications complying with the requirements of Rules 306 through 311 and Sections 67-2351 through 67-2357, Idaho Code, for all communications, filings and transactions with the Department. (4-5-00)

301. FORM OF PLEADINGS (RULE 301).

01. Pleadings. All pleadings, except those on agency forms, submitted by a party and intended to be part of an agency record should: (7-1-93)

a. Be submitted on white eight and one-half inch (8 1/2") by eleven inch (11") paper copied on one (1)

side only; (7-1-93)

b. State the case caption, case number, if applicable, and title of the document; (7-1-93)

c. Include on the upper left corner of the first page the name(s), mailing and street address(es), and telephone and FAX number(s) of the person(s) filing the document or the person(s) to whom questions about the document can be directed; and (7-1-93)

d. Have at least one inch (1") left and top margins. (7-1-93)

02. Form. Documents complying with this rule will be in the following form:

Name of Representative
Mailing Address of Representative
Street Address of Representative (if different)
Telephone Number of Representative
FAX Number of Representative (if there is one)
Attorney/Representative for (Name of Party)

BEFORE THE AGENCY

(Title of Proceeding)) CASE NO.
)
) (TITLE OF DOCUMENT)
)

(7-1-93)

302. SERVICE ON PARTIES AND OTHER PERSONS (RULE 302).

All documents intended to be part of the agency record for decision must be served upon the representatives of each party of record concurrently with filing the original with the officer designated by the agency to receive filings in the case. (7-1-93)

303. PROOF OF SERVICE (RULE 303).

Every document filed with and intended to be part of the agency record must be attached to or accompanied by proof of service by the following or similar certificate:

I HEREBY CERTIFY (swear or affirm) that I have this day of, served the foregoing (name(s) of document(s) upon all parties of record in this proceeding, (by delivering a copy thereof in person: (list names)) (by mailing a copy thereof, properly addressed with postage prepaid, to: (list names)).
(Signature) (7-1-93)

304. DEFECTIVE, INSUFFICIENT OR LATE PLEADINGS (RULE 304).

Defective, insufficient or late pleadings may be returned or dismissed. (7-1-93)

305. AMENDMENTS TO PLEADINGS -- WITHDRAWAL OF PLEADINGS (RULE 305).

The presiding officer may allow any pleading to be amended or corrected or any omission to be supplied. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded. A party desiring to withdraw a pleading must file a notice of withdrawal of the pleading and serve all parties with a copy. Unless otherwise ordered by the presiding officer, the notice is effective fourteen (14) days after filing. (7-1-93)

306. ELECTRONICALLY SIGNED COMMUNICATIONS (RULE 306).

The Department will accept electronic signatures and electronically signed communications complying with the requirements of Rules 306 through 311 and Sections 67-2351 through 67-2357, Idaho Code, for all communications, filings and transactions with the Department. For an electronic signature to be valid for use by the Department, it must be created by a technology that is accepted for use by the Department. (4-5-00)

307. CRITERIA FOR ACCEPTABLE ELECTRONIC SIGNATURE TECHNOLOGY (RULE 307).

For an electronic signature technology to be accepted for use by the Department, it must comply with the following